IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

MIKAELA J BOND
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 13A-UI-11843-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/15/13
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the October 11, 2013, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 14, 2013. Claimant participated. Employer participated through human resource clerk, Kristi Fox. Employer's Exhibit 1 was received.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a production worker and was separated from employment on September 10, 2013. Claimant's daughter was admitted to the hospital on Thursday, September 5 because of seizures and was released September 6. She could not go back to daycare because she was still running a fever. Claimant delivered paperwork covering her to September 9 to supervisor Raymond Tennet at Tyson. He did not pass them along to human resources or the medical department. Claimant thought she had points available to be absent on September 9, and reported her absences for September 6 and 9 to Tennet. When she called him on September 10, he told her she no longer had a job. Tennet did not participate in the hearing. The employer presented no evidence that claimant was warned that her job was in jeopardy because of attendance and there is no evidence Tennet told her so on September 6 or 9.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:

> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, and noting that the claimant presented direct, first-hand testimony while the employer failed to provide Tennet as a witness or any documentary evidence of prior warnings, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. It is permissible to infer that testimony and records were not submitted because they would not have been supportive of its position. See, *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

Her no-call/no-show absences from September 10 forward are clearly because Tennet told her on that date she no longer had a job. The reason for the last absence on September 9 was for inconsistent reasons. The employer argues it was a no-call/no-show but claimant reported all absences on the call line and/or to Tennet. Claimant seemed somewhat confused about dates because she gave originals of medical documentation to Tennet without keeping copies for herself. Her last absence was either related to properly reported illness of her child or her desire for a day off after her child returned to day care and before returning to work. Either way, claimant believed she had sufficient attendance points left to take the day off and Tennet did not tell her otherwise. Since she had no warnings her job was in jeopardy due to attendance at that point and Tennet did not tell her if she missed work on September 9, she would be fired on September 10, the employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of

knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The October 11, 2013, (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css