IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KYLE L KONRADI
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 13A-UI-06397-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/05/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Kyle Konradi (claimant) appealed a representative's May 22, 2013 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Tyson Fresh Meats (employer) for excessive unexcused absenteeism. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 8, 2013. This case was heard by Administrative Law Judge Julie Elder. Before a decision could be issued Judge Elder went on an indefinite leave of absence. The case was re-assigned to Administrative Law Judge Scheetz per direction from lead worker Administrative Law Judge Teresa Hillary. Judge Scheetz is hereby issuing a decision based upon the recording of the hearing and the exhibits admitted into the record. The claimant participated personally. The employer participated by Will Sager, Complex Human Resources Manager.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on January 17, 2011, as an on-call part-time hourly team member. The employer went over its attendance policy at orientation and posted on the wall. The claimant properly reported his absence due to illness nine times. On one of the times his supervisor specifically excused him from work. The employer issued the claimant written warnings on May 17, 2011, September 29, 2012, and April 2, 2013, for absenteeism. The employer called the excused absence by the supervisor a no-call/no-show and did not acknowledge the supervisor's excusal.

The claimant properly reported his absence due to illness on April 11 and 12, 2013. The claimant properly requested April 25, 2013, off from his supervisor and supervisor granted the day off. The employer listed April 25, 2013, as a no-call/no-show day for the claimant and assessed him three attendance points. The claimant was suspended and was told by one supervisor to come in and talk to the employer on April 29, 2013. He was told by another

supervisor to come in and talk to the employer about the situation on his next working day, April 30, 2013. The claimant appeared for work on April 30, 2013, and April 29, 2013, was listed as a no-call/no-show for the claimant. He was terminated on April 30, 2013, for excessive absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 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(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Ten of the claimant's thirteen absences were properly

reported and due to a medical issue. Those absences do not amount to job misconduct because they were properly reported.

This leaves the absences on March 14, April 25, and 29, 2013. The claimant reported his absences on March 14 and April 25, 2013, to his supervisor and the claimant's supervisor excused him from work. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony from the supervisor but chose not to do so. The claimant did not appear for the meeting on April 29, 2013, due to a failure to communicate. One absence is not excessive. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer did not provide evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's May 22, 2013 decision (reference 01) is reversed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css