IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

HARRY C FINCH
Claimant

CITY OF KEOKUK
Employer

APPEAL NO. 07A-UI-03757-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/05/07 R: 04
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Harry Finch (claimant) appealed a representative's April 5, 2007 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with City of Keokuk (employer) for failure to perform satisfactory work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 26, 2007. The claimant participated personally. The employer participated by Bill Richards, Director of Public Works, and Shirlee Laubersheimer, Assistant City Clerk in Payroll.

ISSUE:

The issue is whether the claimant is eligible to receive unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on July 1, 1991, as a full-time truck driver. The claimant picks up garbage and must be able to lift 50 pounds. The claimant's last day of work was September 12, 2006. He hurt his back while lifting and twisting while working. He properly reported his absence as a back injury at work. The employer did not hear the claimant say it was a work-related injury. The claimant used all his sick leave, vacation, and personal leave. Based on the claimant's physician's statement, the employer granted the claimant Family Medical Leave. The claimant was properly reporting his absence. On February 5, 2007, the employer asked the claimant to take a functional capacity test. The claimant did so and was found to be capable of performing sedentary work lifting an occasional ten pounds. The claimant was still under a doctor's care.

On March 9, 2007, the employer sent the claimant a written termination of employment for just cause. The employer terminated the claimant because he was unable to return to work.

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). The employer must establish not only misconduct, but that there was a final incident of misconduct that precipitated the discharge. The last incident of absence was a properly reported illness that has been ongoing since September 2006. The claimant's absence does not amount to job misconduct, because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a

final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

DECISION:

The representative's April 5, 2007 decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw