IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DEREK R FISK
Claimant

JELD-WEN INC
Employer

APPEAL NO: 12A-UI-08826-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/17/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jeld-Wen, Inc. (employer) appealed a representative's July 11, 2012 decision (reference 01) that concluded Derek R. Fisk (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 16, 2012. The claimant received the hearing notice and responded by calling the Appeals Section on August 6, 2012. He indicated that he would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, he did not participate in the hearing. Tom Kuiper of TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Eric Pederson and Sharon Allison. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on September 27, 2010. He worked full time as trim saw grader/repair person at the employer's Grinnell, Iowa door manufacturing business, working on an 11:00 p.m. to 7:00 a.m. shift. His last day of work was the shift that ended on the morning of June 20, 2012. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The employer's attendance policy allows for termination if an employee reaches nine points. Prior to May 1 the claimant had a number of reported absences, although the employer did not have information as to what the reasons might have been for the absences. The most recent

warning was a final warning given to him on August 9, 2011, at which time he was at eight points. The most recent of these absences was called in on April 30, and apparently was related to the birth of a baby to the claimant's wife. Due to prior points falling off, the claimant was only at six points as of May 1.

The claimant was then absent on May 1, May 2, May 3, and May 4; he indicated to the employer that these were due to the birth of his baby and he indicated he intended to seek FMLA (Family Medical Leave) coverage for those absences. Allison, the plant administrator, advised him that he would need to provide a copy of the baby's birth certificate to establish the necessary documentation for FMLA coverage. The employer gave the claimant a number of deadlines to provide the birth certificate, but the claimant indicated that he was having difficulty in obtaining a copy of the birth certificate. While the employer might have only wished to have a copy of the informal birth certificate provided by the attending hospital rather than the official birth certificate provided by the state, the employer did not explicitly indicate to the claimant which birth certificate it needed. When the claimant had not been able to provide a birth certificate by June 15, the employer made a determination to deny FMLA. As a result, it then considered his absences on May 1 through May 4 to be unexcused, which brought him to ten points. The employer then determined to discharge the claimant for exceeding the allowable attendance points. There appears to be no doubt even on the part of the employer that the claimant in fact did have a new baby in the early May timeframe.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive and unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). The FMLA provisions in particular were enacted to be an employee protection and shield, not a sword to be used by an employer as a weapon against the employee; while the claimant failed to be able to avail himself of the protection FMLA might have been able to provide him, that does not of itself mean that the reasons for the absences were unexcused and that they should be treated as intentional misconduct on his part.

Because the final absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Further, the employer has not established that the claimant had excessive unexcused absences. The employer has failed to meet its burden to establish misconduct. *Cosper*, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's July 11, 2012 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs