IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROBERT M MATHES
Claimant

COX DESIGN & METAL FABRICATION INC
Employer

APPEAL NO. 15A-UI-03783-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/01/15
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Cox Design & Metal Fabrication (employer) appealed a representative's March 18, 2015 (reference 01) decision that concluded Robert Mathes (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 29, 2015. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Debra Cox, Vice President/Owner. The employer offered and Exhibit One was received into evidence.

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 March 21, 2012 as a full-time welder/assembler/fabricator working 7:00 a.m. to 3:30 p.m., Monday through Friday and some Saturdays. The claimant signed for receipt of the employer's handbook at the time of hire. The handbook indicates employees must notify the employer by 6:30 a.m. of any absences. The handbook does not notify employees how many absences will justify termination of employment or that any absences will be removed from an employee's record after a certain time period. The employer may terminate an employee if it believes the absences are excessive.

The employer believed the claimant's absences became excessive in 2014. In 2014, the claimant was absent four times due to medical issues. He was tardy twice and once the employer sent him home because it thought the claimant was not awake enough to work. On June 27, 2014, the employer issued the claimant a notice for tardiness but did not indicate any action the employer would take for further infractions. On August 29, 2014, the employer issued the claimant a written warning and thirty-day probation for absenteeism and cell phone usage. The employer notified the claimant that further infractions could result in termination from employment.

The employer did not issue the claimant any warnings for failure to properly report absences even though the claimant had improperly reported absences. Two of those improperly reported absences, February 13, 2013, and March 31, 2014, the employer considered excused.

On January 15, 2015, the claimant properly reported he was ill and would not be at work. It is unknown whether this absence was excused or unexcused. On February 17, 2015, the claimant arrived late to a production meeting. This absence was not excused. On February 21, 2015, the claimant took his grandmother to the hospital and did not appear for work. The employer did not excuse this absence.

On February 27, 2015, the claimant notified the employer at 6:48 a.m. that he was ill and could not report to work. On the next working day, March 2, 2015, the claimant brought the employer a doctor's note excusing him from work on February 27, 2015. The employer terminated the claimant for excessive absenteeism.

The claimant filed for unemployment insurance benefits with an effective date of March 1, 2015. The employer participated personally at the fact-finding interview on March 17, 2015 by David Stefani.

REASONING AND CONCLUSIONS OF LAW:

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

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.

Iowa Admin. Code r. 871-24.32(1)a, (8) provide:

> 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

(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 which precipitated the discharge. The last incident of absence was a reported illness which occurred on February 27, 2015. The employer argues that the absence was not properly reported because the claimant called at 6:48 a.m. and not by 6:30 a.m. It appears from the employer's records that the employer allowed the claimant to not follow the rule of calling the employer by 6:30 a.m. It did not warn the claimant about the rule prior to the termination. On March 2, 2015, the employer became aware of the claimant's proof of illness when he presented the doctor's note. The employer knew he could not work on February 27, 2015, but terminated the claimant. The claimant's absence does not amount to job misconduct because it was reported to the employer in a manner in which the employer had accepted as far back as February 13, 2013; without issuing the claimant a warning. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's March 18, 2015 (reference 01) decision is affirmed. 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

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