IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROBERT PERRY
Claimant

KEVIN W O'BRIEN
WILLIAMSBURG MCDONALDS
Employer

APPEAL NO. 09A-UI-02509-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/02/08
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Robert Perry (claimant) appealed a representative's February 9, 2009 decision (reference 05) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Williamsburg McDonalds (employer) for excessive unexcused absenteeism and tardiness after having been warned. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for March 11, 2009. The claimant participated personally. The employer participated by Mario Zuniga, Operations Supervisor, and Lyndsee Detra, Human Resources Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

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 October 30, 2008 as a full-time maintenance person. The claimant signed for receipt of the employer's handbook. The handbook states that an employee must report an absence two hours prior to the start of the shift. The claimant started work at 6:00 a.m. On December 5, 2008, the claimant was ill and reported his absence at 5:20 a.m. The claimant could not call two hours in advance because there was no one working at 4:00 a.m. On December 5, 2008, the employer wrote the claimant a warning. On December 6, 2008, the claimant felt better but was still groggy. He overslept and called the employer at approximately 7:00 a.m. The claimant said he would be at work shortly. The employer told him not to worry about it. The employer had a replacement worker. On December 7, 2008, the employer issued the claimant both warnings. The employer notified the claimant that further infractions could result in termination from employment.

On December 24, 2008, the claimant pointed out to the scheduler that on December 28, 2008, there was no maintenance person listed. The scheduler told the claimant he could work if he wanted to do so. The claimant did not say he would work. He checked the schedule after December 24, 2008, and did not see his name listed.

On December 27, 2008, the claimant overslept and was a few minutes late. The employer asked the claimant if he would work on December 28, 2008. The claimant said he would think about it. The employer assumed the claimant would work.

On December 28, 2008, the claimant did not appear for work because he did not tell the employer he would work. The claimant discovered he had taken the employer's keys home with him and he was not supposed to do that. He drove through the drive through and dropped them off at the window. Later that day he discovered that the employer wanted to speak with him before his shift the following day.

On December 29, 2008, the claimant appeared before his shift to meet with the employer. The employer gave the claimant a written warning for failing to appear for work and not notifying the employer of his absence on December 28, 2008. The claimant refused to sign the warning because he had not been scheduled for the day and did not agree to work that day. The employer told the claimant he was considered to have quit work because he returned the employer's keys on December 28, 2008. Continued work was not available.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was 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.

There was evidence presented to prove the separation was voluntary. The separation shall be analyzed as an involuntary separation. The employer has the burden of proof in establishing disqualifying job misconduct. 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 employer stated that the final event was the claimant's failure to appear for work without notice on December 28, 2008. 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 but chose not to do so. There was no testimony to support the fact that the claimant was on the schedule on December 28, 2008. There was no testimony to support the fact that the claimant agreed to work on December 28, 2008. The scheduler and the manager did not testify at the hearing. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's February 9, 2009 decision (reference 05) 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/pjs