IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANGELINA A HERNANDEZ
Claimant

WEST LIBERTY FOODS
Employer

APPEAL NO. 09A-UI-11244-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/17/09
Claimant: Respondent (1)

871 IAC 24.1(113)a – Separations From Employment
Section 96.5-1 – Voluntary Leaving – Layoff
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

West Liberty Foods (employer) appealed a representative's July 27, 2009 decision (reference 02) that concluded Angelina Hernandez (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 21, 2009. The claimant participated personally through Olga Esparza, Interpreter. The employer participated by Nikki Bruno, Human Resources Generalist, and Anne Hocke, Human Resources Information Specialist Administrator.

ISSUE:

The issue is whether the claimant was laid off and later 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 June 30, 2003, as a full-time laborer. The claimant signed for receipt of the employer's handbook on January 11, 2005. The claimant provided a doctor's note to the employer indicating she was not to work from April 16 through May 18, 2009, because of migraines. The claimant told the employer that the migraines might be work related. The employer did not report the matter to its workers' compensation carrier or send the claimant to a physician.

The employer told the claimant she could not return to work until she had a Functional Capacity Examination (FCE). The employer did not schedule the exam until May 28, 2009. The Human Resources and Safety Departments reviewed the nurse's findings. The FCE, in a letter dated June 20, 2009, stated the claimant had permanent lifting restrictions. The employer told the claimant she could return to work on June 19, 2009. The employer did not pay the claimant any wages during this period. The employer issued the claimant a written warning on June 19, 2009, for being absent nine times for properly reported illnesses.

The claimant properly reported her absence due to illness on June 20, 2009. On June 22, 2009, the claimant appeared for work ill. The employer issued the claimant a written warning for

her absence on June 20, 2009. After receiving the written warning, the claimant told the employer she could not work. On June 23 and 24, 2009, the claimant properly reported her absence due to illness. The claimant was hospitalized. The employer terminated the claimant on or about June 25, 2009.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was laid off May 19 through June 19, 2009.

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.1(113)a provides:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status (lasting or expected to last more than seven consecutive calendar days without pay) initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

The employer laid the claimant off for lack of work from May 19 through June 19, 2009. When an employer suspends a claimant from work status for a period of time, the separation does not prejudice the claimant. The claimant is eligible to receive unemployment insurance benefits for that period.

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 which precipitated the discharge. The last incident of absence was a properly reported illness which occurred in June 2009. 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 which would be a final incident leading to the discharge. The claimant was discharged on June 24, 2009, but there was no misconduct.

DECISION:

The representative's July 27, 2009 decision (reference 02) 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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