IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRANDON L WORRELL
Claimant

ROQUETTE AMERICA INC
Employer

APPEAL NO. 09O-UI-06331-S2T

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 01/11/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Roquette America (employer) appealed a representative's February 6, 2009 decision (reference 01) that concluded Brandon Worrell (claimant) was discharged and there was no evidence of willful or deliberate misconduct. A hearing was held on May 22, 2009, following due notice pursuant to Remand Order of the Employment Appeal Board dated April 22, 2009. The claimant participated personally. In addition, the claimant offered witnesses Steve Underwood, President of Union 48G; Tommy Buckert, Vice President of Union 48G; and Mike Samuels, Material Handler. The employer participated by Chris Wildrick, Human Resources Performance Management Associate Team Leader; Patty Steffensmeier, Labor Relations Senior Specialist; and Tom Ross, Human Resources Director.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

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 January 4, 1999, as a full-time operator. The claimant received the union contract.

The employer issued the claimant a written warning on November 8, 2008, for absences due to two illnesses and three personal days. On December 21, 2008, the claimant traded shifts using the proper procedures but the employer counted the claimant as a failure to report. On December 22, 2008, the claimant's furnace broke on a day with frigid temperatures. The employer used those two additional absences to place the claimant on a Special Program Commitment Agreement.

The claimant signed that agreement on December 23, 2008. The claimant could not be absent for any reason for 120 days or he would be terminated. On January 8, 2009, the claimant was sick with the flu. He suffered from diarrhea and vomiting but knew he would be terminated if he called in sick. The claimant arrived at work 45 minutes late and the employer terminated him.

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). Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. Roberts v. Iowa Department of Job Service, 356 N.W.2d 218 (Iowa 1984). 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 an improperly reported illness. The claimant's absence does not amount to job misconduct, because the claimant was thinking only of getting himself to work through his

illness. He used the restroom when he went to work. The employer would have terminated his employment for any absence and 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 February 6, 2009 decision (reference 01) is affirmed. The employer has not met its burden of 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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