IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LARRY J MULLIN JR
Claimant

BARILLA AMERICA INC
Employer

APPEAL NO. 07A-UI-08024-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/29/07 R: 02
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Barilla America, Inc. (Barilla), filed an appeal from a decision dated August 21, 2007, reference 01. The decision allowed benefits to the claimant, Larry Mullin Jr. After due notice was issued a hearing was held by telephone conference call on September 5, 2007. The claimant did not provide a telephone number where he could be contacted and did not participate. The employer participated by Human Resources Generalist Deb Marchesano.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Larry Mullin was employed by Barilla from October 11, 1999 until July 27, 2007, as a full-time processing technician. He received the most recent copy of the employee handbook on September 19, 2001.

The employer's attendance policy gives every employee 48 hours of personal time off every calendar year. This may be used to cover all absences which are not considered vacation. Any employee who uses all the available personal time off and accumulates three occurrence points is put on disciplinary suspension. An employee who is suspended twice in a rolling 12-month period is discharged.

The claimant was suspended for absences in November 2006 without personal time off to cover it. He then used all available 48 hours after January 1, 2007, and accumulated three more points as of an absence due to illness on July 24, 2007. He did call in at least 30 minutes prior to the start of his shift as required to report the absence. The absence resulted in another three points being accumulated and he was given a second suspension and discharged.

REASONING AND CONCLUSIONS OF LAW:

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(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant was discharged because he had accumulated three attendance points twice in a 12-month period. Although the employer's attendance policy is on a no-fault basis, the final occurrence was due to illness and the employer was notified as required under policy. A properly reported illness cannot be considered misconduct as it is not volitional. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). There was no final occurrence of misconduct as required by 871 IAC 24.32(8), and disqualification may not be imposed.

DECISION:

The representative's decision of August 21, 2007, reference 01, is affirmed. Larry Mullin Jr. is qualified for benefits, provided he is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs