

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**AMBER N NIXON**  
Claimant

**APPEAL NO. 08A-UI-09427-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BYERLY FOODS INTERNATIONAL**  
Employer

**OC: 08/03/08 R: 02**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Byerly Foods International (employer) appealed a representative's October 7, 2008 decision (reference 01) that concluded Amber Nixon (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 October 30, 2008. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Ronald Pitkin, Plant Manager, and Dawn Olson, Administrative Assistant.

**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 August 27, 2007, as a full-time sanitation worker. The claimant signed for receipt of the employer's handbook on August 27, 2007, and the employer's Attendance Guidelines on January 16, 2008.

The employer issued the claimant a verbal warning on April 18, 2008, for being tardy six times and two absences. On April 25, 2008, the employer issued the claimant another verbal warning for being tardy and leaving early on April 24, 2008. The employer issued the claimant a written warning on May 28, 2008, for an absence on May 27, 2008. The employer suspended the claimant on July 10, 2008, after she was tardy for work on June 4 and July 8, 2008.

On August 4, 2008, the claimant properly reported her absence due to illness. The employer terminated her employment on August 5, 2008.

**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). The employer must establish not only misconduct, but that there was a final incident of misconduct that precipitated the discharge. The last incident of absence was a properly reported illness that occurred on August 4, 2008. 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 that would be a final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

**DECISION:**

The representative's October 7, 2008 decision (reference 01) 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

bas/kjw