IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARIA J GONZALEZ
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO: 07A-UI-01557-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/21/07 R: 01
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Maria Gonzalez (claimant) appealed a representative's February 9, 2007 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Tyson Fresh Meats (employer) for insubordination in connection with her work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 8, 2007. The claimant participated personally through Ike Rocha, Interpreter. The employer participated by Will Sager, Complex Human Resources Manager; Orv Molan, Superintendent of Hot Side Operations; Lori Molan, Supervisor of Cold Side Operations; and Nicole Koeppen, Human Resources Manager. Sabina Kneifl observed the hearing. The claimant offered one exhibit which was marked for identification as Exhibit A. Exhibit A was received into evidence.

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 November 1, 2005, as a full-time hourly production worker. English is a second language for the claimant. She never received any warnings during her employment. The claimant understood that she had to work some overtime. She was previously injured at work, returned to light duty work and moved into her regular job duties.

On January 17, 2007, at or about 11:00 p.m. the claimant tried to tell her supervisor that she was tired and hurting all over. The supervisor would not listen to the claimant because she was arguing with another supervisor. The claimant tried repeatedly to speak to the supervisor but the supervisor was dismissive. The supervisor told everyone they had to work past the 11:00 p.m. end of shift.

The claimant worked until 11:45 p.m. and then went to the human resource manager. She told the human resource manager she was tired and hurting. The human resource manager thought she was trying to get out of work and told the claimant to work as directed. Three times the claimant tried to tell the employer that she could not work but the human resource manager repeatedly told the claimant to return to work. The claimant returned to the work area and attempted to go back to work. The claimant's supervisor told her to leave. The claimant left work on January 18, 2007, at approximately 12:00 a.m. in accordance with her supervisor's instructions. The overtime ended at approximately 12:30 a.m.

On January 18, 2007, the employer suspended the claimant. The claimant reiterated that she was hurting. The employer sent the claimant to the company nurse on January 19, 2007. The company nurse told the claimant that she was hurting because she was overworked. On January 22, 2007, the employer terminated the claimant.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 testimony of the employer and claimant were not inconsistent. Both the employer and the claimant agree that the employer was not listening or understanding her when she tried to inform the superintendent, the supervisor and the human resources manager that she was hurting. Both agreed she went to the nurse with a medical condition that was reported on January 18, 2007, the same day she left work early due to her medical condition.

The last incident of absence was a properly reported illness for approximately 30 minutes, which occurred on January 18, 2007. The claimant's request for and subsequent 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 but there was no misconduct.

DECISION:

The representative's February 9, 2007 decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs