IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

EDITH E ARGUETA Claimant	**APPEAL NO. 11A-UI-03598-VST**
	ADMINISTRATIVE LAW JUDGE DECISION
PINERIDGE FARMS LLC Employer	
	OC: 02/13/11 **Claimant: Appellant (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated March 17, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 12, 2011. Claimant participated. Employer participated by John Anderson, human resources director. The record consists of the testimony of John Anderson; the testimony of Edith Argueta; Claimant's Exhibit A; and Employer's Exhibits 1-2. Ike Rocha served as Spanish interpreter for the claimant.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a pork processing facility. The claimant was hired on February 6, 2009, as a full time worker in the cutting department. The claimant's last day of actual work was February 10, 2011. She was terminated on February 16, 2011.

The incident that led to the claimant's termination occurred on February 14, 2011. The claimant was a no call/no show for work on that day. The claimant was on a final attendance warning, which had been issued on November 19, 2010. The claimant had been given a one-day suspension and was informed that any further absences would lead to termination. She had had previous written warnings concerning her attendance on October 5, 2009, and October 30, 2009. When the claimant was given her final written warning on November 19, 2010, she had 15 instances of absenteeism, which included tardiness and leaving early. She provided doctor's excuses for 6 out of these 15 instances. There were nine instances of tardiness, including December 15, 2010, and January 17, 2011.

The claimant was absent due to illness on February 7, 2011, for which she did provide a doctor's note. She was absent on February 11, 2011, for illness, but she did not comply with

the employer's notification policy. The claimant was required to call in one half hour prior to the start of the shift. The claimant called at 7:16 a.m. Her shift started at 7:15 a.m. She did see a doctor and was diagnosed with a peritonsillar abscess. She was prescribed an antibiotic and Vicodin.

The claimant did not provide this medical information to the employer until she returned to work on February 15, 2011. The claimant was a no call/no show on February 14, 2011. She told the employer that she had overslept due to the medication she was taking.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct.

See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984) Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to establish misconduct.

The evidence in this case established excessive unexcused absenteeism. The claimant was on a final warning for absenteeism and knew her job was in jeopardy. The issue, however, is whether the final absence, which led to the claimant's termination, is a current act of misconduct. The claimant admitted that she did not call her employer to report her absence on February 14, 2011. The claimant was a no call/no show and therefore terminated when she came back to work on February 15, 2011. The claimant's reason for being absent was that she was still sick and had taken medication that caused her to oversleep.

Personal illness is an excused absence under unemployment insurance law but only if the employee properly notifies the employer about the absence. The claimant was scheduled to work on February 14, 2011, and she admitted that she did not call the employer at all that day to report her absence. She testified that she told John Anderson the previous Friday that she would not be at work on February 14, 2011, due to the effect of the medications that she was taking. There is nothing in the medical records to indicate that the claimant had been excused for February 14, 2011. Mr. Anderson testified that the claimant did not inform him that she was to be absent on February 14, 2011, or that would have been noted. The claimant admitted that she was asked by Mr. Anderson on February 15, 2011, why she had been a no call/no show and it was then that she mentioned she had overslept due to the medication she was taking. If he had indeed excused her from work on February 14, 2011, it makes no sense why he would ask her about being a no call/no show on February 14, 2011.

The administrative law judge concludes that the final absence was likely due to illness but that the claimant did not properly report her absence to her employer. Even if the claimant did oversleep, she did not call her employer at all on February 14, 2011. She did not follow the employer's notification policy for reporting an absence. Her failure to follow the notification policy means that the final absence was unexcused and therefore constitutes a final act of misconduct. Benefits are denied.

DECISION:

The decision of the representative dated March 17, 2011, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs