**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**TANYA D BOSLEY**
Claimant

**CARGILL MEAT SOLUTIONS CORPORATION**
Employer

**APPEAL NO: 08A-UI-05377-S2T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 05/04/08 R: 03**
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Tanya Bosley (claimant) appealed a representative's May 30, 2008 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she voluntarily quit work with Cargill Meat Solutions Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 23, 2008. The claimant participated personally and through her mother, Cheryl Blaise. The employer participated by Lauri Elliott, Assistant Human Resources Manager.

**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 September 22, 2003, as a full-time production worker. The claimant signed for receipt of the employer's handbook on September 22, 2003. The handbook indicates that the claimant worker must notify the employer if she is going to be absent. The claimant understood this to mean that no one else could call in for her absence. The employer has a no fault attendance policy. The employer has a policy that states that a person who is absent without notice for three days will be considered to have quit work.

The claimant was diagnosed in 2006 with seasonal attentive disorder, post traumatic stress disorder, severe anxiety and depression. The employer's nurse practitioner saw the claimant and helped her with treatment. The claimant's supervisor helped the claimant through the claimant's seasonal issues in the winter of 2006 and 2007. The claimant had been granted Family Medical Leave (FMLA).

On or about January 18, 2008, the employer sent the claimant home. Her blood pressure was too high. On one day in January 2008, the employer sent the claimant to the emergency room. The claimant had the flu and had to stay in bed. These health problems triggered the claimant's

mental health issues. On January 18, 2008, the claimant telephoned a mental health facility requesting an appointment. A physician could not see the claimant until February 21, 2008.

After January 28, 2008, the claimant could not care for herself. She was in bed and someone needed to stay with her. She was unable to eat or function without help. The claimant is a smoker and did not smoke during this time period. Her physician restricted her from working from January 28 through 31, 2008, but the physician did not supply the note to the employer.

On March 5, 2008, the claimant was released by her physician to return to work and she went to the work site. The Assistant Human Resources Manager told the claimant she was terminated because the claimant was absent without notice. The claimant then completed FMLA paperwork and was originally approved. Later she was denied because the employer had terminated the claimant as of January 31, 2008.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was 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 could not properly report her absence due to mental incapacity. 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 May 30, 2008 decision (reference 03) is reversed. 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/pjs