IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GINA M BALDWIN
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL NO. 09A-UI-11085-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/21/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Casey's Marketing Company (employer) appealed a representative's July 24, 2009 decision (reference 01) that concluded Gina Baldwin (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 August 21, 2009. The claimant participated personally. The employer participated by Lorie Arnold, Area Supervisor, and Jeannie Cochenour, Store 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 March 28, 2009, as a full-time assistant manager. The claimant signed for the employer's handbook on March 28, 2008. The employer issued the claimant a written warning on May 13, 2009, for failing to send payroll. On June 2, 2009, the employer issued the claimant a written warning for failure to make a pizza for a customer. The employer notified the claimant that further infractions could result in termination from employment.

On June 11, 2009, the claimant could barely breathe. She finished almost all her shift with difficulty. She did not stay the last 15 minutes and complete all her job duties because she was physically unable to perform the work. She did not call her supervisor because it was 11:00 p.m. and had been treated poorly by the store manager in the past. The store manager had hung up on her, sworn at her and told her it was stupid to call. The claimant was not thinking clearly because of her inability to breath.

On June12, 2009 the claimant reported she could not appear for work. The employer told her to come in for a meeting. The claimant told the employer that she was too ill and was waiting for the results of tests from her doctor's appointment. The doctor told the claimant she had

pneumonia and could not work from June 12 through 19, 2009. The claimant reported this to the employer.

The claimant was supposed to return to work on June 22, 2009. She was unable to report her absence because she was hospitalized. A family member contacted the employer. The claimant was released on June 23, 2009. She called the employer as soon as she arrived at home. The employer told the claimant to come to a meeting on June 24, 2009. The claimant went to the meeting and was terminated for failure to bag ice and post invoices on June 11, 2009. In addition she failed to properly report her absence of 15 minutes on June 11, 2009.

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). 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 on June 11, 22 and 23, 2009, due to physical incapacity and lack of mental accuity. 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 June 21, 2009 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

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