IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MINDY L FAULKNER
Claimant

PARCO
Employer

APPEAL NO. 07A-UI-01301-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/31/06 R: 03
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Wendy's Old Fashioned Hamburgers (employer) appealed a representative's February 1, 2007 decision (reference 01) that concluded Mindy Faulkner (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 held on February 20, 2007. The claimant participated personally. The employer participated by Taunya Embrey, General Manager, Doug Gardner, District Manager. The employer offered one exhibit, which was marked for identification as Exhibit One. Exhibit One 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 May 1, 2004, as a part-time crew member. The claimant signed for receipt of the company handbook on May 1, 2004. The claimant suffers from epilepsy. After a seizure the claimant is unable to work.

On July 10 and November 12, 2006, the claimant did not report her absence to the employer because she had no telephone and no transportation to work. The claimant's husband was angry at her and left her at home without a telephone. She was late in reporting to work on October 9, 2006, because she overslept. On November 9, 2006, the claimant went home for lunch and had a seizure. She thought her husband had reported the absence to the employer because she was unable to do so. The claimant properly reported she was ill and could not work on July 15, August 17, October 17, 18, November 11, 15, 16 and 17, 2006. The employer issued the claimant a written warning for absenteeism. The employer warned the claimant that further infractions could result in her termination from employment.

On December 9 and 10, 2006, the claimant properly reported her absences due to illness. On December 30, 2006, the claimant telephoned the employer and said she was vomiting. The

employer asked the claimant to try to come in to open the business. The claimant said she would try but vomited twice after the telephone conversation. She fell asleep on the couch and was unable to return to work. Later that day she went to the doctor and was given a three day release from work. The claimant properly reported her absence due to illness on December 31, 2006. She was not scheduled to work again until January 3, 2007. When she returned to work the employer terminated her employment.

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 which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on December 30 and 31, 2006. 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 which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's February 1, 2007 decision (reference 01) is affirmed. 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