IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KRISTA A WINDLE
2004 ALLAN ST
SIOUX CITY IA 51103

SUNRISE MANOR
5501 GORDON DR E
SIOUX CITY IA 51106

Appeal Number: 05A-UI-12204-S2T
OC: 11/06/05 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Sunrise Manor (employer) appealed a representative's November 29, 2005 decision (reference 01) that concluded Krista Windle (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 December 19, 2005. The claimant participated personally. The employer participated by Donna Baker, Human Resources Director, and Julie Petersen, Dietary Manager.

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 July 23, 2005, as a full-time dietary server. The claimant received a copy of the employer's handbook and signed for its receipt on July 18, 2004. The handbook contains a policy which requires an employee to report an absence personally and two hours prior to the start of the shift.

On November 20, 2004, the employer issued the claimant a written warning regarding absenteeism. On September 8, 2005, the employer issued the claimant a written warning, three-day suspension and placed on probation for taking too long to administer a lice treatment on her own hair. The claimant was allowed to leave work for one hour but did not return for over two hours. The claimant took a longer time because everyone in her residence was taking a treatment for lice infestation. Both warnings informed the claimant that further infractions could result in the claimant's termination.

At 1:30 a.m. on November 6, 2005, the claimant had a stomachache and telephoned a co-worker to see if the co-worker could work for the claimant on the following day starting at 10:30 a.m. The co-worker refused and the claimant thought she would try to work. At 9:00 a.m. on November 6, 2005, the claimant awoke to a severe sore throat. The claimant attempted to reach someone at the workplace but could not. At 9:50 a.m. the claimant's mother telephoned the claimant's supervisor at home. The supervisor told the mother that the matter would be referred to the Human Resources Department. The claimant called the supervisor and asked why it would be referred. The supervisor told the claimant she had not called two hours prior to the start of her shift and the claimant was on probation.

The claimant went to the emergency room where a physician diagnosed her with pharangitis and tonsillitis. The physician restricted the claimant from working until September 8, 2005. On September 8, 2005, the claimant supplied the doctor's excuse to the employer. The employer terminated the claimant for failure to properly report her absence on September 6, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was not.

871 IAC 24.32(1)a, (8) provide:

> 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).

> (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 an improperly reported illness which occurred on November 6, 2005. While the claimant did not report her absence two hours prior to the start of her shift, she did try to report her absence as soon as she realized she could not work. In addition, this was the only occurrence of an improperly reported absence during the claimant's employment. The claimant's actions do not rise to the level of misconduct. Benefits are allowed.

DECISION:

The representative's November 29, 2005 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/kjf