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

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

**LORENZO L AVILA**
Claimant

**JOHN MORRELL & COMPANY**
Employer

**APPEAL NO. 10A-UI-11750-S2T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 06/20/10**
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Lorenzo Avila (claimant) appealed a representative's August 16, 2010 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with John Morrell & Company (employer) for excessive unexcused absenteeism after having been warned. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 6, 2010. The claimant was represented by Al Sturgeon, Attorney at Law, and participated personally. The employer participated by Kathy Peterson, Human Resources Manager; Judy Ratliff, Nurse; and Leticia Cvetnich, Human Resources Assistant. The claimant offered and Exhibit A was received into evidence. The employer offered and Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on July 9, 2003, as a full-time trimmer. The claimant's first language is Spanish. He understands and can speak conversation English, but cannot understand written English very well. The claimant received the employer's handbook. The claimant reported a work-related injury on April 30, 2010. The employer sent the claimant to its physician who prescribed medication and sent the claimant back to work with restrictions. The employer decided that the injury was not work-related but chose to accommodate the claimant's restrictions. The claimant continued to work with extreme pain and discomfort. The medication caused the claimant some memory loss. He last worked on May 29, 2010.

On June 4, 2010, the employer issued the claimant a written warning for absences without notice on June 2 and 3, 2010. The employer notified the claimant that further infractions could result in termination from employment. The claimant was having trouble functioning due to the medicine prescribed by the employer's physician. At that meeting, the employer advised the claimant to complete Family Medical Leave (FMLA) paperwork. The claimant completed the

FMLA application and submitted it to the employer on June 7, 2010. On June 10, 2010, the employer notified the employer that he was eligible for FMLA leave beginning on June 7, 2010. The claimant was informed that he had to provide sufficient certification by way of completing a form by June 25, 2010. He was told to provide periodic reports of his status and intent to return to work every 30 days. The claimant concluded it was not necessary to report his absences each day because his FMLA was approved starting June 2010.

The claimant was absent without notice on June 14, 2010. The claimant did not remember to report his absence because of the medication prescribed by the employer's physician. The employer terminated the claimant on June 14, 2010, for failure to properly report his absence.

**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 that precipitated the discharge. The last incident of absence was an improperly reported illness or injury. The claimant's absence does not amount to job misconduct, because the claimant could not properly report his absence due to mental incapacity caused by the medication the employer's physician prescribed and lack of understanding of the employer's instructions provided in English. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

**DECISION:**

The representative's August 16, 2010 decision (reference 01) is reversed. The employer has not met its burden of 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/kjw