IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ROBEL T ESKIAS Claimant **SWIFT PORK COMPANY** Employer	**APPEAL 18A-UI-04375-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/18/18** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Robel T. Eskias (claimant) filed an appeal from the April 3, 2018, reference 01, unemployment insurance decision that denied benefits based upon the determination he voluntarily quit employment with Swift Pork Company (employer) when he refused to continue working, which is not a good cause reason attributable to the employer. The parties were properly notified about the hearing. A telephone hearing began on May 2, 2018 and concluded on May 10, 2018. The claimant participated. The employer participated through Human Resource Supervisor Rogelio Bahena. Tigrinya interpretation was provided by Ayedefer (employee number 21137) and Asmerh (employee number 5957) of CTS Language Link. The claimant's Exhibit A was admitted without objection. The claimant had not received the employer's proposed exhibits as they were mailed on May 8, 2018. The employer stated it was prepared to proceed without the proposed exhibits. The employer's proposed Exhibit 1 was not admitted into the record.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Cryovac Operator beginning on April 17, 2017, and was separated from employment on March 16, 2018, when he was discharged. The employer has an attendance policy that states an employee who leaves work without permission is considered to have abandoned the job and voluntarily terminated employment. The employer also has a policy stating shutting down production is a major infraction and can result in suspension or termination.

The claimant experienced a work-related injury to his shoulder in October 2017. He was given restrictions on February 19, 2018, stating he could not lift more than 15 pounds, no repetitive movement, and no work above shoulder height. The doctor approved him to work as a Cryovac Operator. This was all recorded on a "Red Card" that the claimant carried on his person while at work. (Exhibit A)

On March 14, 2018, the claimant was working as a Cryovac Operator on the back ribs line which would normally require him to lift up to nine pounds. However, that evening he was required to complete two pieces at a quicker pace. The claimant's shoulder, neck, and back began to hurt. The claimant went to the medical department and was allowed to apply Biofreeze and use a warm compress on his shoulder. The claimant returned to work.

He continued to experience pain and told his acting supervisor Casey Johnson. He shut the machine down to talk to her and asked if he could have someone assist him or go home. Johnson refused to assign someone to help him or send him home, instead she sent him back to the medical department. Johnson then assumed the claimant's job duties.

The claimant did not go to the medical department but went to speak with Human Resource Supervisor Rogelio Bahena. He explained to Bahena that his work was causing his shoulder to hurt and showed Bahena his Red Card believing that the work he was doing was outside his restrictions. Bahena told the claimant that he is not a doctor and the machine to which he was assigned was within his restrictions. Bahena and the claimant then went to the medical department. The claimant began to grab a warm towel for his shoulder, but as it had not worked earlier, he did not continue. The claimant reiterated his request to leave due to the pain in his shoulder. Bahena told the claimant that he did not have permission to leave and, if he left, it might result in his termination. Due to the language barrier, the claimant did not understand what the word termination meant and believed leaving work would only result in a point under the employer's attendance policy. The claimant left work.

The claimant called in sick to work the next day. He reported to work on March 16, 2018 and was discharged for shutting off production and leaving without permission on March 14.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. Iowa Administrative Code rule 871-24.32(1)a provides:

> "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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct **except for illness or other reasonable grounds** for which the employee was absent and that were properly reported to the employer. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law."

The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. The claimant reported to his supervisor and Human Resources that he was in pain due to his injury and needed to go home or get assistance to continue working. The employer refused both. The employer gave him the option of continuing to work while in pain possibly resulting in additional injury or face disciplinary action for leaving without permission. The claimant then left work due to his injury. The claimant's conduct, as it was due to his physical ailment, cannot be considered willful or deliberate misconduct as it was beyond his control. The employer has not established that the claimant was untruthful about his reports that he was in pain and was engaging in deliberate or willful misconduct.

As the claimant's last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, the history of other incidents need not be examined. Benefits are allowed.

DECISION:

The April 3, 2018, reference 01, unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Any benefits withheld based upon this separation shall be paid to the claimant.

_____
Stephanie R. Callahan
Administrative Law Judge

_____
Decision Dated and Mailed

src/scn