

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

STEVEN N SIMOFF
Claimant

APPEAL NO. 19A-UI-00840-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ROSE ACRE FARMS
Employer

OC: 01/06/19
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Rose Acre Farms (employer) appealed a representative's January 25, 2019, decision (reference 01) that concluded Steven Simoff (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 13, 2019. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Tami Ryerson, Human Resources Manager. Exhibit D-1 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 considered all of the evidence in the record, finds that: The claimant was hired on October 22, 2018, as a full-time general laborer. He electronically signed for receipt of the employer's handbook on October 18, 2018. On November 5, 2018, the employer changed the attendance policy in the handbook without having the claimant sign for receipt of it. The new policy indicated that an employee would be discharged if he accumulated six attendance points in a rolling ninety-day period. The policy did not require employees to report absences but encouraged it.

On October 31, 2018, the employer issued the claimant a one-point written warning for his absence due to a properly reported illness on October 30, 2018. The claimant properly reported his absences on November 8 and 13, 2018. He was ill and vomiting on November 13, 2018. On November 17, 2018, the employer issued him a three-point written warning.

On December 3, 2018, the claimant was sick with fever and vomiting. He did not report his absence and was issued a four-point written warning on December 4, 2018. On December 10, 2018, the employer issued the claimant a five-point final warning for his properly reported absence on December 9, 2018, due to transportation issues.

On December 19, 2018, the claimant injured his left arm at work and reported the injury to his supervisor. The claimant is left handed. On December 20, 2018, the claimant could not move his left arm or put on a shirt. He called his supervisor ninety minutes prior to the start of his shift to say he would not be at work due to the work injury. The supervisor said the employer would set up a doctor's appointment. The employer called the claimant back and terminated him for having accumulated six attendance points in a ninety day period. The employer did not have a doctor evaluate the claimant's medical condition.

The claimant filed for unemployment insurance benefits with an effective date of January 6, 2019. He did not receive any unemployment insurance benefits after his separation from employment. The employer provided the number of Tami Ryerson as the person who would participate in the fact-finding interview on January 23, 2019. The fact finder called Ms. Ryerson, but she was not available. The fact finder left a voice message with the fact finder's name, number, and the employer's appeal rights. The employer did not respond to the message. The employer provided some documents for the fact finding interview.

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, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

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).

Iowa Admin. Code r.871-24.32(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 20, 2018. 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 January 25, 2019, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs