

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DUSTIN HOTCHKIN
Claimant

APPEAL NO. 09A-UI-10574-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 06/14/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 14, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 10, 2009. Claimant Dustin Hotchkin participated. Tony Luse, Employment Manager, represented the employer. Exhibits One through Four were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dustin Hotchkin was employed by Swift & Company/JBS as a full-time mechanic from December 2004 until June 18, 2009, when Tony Luse, Employment Manager, discharged him for attendance. Mr. Hotchkin's shift started at 6:00 a.m. and ended at 2:00 p.m.

The employer's attendance policy required that Mr. Hotchkin notify the employer at least 30 minutes before the scheduled start of his shift if he needed to be absent. The policy was contained in the employee handbook and Mr. Hotchkin was aware of the policy.

The final absence that triggered the discharge occurred on June 18, 2009, when Mr. Hotchkin was late for work. Mr. Hotchkin had recently become a foster parent to his seven-year-old nephew. Mr. Hotchkin had dropped the nephew at the babysitter's on his way to work and then had to return to the babysitter's to address the child's separation anxiety. Mr. Hotchkin had been late for personal reasons on June 5. On June 8, Mr. Hotchkin had been absent because his grandmother had a stroke the night before. Mr. Hotchkin properly notified the employer of the absence.

Prior to the tardiness on June 5, 2009, the next most recent date Mr. Hotchkin had been absent for something other than illness properly reported to the employer was December 9, 2008. On that day, the Iowa Department of Transportation had issued an advisory against travel.

Mr. Hotchkin attempted to take his step-daughter and niece to his in-laws' home before heading to work, but wound up in a ditch. By the time Mr. Hotchkin got his vehicle out of the ditch, his shift was over. Mr. Hotchkin did not report the absence to the employer. Mr. Hotchkin's cell phone was not charged and he did not have access to another phone.

Mr. Hotchkin had many additional absences, but these were for illness properly reported to the employer.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings.

However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence establishes unexcused tardiness on June 18, 2009, when Mr. Hotchkin was late for personal, childcare reasons. The evidence establishes another incident of unexcused tardiness on June 5, when Mr. Hotchkin was late for personal reasons. The evidence establishes an unexcused tardiness on December 9, 2008. On that date, Mr. Hotchkin was absent due to weather that made it impossible for him to get to the employment, but failed to notify the employer of the need to be absent. The remaining absences were for illness properly reported and were excused absences under the applicable law.

The evidence fails to establish excessive unexcused absences. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Hotchkin was discharged for no disqualifying reason. Accordingly, Mr. Hotchkin is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Hotchkin.

DECISION:

The Agency representative's July 14, 2009, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css