

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CESAR E GODINEZ-ARROYO
Claimant

APPEAL NO. 12A-UI-01037-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 12/11/11
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Swift Pork Company filed a timely appeal from a representative's decision dated January 20, 2012, reference 02, which held claimant eligible to receive unemployment insurance benefits finding that the claimant was dismissed under nondisqualifying conditions. After due notice, a hearing was scheduled for and held on February 22, 2012. Claimant participated personally. The employer participated by Aureliano Diaz, Human Resource manager. Claimant's Exhibits One and Two were received into evidence

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Cesar Godinez-Arroyo was employed Swift Pork Company, doing business as JVS, from January 31, 2011 until December 12, 2011 when he was discharged from employment. The claimant was employed as a full-time quality assurance worker on the company's second shift and was paid by the hour.

The claimant was discharged based upon the employer's reasonable belief that the claimant had engaged in falsification of record for flying to Mexico and calling in sick that day after authorization to be absent to fly to Mexico had been denied by the employer.

Mr. Godinez-Arroyo had requested and been granted a period of time from December 1 through December 12 off work as authorized vacation time. The claimant had then requested to also be off work on November 28, 29 and 30 for the purpose of flying to Mexico. Because of business and production needs, the claimant's request to be off work on November 28, 29 and 30 was denied. Mr. Godinez-Arroyo, although aware of the denial, did not report for work on November 28, 29 or 30 subsequently indicating that he had been ill and presenting a doctor's note. The employer had also requested that the claimant submit an itinerary of his flight to

Mexico and had determined that the claimant had flown to Mexico during the days that he had claimed he was too ill to report for work. The employer concluded that the claimant had chosen to ignore the employer's decision about denying time off on those days and considered the claimant's conduct to be intentional disregard of the employer's interests and standards of behavior.

Upon his return the claimant submitted a doctor's note (See Exhibit One) signed by Dr. Orville Jacaba stating that the claimant was unable to return to work from November 28 through November 30, 2011. The claimant testified that the doctor's note holding him unable to work was based upon the claimant's statement to the physician that he was "depressed" and suffering from "anxiety."

It is the claimant's position that although he was too ill to report for work, he nonetheless was given permission by his physician to fly to Mexico accompanied by his daughter.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 insurance benefits. 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 this matter the evidence establishes that Mr. Cesar Godinez-Arroyo was discharged based upon the employer's reasonable belief that the claimant had intentionally disregarded a work directive denying him permission to be absent from work on November 28, 29 and 30, 2011. The claimant had requested and been authorized an extended period of time away from work beginning December 1, 2011 so that the claimant could travel to Mexico for personal reasons. When the claimant had requested to leave work three days earlier on November 28, 29, and 30 the employer specifically denied the request because of production and staffing needs. After the claimant was informed of the denial he nonetheless did not report for work utilizing a pre-purchased airline ticket to fly to Mexico and subsequently providing a doctor's note that reflected only the reasons that the claimant had himself stated to the employer as to why he could not work. The claimant testified that the doctor had determined that he was suffering from depression and anxiety and thus was too ill to work. The administrative law judge finds that it strains credibility that the claimant would be authorized to take an international flight when suffering from such a level of anxiety depression that would prevent the claimant from merely reporting to work to perform quality assurance duties for his employer.

The administrative law judge concludes based upon the totality of the evidence in the record that the claimant chose to ignore a reasonable and work-related directive and to intentionally absent himself from work for personal reasons that were not necessitous nor compelling.

No part of the contract for employment is more basic than the right of an employer to expect employees will appear for work on the day and hour agreed upon. Intentional failure to honor that obligation shows a substantial disregard for the employer's reasonable interests and standards of behavior that an employer has a right to expect of its employees under the provision of the Employment Security Law. Unemployment insurance are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue

of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The fact-finder's decision dated January 20, 2012, reference 02, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, providing that he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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