

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSE N MOLINA
Claimant

APPEAL NO. 09A-UI-08930-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC
Employer

OC: 08/24/08
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, West Liberty Foods, filed an appeal from a decision dated June 12, 2009, reference 02. The decision allowed benefits to the claimant, Jose Molina. After due notice was issue, a hearing was held by telephone conference call on July 9, 2009. The claimant participated on his own behalf. The employer participated by Human Resources Generalist Nikki Bruno.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Jose Molina was employed by West Liberty Foods from March 17 until April 28, 2009 as a full-time maintenance mechanic. He received a copy of the employer's attendance policy which provides for discharge of any employee who has three occurrences of absenteeism in the first 90 days of employment.

Mr. Molina missed work on April 4, 2009, due to personal illness, and on April 10, 2009, due to transportation problems. He was absent on April 18, 19, 20, 23 and 24, 2009, all consecutive workdays in his schedule, to care for his father who was ill. His mother also has health problems and was unable to care for her spouse without help from the claimant. Mr. Molina's father had surgery on April 20, 2009, was discharged two days later, and the claimant continued to care for him personally. The absences were all reported properly under the employer's policy.

Mr. Molina was notified by Recruiting Supervisor Catherine Castillo on April 28, 2009, he was discharged. After that date he attempted to provide a doctor's statement to the employer but it was not accepted as it was not tendered until more than a week after his discharge. The employer acknowledged the doctor's statement would not have made any difference to the decision to discharge because the claimant had missed seven days of work in six weeks.

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. 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.

The claimant was discharged for excessive absenteeism. But in order to be disqualified, the absences must not only be excessive but unexcused. A properly reported illness cannot be considered misconduct as it is not volitional. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The employer acknowledged the absences were all properly reported and a doctor's excuse would not have made any difference to the decision to discharge. 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. IDJS*, 364 N.W.2d 262(Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment benefits are two separate decisions. *Pierce v. IDJS*, 426 N.W.2d 679 (Iowa App. 1988).

Because the absences were due to serious family illness and were properly reported, they cannot be considered to be unexcused. Disqualification may not be imposed.

DECISION:

The representative's decision of June 12, 2009, reference 02, is affirmed. Jose Molina is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css