

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORY G KUON
Claimant

APPEAL NO: 11O-UI-10670-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 03/27/11
Claimant: Appellant (5)

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's April 26, 2011 determination (reference 01) that disqualified her from receiving benefits and held the employer's account exempt from charge because she voluntarily quit her employment for reasons that do not qualify her to receive benefits. A hearing was first held on June 2, 2011. The claimant did not respond to the hearing notice or participate in the hearing. The employer participated in the hearing. The employer agreed the administrative law judge should make a decision based on information in the administrative record. The administrative law judge issued a decision on June 3 that affirmed April 26 representative's determination, 11A-UI-06002-ET.

The claimant appealed the administrative law judge's June 3 decision to the Employment Appeal Board. The Employment Appeal Board remanded this matter to the Appeals Section for a new hearing. A hearing was held on October 25, 2011. The claimant participated in the hearing. Aureliano Diaz and Aaron Vawter appeared on the employer's behalf. Joseph Malual interpreted the hearing. Based on the evidence, the arguments of the parties, and the law, the administrative law judge finds the claimant is not qualified to receive benefits as of March 27, 2011.

ISSUE:

Did the claimant voluntarily quit her employment for reasons that qualify her to receive benefits, or did the employer discharge her for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in May 2007. She worked full time. When the claimant worked, the employer's attendance policy informed employees they could be discharged if they accumulated 11 attendance points. The employer's policy also informed employees the employer would consider an employee to have voluntarily quit if they had three no-call, no-reports on days they were scheduled to work.

The claimant properly notified the employer she was unable to work as scheduled on March 16, 17 and 18. The claimant's brother brought in paperwork verifying the claimant could not work

these days because her child was ill. The employer gave the claimant only one attendance point for these three days. As of March 18, the claimant had ten attendance points.

The claimant did not call or report to work on March 21, 22 or 23. On March 24, the employer completed termination papers indicating the claimant voluntarily quit because she had not called or reported for three days she had been scheduled to work. The claimant went back to work, but did not go back until after March 24, 2011.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if she voluntarily quits employment without good cause or an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5(1), (2)a.

The claimant testified she returned to work on March 21 and Vawter talked to her. The claimant said Vawter told her she no longer had a job because she had too many attendance points. What happened on March 21 is an issue that must be addressed.

The claimant may have returned to work, but the credible evidence does not support the claimant's testimony she returned on March 21. The employer's testimony as to what occurred on March 21 is considered more credible than the claimant's testimony. The claimant asserted she had been discharged because she had ten attendance points when she returned to work on March 21. At that time, the employer did not discharge employees until they had 11 attendance points. Also, Vawter reviewed the employer's business records while testifying. The administrative law judge considers the employer's business records more reliable than the claimant's memory as to what happened seven months ago. The claimant may have gone back to work, but the evidence indicates she did this sometime after March 24, not on March 21. Since the claimant filed her claim during the week of March 27, it is more likely she went back to work on Monday, March 28, and then learned she did not have a job.

The evidence does not establish that the claimant voluntarily quit her employment. Instead, the employer initiated the employment separation on March 24 and discharged her for violating the employer's three-day no-call, no-report rule.

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 Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The claimant may have assumed she would be discharged when she did not work on March 16, 17 or 18. This assumption was incorrect. If the claimant had reported to work on March 21, she would have had a job. The employer did not discharge her for violating the employer's attendance policy. Instead, the employer ended her employment when she did not call or report to work for three scheduled shifts. When the claimant did not call or report to work on March 21, 22 and 23, she intentionally and substantially disregarded the employer's interest. She committed work-connected misconduct. As of March 27, 2011, the claimant is not qualified to receive benefits.

DECISION:

The representative's April 26, 2011 determination (reference 01) is modified, but the modification has no legal consequence. The claimant did not voluntarily quit her employment. Instead, the employer discharged her for reasons that constitute work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of March 27, 2011. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css