

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KEAK C DUOP
205 S 2ND ST APT 1A
MARSHALLTOWN IA 50158

SWIFT & COMPANY
C/O EMPLOYERS UNITY INC
PO BOX 749000

Appeal Number: 05A-UI-02757-JTT
OC: 02/20/05 R: 01
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Keak Duop filed a timely appeal from the March 16, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 4, 2005. Mr. Duop participated in the hearing with the assistance of interpreter Daniel Lock. Jeremy Cook, Human Resources Manager, represented Swift. Exhibit One was received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Keak Duop is an immigrant from Sudan and has limited English skills. Mr. Duop was employed by Swift as a full-time production worker from August 2, 2004 until February 19, 2005, when

Jeremy Cook, Human Resources Manager, discharged him for excessive absenteeism. Mr. Duop worked the second shift, 3:00 p.m. to 11:30 p.m., Monday through Friday, and occasionally on Saturdays.

The absences that prompted the discharge occurred on February 18-19, 2005. Mr. Duop left work early on February 17, 2005, due to illness. Mr. Duop advised his immediate supervisor at that time that he would not be in the following day because he planned to see a doctor. Mr. Duop did not contact the employer on February 18 or February 19. When Mr. Duop arrived for work on February 21, he learned that he had been discharged based on excessive absenteeism. Mr. Duop did not have an appointment with a physician on February 18 and had been turned away at the doctor's office when he appeared without an appointment. Mr. Duop was finished at the doctor's office shortly after the scheduled start of his shift, but was not feeling well and did not go to work. Because Mr. Duop did not go to work on Friday, February 18, he did not see the posting that indicated he needed to appear for work on Saturday, February 19.

On January 18, 2005, Swift placed Mr. Duop on a 90-day probation and warned Mr. Duop that any additional absences during that 90-day period would result in termination of his employment. The probation contract was prompted by the fact that Mr. Duop had accrued three unexcused absences in the previous twelve-month period. Mr. Duop had been absent on August 27-28, 2004, due to being incarcerated. Mr. Duop had been absent on January 17 because he chose to attend a family gathering rather than go to work.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Duop was discharged for misconduct in connection with his employment based on excessive unexcused absences.

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(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.

871 IAC 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.

Because the claimant was discharged, the employer bears 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 Mr. Duop's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that Mr. Duop'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 employer must first show 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 lack of 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).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Duop's absences on February 18-19 were excused absences for purposes of determining Mr. Duop's eligibility for unemployment insurance benefits. Mr. Duop had informed his supervisor on February 17 that he intended to consult with a physician the next day and would not be at work. Mr. Duop was not aware that he needed to appear for work on February 19, because that information had just been posted on February 18. Mr. Duop's absence on February 19 was, therefore, not volitional. Since the final absences that prompted the discharge were excused absences, the evidence in the record fails to establish a "current act" of misconduct that might serve as the basis for disqualifying Mr. Duop for unemployment insurance benefits. See 871 IAC 24.32(7). Accordingly, no disqualification will enter. Benefits are allowed, provided Mr. Duop is otherwise eligible.

DECISION:

The representative's decision dated March 16, 2005, is reversed. The claimant was discharged from his employment for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements.

jt/s