

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEREMIAH E KERBY
Claimant

APPEAL NO. 08A-UI-02340-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL MEAT SOLUTIONS CORP
Employer

OC: 01/20/08 R: 03
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
871 IAC 24.32(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

Cargill Meat Solutions Corporation filed a timely appeal from an unemployment insurance decision dated February 29, 2008, reference 02, that allowed benefits to Jeremiah E. Kerby. After due notice was issued, a telephone hearing was held March 24, 2008, with Mr. Kerby participating on his own behalf. Assistant Human Resources Manager Lauri Elliott participated for the employer.

ISSUE:

Was the claimant discharged because of a current act of misconduct?

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Jeremiah E. Kerby was a production worker for Cargill Meat Solutions Corporation from June 14, 2007, until he was discharged January 22, 2008. He was discharged for excessive absences. The final incident considered by the employer was Mr. Kerby's absence on January 21, 2008. Mr. Kerby called the employer at least a half-hour prior to his shift, in accordance with company policy, saying that he would be absent because he was experiencing difficulty breathing. Mr. Kerby went to his physician and returned to work with a note from his doctor. He was discharged in any event because of violating the total number of absences.

REASONING AND CONCLUSIONS OF LAW:

The question is before the administrative law judge is not whether the employer was justified in discharging Mr. Kerby. Instead, it is whether the discharge was because of disqualifying misconduct. For the reasons which follow, the administrative law judge concludes that it was not.

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. See Iowa Code section 96.6-2. Among the elements that the employer must prove is that the final incident leading directly to the discharge was a current act of misconduct. See 871 IAC 24.32(8). While excessive unexcused absenteeism is misconduct, absences due to a medical condition properly reported to the employer are considered to be excused. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) and 871 IAC 24.32(7).

The employer's witness testified that the employer considered the January 21 absence in reaching the decision to discharge Mr. Kerby. She also testified that Mr. Kerby had properly reported the absence by contacting the employer more than 30 minutes before the beginning of his shift. She had no information to contradict Mr. Kerby's testimony that the absence was due to illness and that he had returned with a note from his physician. From this, the administrative law judge concludes that the final incident leading to the decision to discharge was not an act of misconduct. No disqualification may be imposed.

DECISION:

The unemployment insurance decision dated February 29, 2008, reference 02, is affirmed. The claimant is entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

kjw/css