

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SCOTT G FRANKS**

Claimant

**APPEAL NO. 14A-UI-12746-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**

Employer

**OC: 11/16/14**

**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated December 4, 2014, reference 01, which denied unemployment insurance benefits finding that the claimant was discharged from work on November 17, 2014 for excessive unexcused absenteeism after being warned. After due notice was provided, a telephone hearing was held on January 7, 2015. The claimant participated. Participating on behalf of the claimant was his attorney, Mr. Erik D. Bair. The employer participated by Ms. Stacy Santillan, Human Resource Manager. Claimant's Exhibits A, B, C and D 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:**

Having considered all the evidence in the record, the administrative law judge finds: Scott Franks was employed by the captioned employer from March 15, 2013 until November 17, 2014 when he was discharged for exceeding the permissible number of point infractions on the company's no-fault attendance policy. Mr. Franks was employed as a full-time distribution technician and was paid by the hour. His last immediate supervisor was Tony Sauze.

Scott Franks was discharged from his employment after he exceeded the number of infraction points allowed under the company's "no fault" attendance policy. Under the terms of the policy, employees are subject to discharge if they accumulate five infraction points during a twelve-month rolling period. Under the terms of the policy, infraction points are assessed for absences, leaving early or reporting to work late. The reason for the attendance infraction is not considered by the employer under the policy.

Mr. Franks had received a work injury on December 10, 2013, suffering a number of broken bones and a back injury. The claimant later reported back to work with a light-duty limitation. The limitation included limiting the claimant to working eight hours per day. As time progressed, the employer began to expand its work expectations for Mr. Franks and also required him to

begin working twelve hours per day. The claimant protested to the employer that the changes in his employment were contrary to the limitations imposed by his physician and were exacerbating his medical condition.

Mr. Franks called off work on April 24, 27 and April 30 due to pain associated with his back injury and had also called off work due to illness on August 26 and 27, 2014. On October 1 and 2, Mr. Franks left work early due to back pain. On November 1 and November 2, the claimant called off work due to pain associated with his back injury. The final attendance infraction that caused the claimant's discharge from employment took place on November 15 and 16 when the claimant reported that he was unable to report to work due to pain in his back that had been exacerbated those days by attempting to remove snow. In all cases, Mr. Franks had provided required notice to the employer of his impending absences.

### **REASONING AND CONCLUSIONS OF LAW:**

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

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

In discharge cases, the employer has the burden of proof to establish disqualifying conduct on the part of a claimant. 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 may not necessarily be serious enough to warrant the denial of unemployment insurance 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 the claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant'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 evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absence related to issues of personal responsibilities such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused providing the employees comply with the employer's policy regarding notifying the employer of the absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

A reported absence related to illness or injury is excused for the purposes of the Iowa Employment Security Act. The employer's no-fault absenteeism policy is not dispositive of the issue of qualification for benefits.

The evidence in the record establishes that Mr. Franks did follow the employer's attendance policy by providing notice to the employer of all impending absences. The evidence in the record establishes that the claimant's absences were due to illness and or injury and were properly reported.

Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that Mr. Franks was discharged under non-disqualifying conditions. Accordingly, the claimant is qualified for unemployment insurance benefits providing that he meets all other eligibly requirements of Iowa law. The employer's account is subject to charges for benefits paid to Mr. Franks.

#### **DECISION:**

The representative's decision dated December 4, 2014, reference 01, is reversed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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