

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARWA DOLLY
Claimant

APPEAL NO. 10A-UI-10472-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 05/30/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Swift & Company (employer) appealed a representative's July 15, 2010 decision (reference 03) that concluded Marwa Dolly (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 9, 2010. The claimant participated personally. The employer participated by Jenny Mora, Employment Manager. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason. In addition, whether the claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on October 26, 2009, as a full-time production worker. The claimant does not remember receiving the employer's handbook. The employer has a policy that an employee who accrues ten points will be placed on a 90-day contract. While on the 90-day contract, the employee can be terminated for any absence. The employer told the claimant her attendance point totals on January 19, February 18, April 28, and May 4, 2010. The claimant's absences were all properly reported and due to illness or injury. The claimant had accrued six points as of May 4, 2010. The claimant is pregnant and was involved in an automobile accident.

The claimant properly reported her absence due to illness on May 14 and 24, 2010. The employer recorded the claimant's absences as no-call, no-shows and awarded her four additional attendance points. The employer did not notify the claimant of the additional points. She worked on May 25 and 26, 2010, but had to sign in because of issues with her identification badge. The employer listed the claimant as a no-call, no-show on May 26, 2010, and terminated her on May 27, 2010. The claimant's physician has not restricted her from working.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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(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.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct, but that there was a final incident of misconduct that precipitated the discharge. The last incident of absence was a properly reported illness that occurred on May 24, 2010. The claimant's absence does not amount to job misconduct, because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

The next issue is whether the claimant was able and available for work. For the following reasons, the administrative law judge concludes she is.

871 IAC 24.23(1) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(1) An individual who is ill and presently not able to perform work due to illness.

When an employee is ill and unable to perform work due to that illness, she is considered to be unavailable for work. The claimant has never been issued restrictions by her physician. She is considered to be available for work. The claimant is not disqualified from receiving unemployment insurance benefits.

DECISION:

The representative's July 15, 2010 decision (reference 03) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed. The claimant is not disqualified from receiving unemployment insurance benefits. She is able and available for work.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw