

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

ALBERTO FERRER ROMERO

Claimant

and

SMITHFIELD FARMLAND CORP

Employer

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HEARING NUMBER: 15B-UI-05385

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 96.3-7

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Alberto Ferrer Romero, worked for Smithfield Farmland Corp. from April 4, 2013 through April 2, 2015 as a full-time worker on the receiving dock. (20:55-22:11; 31:21-31:55) His last day actually worked was March 20, 2015. (21:15-21:27) The Claimant worked Monday through Friday. (22:18-22:28)

On April 5, 2013, the Claimant received orientation in which the Employer reviewed all attendance policies and procedures. (23:05-23:33) The Employer explained that if an employee does not call at least 30 minutes prior to his shift, or do not come in, it shall be considered a 3-day no call/no show and a voluntary termination from the plant. (23:48-24:00) Mr. Romero signed in acknowledgement of receipt of this training that same day. (35:15-38:18; Exhibit 2)

On February 18, 2015, the Employer issued a written warning to the Claimant for having accumulated 8 attendance points. (28:15-28:30)

On March 23, 2015, the Claimant and his wife requested time off to tend to his sick mother-in-law in Texas. (25:08-25:27; 32:31-32:51; 35:20-35:25) The Employer informed Mr. Romero via Jose Miguel Guzman, an employee who interpreted for him, (27:00-28:03) that the Claimant needed to return by March 30th. (25:45-25:50) When the Claimant did not return on the 30th, the Employer attempted to contact him, leaving a message that he should contact the Employer. (25:52-26:00) The Employer did not hear from Mr. Romero until Friday, April 3, 2015. (26:02-26:05; 26:39-26:52) The Claimant was a no call/no show on March 30th, 31st and April 1st, 2015, which triggered his termination on April 2, 2015. (24:27-24:41)

The Claimant asked the Employer to meet with him at the plant on April 8th, as there had been a misunderstanding about his termination; but the Claimant did not show for the meeting. (29:35-30:10) Instead, he showed up on April 13th inquiring about getting his job back, however, all the Employer wanted was proof that he had called in, which he failed to provide. (30:07-30:24)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

871 IAC 24.32(7) provides:

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.

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 substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We attribute more weight to the Employer's version of events. The record shows that the Claimant understood the Employer's attendance policy based on his signature as well as his testimony. It is clear that he already experienced attendance problems as evidenced by the written warning he received, which he doesn't dispute.

As for the final absences that triggered his termination, Mr. Romero admitted that he understood the Employer's instruction that he return by March 30, 2015, even though he knew up front that the time allotted was not enough. It would seem that considering he had already received a written warning about his attendance, he would have been more diligent in keeping the Employer apprised of his circumstances. Although he argued that he did call in on the 2nd, Mr. Romero failed to provide any corroboration to show he made any type of good faith effort to comply with the Employer's directive. The Employer has a right to expect its employees to report to work as scheduled. In light of the Claimant's unauthorized absences, we conclude that the Claimant failed to properly report his absences on March 30th, 31st, and April 1st, which was misconduct by its legal definition. See, 871 IAC 24.32(7), *supra*. For this reason, we conclude that the Employer has satisfied its burden of proof.

DECISION:

The administrative law judge's decision dated June 17, 2015 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying reasons. Accordingly, he is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

Kim D. Schmett

Ashley R. Koopmans

DISSENTING OPINION OF JAMES M. STROHMAN:

I respectfully dissent from the decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

AMG/fnv

James M. Strohman