

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**EDWIN O MEJIA MARTINEZ**  
Claimant

**SWIFT PORK COMPANY**  
Employer

**APPEAL 16A-UI-07501-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/12/16**  
**Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting

**STATEMENT OF THE CASE:**

The claimant/appellant filed an appeal from the July 5, 2016 (reference 01) unemployment insurance decision that denied benefits based upon his discharge from work for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on July 26, 2016. The claimant, Edwin O. Majia Martinez, participated personally and with the assistance of an interpreter through CTS Language Link. The employer, Swift Pork Company, participated through Human Resources Supervisor Rogelio Bahena.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?  
Did claimant voluntarily quit the employment with good cause attributable to employer?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as machine operator. He was employed from March 28, 2011 until June 17, 2016. This company is a pork production company. His job duties included operating the saw that cut the neck bones from the hogs on the production line. Claimant's immediate supervisor was Wes Macintire.

The employer has a policy in place regarding absenteeism which provides that an employee must call in and report a tardy or absence at least thirty minutes prior to their scheduled shift start time. The absenteeism policy also has a no fault point system wherein employees incur points if they are absent. If an employee reaches ten points they are discharged. The claimant signed that he understood this policy on March 28, 2011 when he first began working for this employer.

The claimant took a two week vacation to El Salvador to visit his wife and children who live there. Claimant was scheduled to return to work from his vacation on June 6, 2016. While the claimant was visiting his wife and children in El Salvador gang members broke into his home,

robbed his family, and instructed claimant and his family not to return to their family home. The gang members had weapons during the robbery. Claimant spent the next several days moving his family from their previous home to a new location. Claimant arranged for a rental unit for his family to stay in because they could not return to their family home.

Claimant knew that he needed to call in to report his absences. The employer has a toll-free number for call-in purposes. Claimant called that telephone number to report his absences but the call would not go through due to the fact that it was a toll-free number and he was calling from El Salvador. Claimant called a friend in Ottumwa, Iowa and gave him the telephone number to contact his employer on his behalf to report his absences from work. Claimant's friend said that he would call on his behalf, but he forgot to do so. Claimant was absent from work June 6, 2016 through June 10, 2016 while he was attending to this family emergency. The claimant returned to work the following week.

On June 17, 2016 claimant was told that he was being discharged from employment. The claimant was discharged for absenteeism. The claimant had reached ten points for his absences from June 6, 2016 through June 10, 2016. The claimant did not receive any verbal or written discipline prior to his discharge.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code § 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(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. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Id.* at 558.

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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law." The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness and an incident of tardiness is a limited absence. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered

excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

In this case the claimant was absent for five consecutive work days because he was in El Salvador helping his family escape gang violence. He did try to call the toll-free number that was given to him from El Salvador; however, it did not work. He then called a friend in Ottumwa, Iowa and gave him the toll-free number to call on his behalf to report his absences. His friend forgot to call in for him. Claimant did not properly report all of his absences according to the employer's policy but he made his best efforts to try to reach his employer to do so. His inability to telephone his employer and notify them that he would be absent is not volitional and does not rise to the level of misconduct. See *Floyd v. Iowa Dept. of Job Service*, 338 N.W.2d 536 (Iowa App. 1983)(finding that employee who had no telephone to call in to the employer to report his absences and was bedridden due to illness did not commit misconduct due to his inability to report his absences).

The absences on this week were due to the fact that he was moving his family into a new location to escape gang violence in El Salvador. The absences were for good cause. As such, the claimant's absences from June 6, 2016 through June 10, 2016 were excused and there is no current act of misconduct.

The employer's burden to prove misconduct and the employer has failed to establish that the claimant was discharged for job-related misconduct which would disqualify him from receiving benefits. Benefits are allowed.

**DECISION:**

The July 5, 2016, (reference 01) unemployment insurance decision denying benefits is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Dawn R. Boucher  
Administrative Law Judge

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Decision Dated and Mailed

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