

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN P HEWITT
Claimant

APPEAL NO. 10A-UI-06582-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CARGILL MEAT SOLUTIONS
CORPORATION**
Employer

OC: 04/04/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Kevin Hewitt (claimant) appealed a representative's April 29, 2010 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Cargill Meat Solutions (employer) for excessive unexcused absenteeism and tardiness after being warned. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 22, 2010. The claimant participated personally. The employer participated by Jessica Sheppard, Human Resources Associate. The claimant offered and Exhibit A was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on February 3, 2009, as a full-time production worker. The claimant signed for receipt of the employer's handbook on February 5, 2009. The employer issued the claimant a verbal warning on June 22, 2009, for five absences and one failure to punch the time clock. The claimant did punch the time clock but the clock did not record it. Three of the absences were due to illness and properly reported. Two were due to personal reasons. On August 7, 2009, the employer issued the claimant a written warning for three absences due to medical issues and properly reported. The claimant provided a doctor's note for one of the absences. On September 2, 2009, the employer issued the claimant a written warning for absence due to illness with a doctor's note. The claimant properly reported his absence. On January 16, 2010, the employer issued the claimant a written warning and last chance agreement because he was tardy.

On March 29, 2010, the time clock was not working properly and the employer assessed the claimant .25 attendance point because he did not clock in. On April 3, 2010, the employer terminated the claimant for violating his last chance agreement even though his union representative told the employer the time clock was not working properly. (Exhibit A)

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 did not provide sufficient evidence of a final job-related misconduct. The time clock was not working. The failure to record the claimant's clock in time was the employer fault. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's April 29, 2010 decision (reference 01) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs