

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DENG G CHOL
Claimant

SMITHFIELD FARMLAND CORP
Employer

APPEAL 17A-UI-00036-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/04/16
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 23, 2016, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on January 23, 2017. The claimant Deng Chol participated and testified. The employer Smithfield Farmland Corp. participated through Human Resource Manager Rebecca Jackson. Employer's Exhibits 1 through 3 were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a production worker from July 30, 2009, until this employment ended on December 6, 2016, when he was discharged.

In November 2016 claimant's mother was killed in a car accident in Uganda. On November 14, 2016, claimant made a request for a leave of absence so he could fly to Uganda to collect his mother's remains and transport them to her village in South Sudan for proper burial. Claimant requested leave from November 16 through December 9, 2016. The employer's policies only allow for a maximum of eight days for bereavement leave, so claimant's request was denied. The employer testified it does not make any exceptions to this policy based on individual circumstances and therefore did not grant claimant an exception.

Claimant was granted leave from November 16 through 28, 2016. (Exhibit 2). Claimant explained to his employer that this would not be sufficient time, as it was the rainy season in South Sudan, meaning he would have to transport his mother's remains to her village by foot. It was a four day walk each way from the city to his mother's village, so claimant would have to spend eight days alone completing the walk to and from the village. Claimant was advised that

if he did not return to work on November 29, he would accumulate two attendance points daily until he did return. Claimant had eight attendance points at the time and the employer's policies call for termination at 12 attendance points. (Exhibit 1).

Claimant began his leave on November 16. Once his approved time had lapsed, claimant contacted the employer and informed them that he was still in Africa and would not be back in the United States until December 8. On December 9, 2016, claimant reported to work, but was told he had been discharged for violating the attendance policy. (Exhibit 3).

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.

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(7) provides:

(7) 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 Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Excessive absences are not considered misconduct unless unexcused. 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

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* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191,

or because it was not “properly reported,” holding excused absences are those “with appropriate notice.” *Cosper* at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*.

An employer’s no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

Much like illness or injury, the circumstances surrounding claimant’s most recent absence were not volitional. Claimant was absent from work because he was traveling overseas to collect, transport, and bury his mother’s body after she was killed in a car accident. Claimant’s extended absence was reasonable given the circumstances. Because his last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The December 23, 2016, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/