

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WAGEIALLA A ABUSHLIOUKH
Claimant

APPEAL NO. 11A-UI-16431-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 11/27/11
Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Wageialla Abushlioukh, filed an appeal from a decision dated December 20, 2011, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on January 23, 2012. The claimant participated on his own behalf and Magdy Salama acted as interpreter. The employer, Swift, participated by Human Resources Manager Aureliano Diaz.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Wageialla Abushlioukh was employed by Swift from June 15, 2009 until November 28, 2011 as a full-time production worker. He had received progressive disciplinary action for absenteeism on June 2 and July 2, 2011. At the final warning, he had reached eight points and was notified discharge would occur at nine points.

The reason for the claimant's absences was personal illness, he suffers from back pain and would need to go to the doctor. He properly reported the absences and generally provided doctor's excuses, but the employer has a no-fault attendance policy and the excuses did not prevent him from accumulating points.

On November 23, 2011, the claimant reported for work and shortly after that went to the human resources office to say he had to go to the doctor for his back. He was authorized to leave. The doctor's office was closed that day and the next day was Thanksgiving, so he was unable to contact the doctor until Friday, November 25, 2011, to get an appointment for Monday, November 28, 2011. He notified the employer of his absence for November 25, 2011.

When he reported for work after the doctor's appointment on November 28, 2011, and presented the doctor's excuse to Human Resources Aureliano Diaz, he was told the excuse did not make any difference, he had exceeded nine points and was discharged.

REASONING AND CONCLUSIONS OF LAW:

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(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.

In order for a disqualification to be imposed, there must be a current, final act of misconduct that precipitates the discharge. 871 IAC 24.32(8). A properly reported illness cannot be considered misconduct, as it is not volitional. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Mr. Abushlioukh properly reported all his absences and all of the absences were due to a medical condition.

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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Although the claimant did have excessive absenteeism, these absences cannot be considered unexcused and disqualification may not be imposed.

DECISION:

The representative's decision of December 20, 2011, reference 01, is reversed. Wageialla Abushlioukh is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw