**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**RANDY L STITES**
Claimant

**SWIFT & COMPANY / JBS**
Employer

**APPEAL NO: 10A-UI-03248-DT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 01/17/10**
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Randy L. Stites (claimant) appealed a representative's February 16, 2010 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Swift & Company / JBS (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 13, 2010. The claimant participated in the hearing. Cheryl Hughlette appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on February 19, 2007. He worked full time as a mechanic on the third shift (10:00 p.m. to 6:30 a.m.) in the employer's Marshalltown, Iowa pork processing facility. His last day of work was the shift that ended on the morning of January 13, 2010. The employer discharged him on January 15, 2010. The reason asserted for the discharge was absenteeism in violation of a last-chance agreement for excessive absenteeism.

On December 17, 2009 the employer allowed the claimant to continue his employment if he signed a last-chance agreement, as otherwise he would have been discharged at that time due to reaching ten points under the employer's ten-point attendance policy. The ten points that led to that discipline were due to about five absences for personal injury and five absences for family illness or emergencies, specifically the claimant's mother and his son. The last-chance agreement provided for a 90-day probation during which additional occurrences could lead to discharge, although if the claimant could make it into February or March without further occurrences, there may have been some points that might have dropped off from 2009 that could have allowed him some leeway.

The claimant was absent for his shifts the evenings beginning January 13 and January 14; he did call those days to report he would be absent. The reason for the absence was that the claimant's nine-year-old son, who suffers from several mental illnesses and disabilities, was suicidal. On January 13 the son had cut himself with a knife, although not severely, but was talking about killing himself. The claimant took his son to the hospital emergency room at about 8:00 p.m. that evening and stayed with him until he was released at about 3:00 a.m. The emergency room doctor advised that the claimant remain available to stay with his son at least until they could arrange to get into the son's doctor to attempt to adjust the son's medications. The doctor recommended that the claimant not rely on his wife alone to stay with their son, as she also suffers from a mental illness; it was recommended that the claimant remain available to help control their son until his medications were adjusted.

The claimant was unable to get his son in to be seen by his regular doctor during the day on January 14, but hoped to during the day on January 15. Therefore, he stayed home from work on the evening of January 14 to assist in controlling his son that evening. On January 15 he was summoned to the employer's offices, where he was then informed he was discharged for the further absences in violation of the December 17, 2009 last-chance agreement.

**REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness or other non-volitional

emergency-type reasons 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. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). Because the final absences were properly reported and were due to a critical situation beyond the claimant's control, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative's February 16, 2010 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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