

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GLEN L ZAEHRINGER
Claimant

APPEAL NO. 10A-UI-05054-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**Original Claim: 03/07/10
Claimant: Appellant (2)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated March 30, 2010, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 19, 2010. The claimant participated. Although the employer responded to the hearing notice and provided the name and telephone number of a representative, that individual was not available at the time of the hearing. A telephone number was left for the employer's representative to call. While the hearing was ongoing, a message was sent indicating that the employer would not be participating in the hearing. The record consists of the testimony of Glen Zaehringer.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was employed at Tyson's plant in Columbus Junction, Iowa. He started working on December 16, 2008. He did load-out in the freezer section. The claimant was terminated on March 10, 2010, for violation of the employer's attendance policy.

The final incident that led to the claimant's termination occurred on March 10, 2010. The claimant was late for work. As a result, he reached the maximum number of points under the employer's plan and was terminated. The claimant was not certain how many points he had when he was terminated. The claimant had been at two points and then, due to an extended absence because of H1N1 flu, the claimant was given 10.5 points, even though he had a doctor's excuse to be off work.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d (Iowa 1984). Absence due to matters of "personal responsibility," e.g. transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). Absence due to illness and other excusable reason is deemed excused if the employee properly notified the employer. See Higgins, supra, and 871 IAC 24.32(7). The employer has the burden of proof to show misconduct.

In this case, there is insufficient evidence to conclude that the claimant had excessive, unexcused absenteeism. The claimant may have violated the employer's attendance policy by accumulating too many absences, but the claimant credibly testified that 10.5 points were assessed because he was absent from work with the H1N1 flu and had a doctor's excuse to be off work. Since the employer has not shown excessive, unexcused absenteeism, benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's decision dated March 30, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw