

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RODOLFO M TORRES MADRID
Claimant

APPEAL NO. 14A-UI-01984-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 01/19/14
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated, February 18, 2014, reference 04, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a hearing was held on, March 13, 2014, by telephone conference call. The claimant failed to respond to the hearing notice and did not participate. The employer participated by Aureliano Diaz, the interim human resources manager. The record consists of the testimony of Aurelizno Diaz and Employer's Exhibits 1-3.

ISSUE:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

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

The employer is a pork processing plant located in Marshalltown, Iowa. The claimant was hired on January 3, 2011, as a full-time third shift laborer. His last day of work was November 17, 2012. He was terminated on November 17, 2012. The claimant was terminated due to violation of the employer's attendance policy. The claimant was aware of the policy. Termination occurs when an individual reaches nine points.

The absences that led to the claimant's termination occurred on November 17, 2012. The claimant was tardy. He was also tardy on November 16, 2012. He left early on July 30, 2012. The rest of his absences were due to personal illness.

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 disqualifies an individual from receiving unemployment insurance benefits 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 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such 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 reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

The claimant is not eligible for unemployment insurance benefits. An individual is not disqualified from receiving unemployment benefits because he or she is terminated under an employer's attendance policy. Rather the issue is whether the claimant's attendance record shows excessive unexcused absenteeism and that the final absence was unexcused. In this case, the evidence showed that the claimant's absences were due both to personal illness, which is considered an excused absence under Iowa law, and unexcused absences. There are

three unexcused absences, two of which occurred the day before and the day of termination. The claimant did not participate in the hearing and his reasons for being tardy are unknown. Since the employer has shown that the claimant was discharged for excessive unexcused absenteeism, benefits are denied.

The next issue is whether the claimant has been overpaid unemployment insurance benefits. There is no evidence in this record on whether the parties were provided with the fact finding documents. This matter is therefore remanded to the department to determine whether there has been an overpayment; the amount of the overpayment; whether the claimant should be required to repay any overpayment; and whether the employer's account should be charged.

DECISION:

The decision of the representative dated February 18, 2014, reference 04, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the department for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css