

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VICTORIA MAH
Claimant

APPEAL NO. 09A-UI-16378-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 09/06/09
Claimant: Appellant (1)

Section 96.5-2-a – Misconduct
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated September 30, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 8, 2009. Claimant participated. Employer participated by Tony Luse, employment manager. The record consists of the testimony of Tony Luse; the testimony of Victoria Mah; and Employer's Exhibits 1-4. Laura Solo served as the claimant's interpreter in the Krahn language. Official notice is taken of agency records.

ISSUES:

Whether the claimant filed a timely appeal; and
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 employer in this case is a pork producer. The claimant worked at the plant in Marshalltown, Iowa. She was hired as a full time production worker on October 13, 2008. The claimant was terminated on September 9, 2009. The reason for her termination was excessive, unexcused absenteeism.

The employer has a written attendance policy, of which the claimant was aware, that if an individual had three unexcused absences within a twelve month period that termination would occur. There are five types of unexcused absences: transportation problems; personal business; jail time; failure to provide a medical excuse; and failure to report to work, i.e., a no call, no show. The claimant was a no call, no show on September 4, 2009, and September 5, 2009. She also had unexcused absences on March 30, 2009, and June 16, 2009. On June 16, 2009, she had car trouble. Personal reasons were cited for the absence on March 30, 2009.

The representative's decision disqualifying the claimant from receiving unemployment insurance benefits was issued on September 30, 2009. The appeal was filed stamped received in the Appeals Section on October 30, 2009. The claimant's appeal was received in the local IWD office on October 5, 2009.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code section 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

Local workforce offices are considered to be agents of the Appeals Section and thus an appeal is considered filed when received by the local office. Since agency records show that the local office received the appeal on October 5, 2009, the appeal is considered timely.

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 duty a worker owes 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). 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 reasons is deemed excused if the employee properly notified the employer. See Higgins, supra, and 871 IAC 24.32(7).

The evidence in this case established that the claimant was terminated for excessive unexcused absenteeism. The claimant was a no call, no show on September 4, 2009, and September 5, 2009. She also had unexcused absences on June 16, 2009, and March 30, 2009. Although the claimant attributed some of her absences due to sick family members, she did not notify the employer that this was the reason for her absences that were considered unexcused. The claimant had been excused previously for sickness of a family member and therefore it is reasonable to assume that she knew how to report this situation properly. Since the employer has established excessive, unexcused absences, benefits are denied.

DECISION:

The decision of the representative dated September 30, 2009, reference 01, is affirmed. 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.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs