

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WENDY L PHILLIPS
Claimant

APPEAL NO. 08A-UI-09910-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 01/13/08 R: 03
Claimant: Respondent (1)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (Tyson) filed an appeal from a representative's decision dated October 15, 2008, reference 05, which held that no disqualification would be imposed regarding Wendy Phillips' separation from employment. After due notice was issued, a hearing was held by telephone on November 10, 2008. Ms. Phillips participated personally. The employer participated by Jim Hook, Human Resources Manager.

ISSUE:

At issue in this matter is whether Ms. Phillips was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Phillips was employed by Tyson from June 9 until September 4, 2008 as a full-time production worker. She was discharged because of her attendance. All of her absences were due to illness or injury and were properly reported. She was 15 minutes late on August 16 because she was waiting for a ride to work. She was also late on August 22 due to child care issues. Ms. Phillips had been warned about her attendance on June 24 and July 5.

Ms. Phillips' last day at work was August 28. She was suspended on that date and told to return after three days. When she returned after three days, she was notified that she was discharged due to having too many attendance points. Attendance was the sole reason given for the discharge.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified

from receiving benefits if she was excessively absent on an unexcused basis. Properly reported absences that are for reasonable cause are considered excused absences. Tardiness in reporting to work is considered a limited absence from work.

When Ms. Phillips missed a full day of work, it was due either to illness or resulted from injuries sustained in the work. All of the absences were properly reported. For the foregoing reasons, all of the times she was absent for full days represented excused absences. Time missed from work due to purely personal responsibilities, such as transportation and child care, is not excused. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Therefore, the time Ms. Phillips missed on August 16 due to transportation issues and on August 22 due to child care issues is unexcused.

Ms. Phillips' final incident of tardiness on August 22 did not represent a current act in relation to her suspension on August 28. The employer waited almost a full week before taking disciplinary action as a result of the tardiness. The time missed after August 22 represented excused absences. For the reasons stated herein, the administrative law judge concludes that a current act of unexcused absenteeism has not been established as required by 871 IAC 24.32(8). As such, no disqualification is imposed.

The employer contended that Ms. Phillips was presumed to have quit after she was absent for five consecutive days without notice in violation of the collective bargaining agreement. However, the administrative law judge did not find the employer's evidence reliable. The employer indicated that Ms. Phillips' last day at work was August 21. The employer later testified that she was late on August 22. The employer could not indicate from its records whether she was allowed to work on August 22 or what steps the employer took from August 22 forward. The date of separation given by the employer is more consistent with Ms. Phillips' testimony that she was suspended on August 28, told to return after three days, and was discharged upon her return.

DECISION:

The representative's decision dated October 15, 2008, reference 05, is hereby affirmed. Ms. Phillips was discharged by Tyson, but disqualifying misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw