

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**VICTOR L PINES SR**  
Claimant

**APPEAL NO. 09A-UI-05533-E2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AGRIPROCESSORS INC**  
Employer

**Original Claim: 02/01/09  
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.5-1 – Voluntary Quit

**STATEMENT OF THE CASE:**

The claimant filed an appeal from a representative's decision dated March 23, 2009, reference 03, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 5, 2009. The claimant participated personally. The employer participated by Laura Althouse.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct or voluntary quit

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds: The claimant worked the poultry production line for the employer. He was scheduled for work on February 1, 2, 3, and 4, 2009. The claimant injured his back and could not make it to work. He had no working phone and asked one neighbor for help but could not speak the same language. The claimant came in to work on February 5 and was told to get a doctor's excuse and he would be reinstated. The claimant obtained a doctor's statement and provided it to a receptionist at work on February 6, 2009. The employer has a policy of two days' no-call/no-show is deemed as voluntary quit. The employer testified that the claimant was deemed to have quit after his second day of no-call/no-show and was no longer considered an employee after the end of the second day.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The claimant's employment relationship ended after the second day of no-call/no-show. There was nothing for the claimant to do as far as calling in on the third day, since he was no longer an employee. The provisions of 871 IAC 24.25(4) are not applicable due to the employer's policy of deeming a voluntary quit after two days.

The claimants did not want to quit his employment. He was physically incapacitated and did not have access to a phone. The claimant's actions need to be evaluated as to whether he committed misconduct as define by Iowa 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.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the

unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good-faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

The claimant was unable to phone his employer. He contacted his employer as soon as he could. He had no phone or car. He walked to work. When he contacted his employer, he was told that if he had a doctor's release, he could return to work. He went to the doctor on February 5 and provided a statement to his employer on the February 6. It would have been better for the employer and the claimant if he had a working phone. Unfortunately, the economic realities of life for the claimant limited his access to phones. The failure to call in is not misconduct. The employer can decide to terminate the claimant for his failure to communicate, but it is not misconduct or a voluntary quit under unemployment law.

In this matter, the evidence fails to establish that the claimant was discharged for an act of misconduct or voluntary quit when he violated employer's policy concerning calling in to work.

#### **DECISION:**

The decision of the representative dated March 23, 2009, reference 03, is reversed. The claimant is eligible to receive unemployment insurance benefits, provided he meets all other eligibility requirements.

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James Elliott  
Administrative Law Judge

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Decision Dated and Mailed

jfe/kjw