

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRIAN D. TURNER**

Claimant

**APPEAL NO. 09A-UI-10848-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WEST LIBERTY FOODS LLC**

Employer

**OC: 10/26/08**

**Claimant: Appellant (1)**

Section 95.6-2-a – Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated July 21, 2009, reference 04, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 13, 2009. Claimant participated. Employer participated by Monica Dyar, human resources supervisor. The record consists of the testimony of Monica Dyar; the testimony of Brian Turner; and Employer's Exhibits 1-7.

**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 employer is a co-packer. It produces sliced luncheon meat for its customers. The claimant was hired on September 1, 2008, as a decaser. He removed the plastic casings off logs of meat prior to the meat being sliced. His last day of work was May 27, 2009, and he was terminated on May 28, 2009.

The employer has a written no-fault attendance policy. If an individual is absent or tardy, for any reason, points are assessed. Once an individual reaches 10 points, termination occurs. The most serious violation is to be absent without notifying the employer prior to the start of the shift. If that happens, three points are assessed. If an individual is sick for up to five consecutive days, only one point is assessed for the entire time. However, the individual must still properly report the absence prior to the start of the shift.

The claimant quickly accumulated points after being hired. On December 12, 2008, he was a no-call, no-show, which the employer calls AWOL. He got three points for this. He was late on January 23, 2009, and was assessed a half point for this. On February 9, 2009, he was sick and this led to a continuous absence through February 13, 2009. The claimant did not,

however, call in to report his absence on February 13, 2009. As a result, he got another three points. As of February 13, 2009, the claimant was at 12 ½ points. He had accumulated his points so quickly and had exceeded the ten points. The employer decided to give the claimant a final warning and an opportunity to correct his attendance problem. The claimant was told that if he had one more late or tardy, he would be terminated.

The claimant accumulated another ½ point on May 26, 2009. He was late. The person who was driving him to work from Chicago got lost. As a result of reaching 13 points the claimant was terminated.

## **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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. 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. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). 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.

Misconduct that leads to disqualification for unemployment benefits occurs when there is a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. Absenteeism includes tardiness. The employer has the burden of proof and must show that the claimant's absences were both excessive and unexcused. Absence due to illness is deemed excuse if the employee properly notifies the employer.

The evidence in this case established that seven of the claimant's thirteen points were accumulated due to no-call, no-show and tardiness. The final incident was due to tardiness as the result of a transportation problem. Transportation problems are matters of personal responsibility and are not excused absences. The rest of the claimant's points were due to illness, which is an excused absence. The claimant was AWOL on December 12, 2008. He testified, however, that he was sick on February 13, 2009. He said he thought his sister had called for him. The employer has no record that the claimant complied with its policy of notification prior to the start of the shift.

The majority of the claimant's points are due to unexcused absence. There are four instances of unexcused absence. After carefully considering the evidence, the administrative law judge concludes that the employer has shown excessive unexcused absenteeism and that misconduct has been established. Benefits are denied.

**DECISION:**

The decision of the representative dated July 21, 2009, reference 04, 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.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs