

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MANUEL GUERRERO JR
Claimant

APPEAL NO. 09A-UI-00902-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 05/04/08 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Manuel Guerrero, Jr. (claimant) appealed a representative's January 16, 2009 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment after a separation from employment from Swift & Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 6, 2009. The claimant participated in the hearing. Tony Luse appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct? Is the employer's account subject to charge?

FINDINGS OF FACT:

The claimant started working for the employer on August 20, 2008. He worked full time as a production worker on the first shift in the employer's Marshalltown, Iowa, pork processing facility. His last day of work was October 21, 2008. The employer discharged him on October 23, 2008. The reason asserted for the discharge was excessive absenteeism.

The claimant was still in his 75-day probationary period with the employer, in which he was supposed to have perfect attendance until November 2. The claimant had actually already missed work on two occasions, September 2 and September 24 and September 25; both incidents were due to personal illness on the part of the claimant and were properly reported. However, the claimant was advised on September 26 that he should not miss any more work.

The claimant's workday started at 6:42 a.m. On October 22, the claimant left his home at about 5:15 a.m. with his girlfriend, who also worked for the employer. The claimant did not then have a driver's license, so he was riding with his girlfriend. Virtually immediately after leaving home, the car was stopped by law enforcement and it was discovered that the claimant's girlfriend's

license had been suspended. As a result, the law enforcement would not allow either of them to drive the vehicle, and the claimant had to wait until another family member came to get the vehicle to get a ride home. He did call to report that he would be absent, as he did not have a ride at approximately 6:30 a.m.

On October 23 the claimant made other transportation arrangements. However, when he arrived at work, he was told he was discharged.

The claimant established an unemployment insurance benefit year effective May 4, 2008. He reopened the claim with an additional claim after his October 23 separation from employment.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). The claimant had three absence incidents; the first two were excused due to being due to properly reported illness. While the claimant's final absence due to lack of transportation might not be similarly excused, it is the sole unexcused absence. Therefore, he did not have excessive unexcused absenteeism. The employer has failed to meet its burden to

establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began January 1, 2007 and ended December 31, 2007. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's January 16, 2009 decision (reference 01) is reversed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw