

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DHUL G LUAL
Claimant

APPEAL NO. 10A-UI-09881-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 06/06/10
Claimant: Respondent (1)

Section 96.5-2-A - Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated July 1, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 30, 2010. Claimant participated. Employer participated by Jenny Mora. The record consists of the testimony of Jenny Mora; the testimony of Dhul Lual; and Employer's Exhibits 1-2. Robert Talang served as Sudanese Arabic interpreter for the claimant.

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 pork slaughter facility located in Marshalltown, Iowa. The claimant was hired on October 6, 2008, as a full-time production worker. The employer has a point system for attendance. On June 4, 2010, the claimant signed what is known as a ninety-day agreement. He had reached ten points on the attendance policy, including absences for personal illness; family problems; and unexcused reasons. In the ninety-day agreement, the claimant promised not to miss any more days for any reason for ninety days.

The claimant was having back pain and had provided a doctor's excuse to his employer on June 4, 2010. He was absent on June 5, 2010, and June 7, 2010. He called to report his absence at 9:07 a.m. on June 5, 2010, and at 12:25 p.m. on June 7, 2010. His back pain and medical appointments prevented him from going to work. The employer does not have any record to show that he called. When he came to work on June 8, 2010, he was terminated for violating the ninety-day agreement.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty 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 illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8) See also Green v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

The majority of the claimant's absences, including the final four absences, were due to personal illness. Personal illness is considered an excused absence under Iowa law if the claimant properly notified the employer. The factual dispute is whether the claimant notified the employer of his absence on June 5, 2010, and June 7, 2010. The claimant testified that he did telephone the employer and could state specifically when he called. The employer has no record that the claimant called. The administrative law judge accepts the claimant's testimony that he did call his employer to let the employer know that he would not be coming in to work and that the reason for his absence was personal illness.

The administrative law judge recognizes that the claimant did violate the June 4, 2010, agreement that he would not miss any more days. A violation of that agreement in and of itself

is not misconduct since Iowa law recognizes that an absence due to illness is beyond the control of the claimant. Since there is no current act of misconduct, benefits are awarded if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated July 1, 2010, reference 01, is affirmed. Unemployment insurance benefits are allowed ,provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css