

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSHUE TAFOLLA
Claimant

APPEAL NO. 10A-UI-04724-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

JOHN MORRELL & CO
Employer

**OC: 02/21/10
Claimant: Appellant (1)**

Section 96.5-2-A -- Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated March 18, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 17, 2010. Claimant participated. Employer participated by Leticia Cvetnich, Human Resources Assistant. The record consists of the testimony of Leticia Cvetnich; the testimony of Joshue Tafolla; and Employer's Exhibits 1-8.

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 meat packing plant located in Sioux City, Iowa. The claimant was hired on April 28, 2006, as a full-time forklift operator. The claimant was terminated on February 22, 2010, for violation of the employer's attendance policy.

The employer has a point system for attendance. If an individual reaches 12 points within a one-year period, employment is terminated. One point is assessed if an individual calls in sick or has other personal reasons for not coming to work. Tardiness or leaving early is one-half of a point. A no-call/no-show is counted as two points. An individual is required to call prior to the start of a shift to avoid being given two points as a no-call/ no-show. (Exhibit 1, p. 1) This policy is set forth in the employee handbook and the claimant was aware of the policy.

The incident that led to the claimant's termination occurred on February 21, 2010. The claimant was scheduled to be at work at 5:30 a.m. The claimant had been up that night with his son, who was ill, and he (the claimant) had fallen asleep. He did not wake up prior to the start of his shift and did not call to explain his absence until 8:19 a.m. This failure to notify his employer as required led to an assessment of two points. The claimant had previously been at ten points.

His prior points had been accumulated primarily due to tardiness. The claimant would be late because his babysitter did not arrive on time. When the claimant reached 12 points, he 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts and 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). The concept includes tardiness and leaving early. Absence due to matters of "personal responsibility" e.g., transportation problems and oversleeping is considered unexcused. See Harlan v. IDJS, 350 N.W.2d (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). The employer has the burden of proof to show misconduct.

The evidence in this case established excessive and unexcused absenteeism. The final incident that led to the claimant's termination was due to oversleeping, which is a matter of personal responsibility. The claimant testified that he overslept because he was taking care of a child during the night. This absence can be deemed excused only if the employee properly notifies the employer about the absence. The claimant admitted that he did not call his

employer prior to the start of his shift as the employer's policy required. The claimant attempted to rationalize his failure to call by saying that he could not remember the number as he had moved and had a new cell phone. This does not make an unexcused absence an excused absence. The claimant acknowledged and the employer's records show that the claimant's attendance points were due primarily to tardiness, which he attributed to childcare problems. Childcare is a personal responsibility. Since the employer has shown excessive and unexcused absenteeism, misconduct has been established. Benefits are denied.

DECISION:

The decision of the representative dated March 18, 2010, reference 01, 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.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

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