

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KENDY K NAJARRO-HERRERA**  
Claimant

**APPEAL NO. 08A-UI-03386-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARGILL MEAT SOLUTIONS CORP**  
Employer

**OC: 03/02/08 R: 03**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Cargill Meat Solutions Corporation (employer) appealed a representative's March 27, 2008 decision (reference 01) that concluded Kendy K. Najarro-Herrera (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 22, 2008. The claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Laurie Elliott 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.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on July 21, 2003. She worked full time as a production worker on the second shift in the harvest department of the employer's Ottumwa, Iowa, pork processing facility. Her last day of work was March 5, 2008. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The employer has a ten-point termination policy. The claimant had received a final warning on February 27, 2008 indicating that she was at 9.5 points. The claimant's points had at least primarily been for absences for which she had called in. The employer does not routinely record the reason provided for a called-in absence, and does not distinguish between a called-in absence for illness and an absence for another reason. The only health-related absences which the employer treats as excused are those absences for which medical documentation is provided.

On February 29, 2008, the claimant properly called in and reported an absence. The employer did not record a reason given for the absence; Ms. Elliott, the assistant human resources manager, who did not speak to the claimant in conjunction with the absence or the termination, acknowledged that it was at least equally possible that the claimant had reported the absence as due to illness as not. Since the claimant did not provide any medical documentation for the absence, regardless as to whether the claimant had reported the absence as due to illness, the employer treated the absence

as unexcused, and assessed a point. This brought the claimant to 10.5 points, and she was discharged.

### 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).

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 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. Cosper, supra. While "discharging an unsatisfactory employee is a managerial prerogative of the employer . . . to sustain a charge of misconduct it is necessary to establish that the claimant willfully and intentionally committed an act or acts that were detrimental to the best interests of the employer. . . . Simply put, we think an employer must establish that the employer discharged the claimant because of a specific act or acts of misconduct." West v. Employment Appeal Board, 489 N.W.2d 731 (Iowa 1992).

In order to carry its burden to establish that the claimant's absences, particularly her final absence, were misconduct, it is implicit that the employer also establish that the absences would be considered unexcused under the unemployment insurance laws; to require the claimant to establish that the absences were excused under the unemployment insurance law would be to impermissibly shift the burden of proof to the claimant. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986). While the employer can choose to operate its attendance policy as a no-fault policy under which absences for illness are treated the same as absence for other reasons or no reason, and to only excuse those health-related absences for which medical documentation is produced, that approach will not satisfy the requirements to establish that the absences are unexcused for purposes of the unemployment insurance law. Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). The only requirement for an absence to be treated as excused under the unemployment insurance law is that the absence be properly reported and that it be due to illness; an employer cannot graft on a requirement that a medical excuse be provided in order for the absence be treated as due to illness. Gaborit, supra.

Because the employer could not establish by a preponderance of the evidence that the properly reported final absence was due to a claimed reason that would be unexcused under the unemployment insurance law, it has not proven that a final and current incident of unexcused absenteeism occurred in order to support a finding of work-connected misconduct. Therefore, the employer has failed to meet its burden to establish misconduct. Cosper, supra. Benefits are allowed, if the claimant is otherwise eligible.

#### **DECISION:**

The representative's March 27, 2008 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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