

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RIDDEL D MBOUMBA
Claimant

APPEAL NO. 13A-UI-00497-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 11/25/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Swift Pork Company filed a timely appeal from a representative's decision dated January 7, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on February 14, 2013. Claimant participated. The employer participated by Mr. Javier Sanchez, Human Resource Assistant Manager.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct in connection with his work.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Riddel Mboumba was employed by Swift Pork Company from September 19, 2011 until November 27, 2012 when he was discharged for exceeding the permissible number of infractions under the company's attendance policy. Ms. Mboumba was employed as a full-time production worker and was paid by the hour. His last immediate supervisor was Carl Jensen.

Mr. Mboumba was discharged on November 27, 2012 when he exceeded the permissible number of attendance infraction points allowed under established company policy. Under the company's "no-fault" policy employees are subject to discharge if they accumulate nine attendance infraction points within a 12-month rolling period. Mr. Mboumba was aware of the policy and had been warned.

In the months leading up to the claimant's discharge the claimant had been absent on numerous occasions due to health issues related to his child. Mr. Mboumba had followed company policy by informing the employer in advance of his impending absences. On November 17, 2012 the claimant was issued a final attendance warning when he had reached eight infraction points. The final absence that caused the claimant's discharge took place on or about November 27, 2012 when the claimant was unable to report for scheduled work because he was required to transport his child to Iowa City for medical attention. On that day

Mr. Mboumba left Swift Pork Company a message in advance of his scheduled beginning time giving the required information and explaining why he would be unable to report for work that day.

The employer records do not document that Mr. Mboumba called in that day, November 27, 2012, and therefore the claimant was issued two attendance infraction points causing him to exceed the level allowed under company policy and the claimant was discharged from employment.

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.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Conduct serious enough to warrant the discharge of an employee may not necessarily be

serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The Supreme Court of the state of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is one form of job misconduct. The Court held that the absences must be both excessive and unexcused and that the concept includes tardiness, leaving early, etcetera. The court further held, however, that absence due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer.

In this matter the administrative law judge finds the claimant's testimony that he left a message in advance of his work shift informing the employer that he could not report because of illness to be credible. Mr. Mboumba testified with specificity as to the time that he left the message and the contents and the record establishes that the claimant had always provided notification in the past when he was going to be absent from work.

The question before the administrative law judge is not whether the employer had a right to discharge Mr. Mboumba but whether the discharge is disqualifying under the provisions of the Employment Security Act. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above-stated reasons the administrative law judge concludes that the claimant was discharged under non-disqualifying conditions. His last absence was due to illness and was properly reported. Benefits are allowed providing the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated January 7, 2013, reference 01, is affirmed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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