

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONALD K LUNSFORD
Claimant

APPEAL NO. 09A-UI-16837-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 10/04/09
Claimant: Appellant (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated October 27, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 15, 2009. Claimant participated. Employer participated by Tony Luse, employment manager. The record consists of the testimony of Tony Luse; the testimony of Donald Lunsford; and Employer's Exhibits 1-3.

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 producer and operates a plant in Marshalltown, Iowa. The claimant was hired on February 2, 2009, as a full time production worker. The claimant was afflicted with a gastro-intestinal disorder. The claimant was absent from work due to the condition and as a result, he reached ten points under the employer's attendance policy.

On August 31, 2009, the claimant was offered a last chance contract, which he signed. The claimant was given the chance to retain his job and in order to do that, he agreed that he would not be absent within the next 90 days. The claimant was absent on October 1, 2009, October 2, 2009, and October 3, 2009. The employer has no record of the claimant calling in on October 1, 2009, and October 2, 2009, although the claimant says that he did call. The claimant did call and report his absence on October 3, 2009. The reason for the claimant's absence was illness. The claimant was then terminated on October 5, 2009.

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 notified 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 Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

In this case, the evidence established that the claimant had excessive absenteeism. However, in order to disqualify an individual from receiving unemployment insurance benefits, the evidence must also show that the absenteeism was unexcused. Iowa law states that absence due to illness is excused if the employee properly notifies the employer. While there is some dispute on whether the claimant called the employer on October 1, 2009, and October 2, 2009, he did report his absence on October 3, 2009. In addition his previous absences were properly

reported. The administrative law judge concludes that evidence has not shown excessive unexcused absences. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated October 27, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs