

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**MARANGO O ONYONGO**  
Claimant

**TYSON FRESH MEATS INC**  
Employer

**APPEAL 21A-UI-08430-DZ-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 02/14/21**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quit

**STATEMENT OF THE CASE:**

Marango O Onyongo, the claimant/appellant, filed an appeal from the March 23, 2021, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on August 26, 2021. Ms. Onyongo participated and testified through an Anyuak interpreter employed by MITS. The employer registered for the hearing by providing a telephone number. The employer answered the administrative law judge's first call, but disconnected the call. The administrative law judge called the employer again. The employer did not respond at the telephone number it provided.

**ISSUE:**

Was Ms. Onyongo discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Onyongo began working for the employer on August 4, 2015. She worked as a full-time production worker. She was separated from employment on January 20, 2021.

Ms. Onyongo attended work on January 18, 2021. While she was at work she became sick. Ms. Onyongo told her supervisor that she was sick and the supervisor sent her to the employer's nurse. The nurse sent Ms. Onyongo home. The next day, Ms. Onyongo went to work. About one hour after she clocked in, the employer told her to go home. Ms. Onyongo did so. Ms. Onyongo went back to work again on January 20. That day, the employer told her to clean out her locker because she was fired. The employer told her that she was fired because she had reached ten points.

The employer's policy provides that if an employee reaches ten attendance points the employee is subject to discipline. Ms. Onyongo testified that other employees who reached ten points were suspended for a few days and then returned to work.

By January 18, Ms. Onyongo had 9.5 points. Ms. Onyongo had that many points because she had previously missed work because she did not have childcare. The employer had given Ms. Onyongo verbal warnings for her absences but no written warnings.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes Ms. Onyongo was discharged from employment for no disqualifying reason.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(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.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dept of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dept of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be “substantial” to warrant a denial of job insurance benefits. *Newman v. Iowa Dept of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Excessive absences are not considered misconduct unless unexcused. The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive. *Sallis v. Emp’t Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Dept of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10. The requirement of “unexcused” can be satisfied in two ways. An absence can be unexcused either because it was not for “reasonable grounds,” *Higgins*, 350 N.W.2d at 191, or because it was not “properly reported,” holding excused absences are those “with appropriate notice.” *Cosper*, 321 N.W.2d at 10.

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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 9; *Gaborit v. Emp’t Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. See *Gaborit*, 734 N.W.2d at 555-558. An employer’s no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id.*; see also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness; and an incident of tardiness is a limited absence.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee’s act is misconduct does not rest solely on the interpretation or application of the employer’s policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, the employer did not participate in the hearing and provided no evidence to establish misconduct on the part of Ms. Onyongo. The employer has failed to meet its burden.

Furthermore, the most recent incident leading to Ms. Onyongo's firing must be a current act of misconduct in order to disqualify her from receiving benefits. In this case, the most recent act for which Ms. Onyongo was discharged was because she sick on January 18. Ms. Onyongo told her supervisor she was sick and the employer's nurse sent her home. This is not misconduct. The employer has failed to meet its burden of proof in establishing disqualifying job-related misconduct. Benefits are allowed.

**DECISION:**

The March 23, 2021, (reference 01) unemployment insurance decision is reversed. Ms. Onyongo was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



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August 30, 2021  
Decision Dated and Mailed

dz/mh