

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EDWARD J SHONKA
Claimant

APPEAL NO. 06A-UI-12379-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 11/12/06 R: 01
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's December 12, 2006 decision (reference 01) that concluded Edward J. Shonka (claimant) was qualified to receive unemployment insurance benefits, and the account of Tyson Fresh Meats, Inc. (employer) would not be charged because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 17, 2007. Although the claimant responded to the hearing notice, he was not available for hearing and did not answer his phone. The claimant did not contact the Appeals Section at any time on January 17, 2007. Susan Pfeifer, the human resource manager at the Council Bluffs facility, 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:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on September 29, 2005. At the time of hire, the claimant received a copy of the employer's attendance policy. This policy informed employees they would be discharged if the employee accumulated 14 attendance points in a rolling calendar year.

During the claimant's employment, he almost always notified the employer when he was unable to work as scheduled. When the claimant called, he reported he was ill and unable to work. On these days, the claimant received one attendance point. On April 5, 2006, the claimant did not call or report to work as scheduled. The employer gave him three attendance points for this absence. On August 15, the employer gave the claimant a written warning and counseled the claimant because he had accumulated ten attendance points. The employer warned the claimant that if he accumulated 14 points, he would be discharged.

The claimant called in sick on October 11, 21, 27 and November 2. Each day the claimant received one attendance point. On November 6, the employer suspended the claimant for having 14 attendance points. Before the employer terminated the claimant, the employer verified all of his absences. The employer told the claimant that if his absences on October 11, 21, 27 and November were covered under FMLA, he would not be discharged. Since the claimant had not gone to the doctor any of these days, these absences were not covered under FMLA.

Although the employer asked the claimant to return on November 7, the claimant did not. If the claimant had returned, the employer would have informed him that he was discharged because he violated the employer's attendance policy by accumulating 14 attendance points.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Although the claimant did not return to work on November 7 to find out he was discharged, this was a foregone conclusion when the claimant had not gone to a doctor for any of his last four absences. The claimant knew he was not eligible for FMLA coverage on these days. A preponderance of the facts establishes the employer discharged the claimant.

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

The employer established business reasons for discharging the claimant. Although the claimant accumulated 14 attendance points in a rolling calendar year, all but one time he properly notified the employer when he was ill and unable to work as scheduled. The facts indicate the claimant's absences occurred because the claimant was ill. Since the claimant's illnesses were not work-related, he received 11 attendance points when he was ill and unable to work as scheduled. The law specifically states a properly reported illness does not rise to the level of work-connected misconduct. Even though the employer was justified in discharging the

claimant, the claimant did not commit work-connected misconduct. As of November 12, 2006, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's December 12, 2006 decision (reference 01) is affirmed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of November 12, 2006, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css