

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSEPH M HAGER
Claimant

APPEAL NO. 10A-UI-07080-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

MILLARD REGRIGERATED SERVICES INC
Employer

**Original Claim: 04/18/10
Claimant: Appellant (1)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated May 11, 2010, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 30, 2010. The claimant participated. The employer participated by Sara Cross, human resources coordinator, and Todd Rogers, area operations manager. The record consists of the testimony of Todd Rogers; the testimony of Sara Cross; and the testimony of Joseph Hager.

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 operates a refrigerated warehouse and does storage and shipping for the Cargill plant located in Ottumwa, Iowa. The claimant was hired on January 12, 2009, as a sorter. He was terminated on April 21, 2010, for violation of the employer's attendance policy.

The employer has a no-fault attendance policy that calls for termination when an employee reaches ten points. The claimant was aware of this policy. The claimant's attendance record is as follows:

- April 19, 2010—tardy and left early
- April 17, 2010 – left early
- April 16, 2010 – tardy
- April 15, 2010 –left early (not feeling well)
- April 14, 2010 – tardy and left early
- April 13, 2010 – left early
- April 12, 2010 – left early (sic)
- March 18, 2010 – left early

November 18, 2009 – absent (sick)
August 20, 2009 – absent (no babysitter)
June 30, 2009 – absent
June 10, 2009 – left early (no child care)
June 2, 2009 – tardy

The claimant was warned on April 13, 2010, that he was at six points. He then left early that day. On April 19, 2010, he left early because of lack of child care. He was then at ten points and was terminated on April 21, 2010.

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 disqualifies an individual from receiving unemployment insurance benefits 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). The concept includes tardiness and leaving early. Absence due to matter of "personal responsibility" is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (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). The employer has the burden of proof to show misconduct.

The evidence in this case has established excessive unexcused absenteeism. From March 18, 2010 through April 19, 2010, the claimant was tardy or left early ten times. Although some of the absences were due to illness, the majority of these absences were due to matters of personal responsibility, such as lack of child care, or completely unexplained. The claimant speculated that he was given points for leaving early when he had been excused. Mr. Rogers testified that if an employee is given permission to leave early due to lack of work that points are not given. The employer has established misconduct. Benefits are denied.

DECISION:

The representative's decision dated May 11, 2010, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw