

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHOL W NYOUN
Claimant

APPEAL NO. 12A-UI-11360-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 08/05/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 13, 2012 (reference 02) decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on October 17, 2012. Claimant participated through interpreter Joseph Malual. Employer participated through plant human resources manager Benito Torres.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a production worker and was separated from employment on May 4, 2012. He was last absent on April 24, April 30 and May 1, 2012 (no-call/no-show). Tyson policy assigns three points for each no-call/no-show absence. He was warned in writing about attendance (11.5 points) on January 30, 2012. October 10 (personal business), October 24 (tardy), November 14 (non-work illness), November 28 (no documentation for court appearance), December 12, 2012 (transportation), January 30 (non-work illness), February 3 (non-work illness), February 10 (did not return after court appearance), and April 23, 2012 (no-call/no-show). He was absent from work for two weeks because his brother passed away on April 23. He left the country. He sent a coworker to notify the employer he would be absent but did not call himself to notify the employer of the reason for the absence or request a leave of absence.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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(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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. Employer has established that claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused because claimant failed to report the absence period or obtain a leave of absence. The final absence, in combination with claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The September 13, 2012 (reference 02) decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css