

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRELL D SMITH
Claimant

APPEAL NO. 13A-UI-09632-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 07/07/13
Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. filed a timely appeal from a representative's decision dated August 9, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits finding that the claimant was dismissed from work on July 8, 2013 for excessive absences but finding that the absences were due to illness and were properly reported. After due notice, a telephone hearing was held on September 25, 2013. Although duly notified, the claimant did not participate. The employer participated by Ms. Elexis Bishop, Hearing Representative, and witness, Ms. Kristi Fox, Human Resource Clerk.

ISSUE:

The issue is whether the evidence in the record establishes intentional misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Terrell Smith began employment with Tyson Fresh Meats, Inc. on August 15, 2011. Mr. Smith worked as a full-time production worker and was paid by the hour. Based upon the information provided by the employer's witness and provided at the fact-finder's conference, the administrative law judge concludes that Mr. Smith's last day on the job was June 19, 2013. Mr. Smith was absent thereafter due to illness and was properly reporting his impending absences by notifying the employer each day he was sick and unable to report to work. On the one to two occasions where Mr. Smith did not call the employer, his failure to call was because he had taken medications prescribed by his doctor that made him drowsy and unable to properly report his absence for the day. The employer was aware of Mr. Smith's illness and reasons for his absence. The claimant was discharged when the employer concluded that he had exceeded the permissible number of attendance infractions allowed under company policy. The claimant did call in on July 8, 2013, his last day, to report he was still sick and unable to report for work.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

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 employer has the burden of proof in establishing job disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). Misconduct serious enough to warrant discharge is not always serious enough to warrant a denial of unemployment insurance benefits. Such misconduct must be "substantial." The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

The Supreme Court of the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive, unexcused absenteeism is a form of job misconduct. The Court held that the absences must both be excessive and unexcused and that the concept includes tardiness, leaving early, etc. The Court further held, however, that absence due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer.

Inasmuch as the evidence in the case at hand establishes that Mr. Smith was properly notifying the employer of his impending absences throughout the time that he was absent due to illness and properly notified the employer on his final day, the administrative law judge concludes that the claimant's absences are deemed "excused" and do not constitute intentional misconduct warranting the denial of unemployment insurance benefits. Benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated August 9, 2013, reference 01, is affirmed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs