

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLAUDE M NOEL
Claimant

APPEAL NO. 13A-UI-03133-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 02/02/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the representative's decision dated March 5, 2013, reference 02, which held that the claimant was not eligible for unemployment insurance benefits. After due notice was issued, a hearing was held by telephone conference call on April 12, 2013. The claimant participated personally. The employer participated by Javier Sanchez, Assistant Human Resources Manager. The record consists of the testimony of Javier Sanchez and the testimony of Claude Noel.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge makes the following findings of fact:

The employer is a pork producer with a facility located in Marshalltown, Iowa. The claimant was hired on May 9, 2012, as a full-time production worker. The claimant's last day of work was January 16, 2013. He was terminated on January 21, 2013. He exceeded the number of allowed points for absence under the employer's attendance policy.

The absence that led to the claimant's termination occurred on January 17, 2013. The claimant was sick with strep throat. He was excused from work by his physician for three days. He informed the employer both by calling in and having a message given to his supervisor. The claimant's prior absences were primarily due to personal illness.

The claimant was given a final warning for his attendance when he reached eight points on November 10, 2012.

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 matters of personal responsibility, such as transportation problems and oversleeping, 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 notifies the employer. See Higgins, supra, and 871 IAC 24.32(7) In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8) See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. Although the claimant did violate the employer's attendance policy, this does not mean that he is disqualified from receiving unemployment insurance benefits. The reason that the claimant is not disqualified from receiving benefits in this case is that his final absence was due to personal illness that was properly reported to the employer. The final absence is therefore considered excused and

cannot be a current act of misconduct. Benefits are therefore allowed if the claimant is otherwise eligible.

DECISION:

The unemployment insurance decision dated March 5, 2013, reference 02, is reversed. Unemployment insurance benefits are allowed, if the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/tll