

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEDIMO J LEYVA ROSSALES
Claimant

APPEAL NO. 12A-UI-03666-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 02/26/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Swift Pork Company filed a timely appeal from a representative's decision dated March 29, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on April 25, 2012. Claimant participated. The employer participated by Mr. Aureliano Diaz, Human Resource Manager.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Ledimo Leyva Rosales was employed by Swift Pork Company from August 21, 2001 until February 14, 2012 when he was discharged for exceeding the permissible number of attendance infractions allowed under company policy. Mr. Rosales worked as a full-time production worker and was paid by the hour.

The claimant was discharged after he accumulated nine attendance infraction points within a six-month rolling period. Under company policies employees are subject to discharge if they accumulate nine points in the six-month rolling period. Mr. Rosales had received a warning on December 21, 2011 about his attendance. The most recent attendance infractions took place when Mr. Rosales was ill and could not report to work. The claimant called in at 4:57 a.m. on February 13 and at 4:50 a.m. on February 14, 2012. The claimant's beginning time is 5:06 a.m. The claimant was unable to meet the one-half hour before the shift call-in deadline because he was ill and the illness affected the claimant's ability to call in properly.

The claimant was considered to be a good worker but nonetheless was discharged because he had exceeded the permissible number of attendance points allowed by policy.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant discharge is not necessarily serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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. App. 1992).

The Supreme Court in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that unexcused absenteeism is a form of job misconduct. The Court held that the absences must be both excessive and unexcused. The court further held 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 record establishes that Mr. Rosales attempted to notify the employer by properly calling in on February 13 and February 14 but was unable to do so due to his illness. The administrative law judge concludes that the claimant has not engaged in willful misconduct sufficient to warrant the denial of his unemployment insurance benefits. Benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated March 29, 2012, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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