

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RUSSELL A KIRK
Claimant

APPEAL NO. 08A-UI-01228-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL MEAT SOLUTIONS CORP
Employer

**OC: 01/06/08 R: 03
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Cargill Meat Solutions Corporation (employer) appealed a representative's January 25, 2008 decision (reference 01) that concluded Russell A. Kirk (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 18, 2008. The claimant participated in the hearing represented by union representative Brian Ulim, who also offered testimony on behalf of the claimant from himself and from one other witness, Chris Frushon. Katie Holcomb appeared on the employer's behalf. During the hearing, Claimant's Exhibits A and B were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on January 16, 2007. He worked full time as a maintenance mechanic at the employer's Ottumwa, Iowa, pork processing facility. His regular schedule was 11:00 p.m. to 7:30 a.m. with Tuesdays and Wednesdays off. His last day of work was December 20, 2007. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The employer has a ten-point attendance policy. On October 16, 2007, the claimant was facing termination due to attendance, but this was reduced to a warning when the employer removed some of the points on the claimant's record due to miscalculation. From that point, the employer considered the claimant to be at 9.5 points. The claimant and the union understood that the employer was going to be further reviewing the claimant's points, as there were further dates the employer had been counting that the claimant and the union understood the employer to agree were incorrect, and so the claimant and his union believed his actual points were approximately seven.

The claimant was absent from December 13 through December 18 for an elective surgical procedure; upon his return, he provided a doctor's note excusing the absence. Due to the note, the employer assessed the claimant only one point, but the employer still considered this to bring the claimant to 10.5 points, and so proceeded with discharge.

In addition to the one point for the December 13 through December 18 absence, the remaining 9.5 attendance points relied upon by the employer for making its discharge decision were:

Dates	Points
05/03/07	1.0
05/04/07	2.0
05/05/07	2.0
05/18/07	1.0
10/10/07	2.0
10/13/07	0.5
10/14/07	0.5
11/18/07	0.5

However, the claimant demonstrated that he in fact was present and did work on May 4 and May 5, which had each been assessed at two points.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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(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.

Excessive unexcused absences can constitute misconduct; however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant reasonably believed that he was actually at about 6.5 or 7.0 points as of December 13, and reasonably believed that the employer was aware of the errors in his points and was taking further corrective action. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's January 25, 2008 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw