

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ISIDORA EMIGDIO PANCHILLO
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 17A-UI-01004-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/25/16
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the January 17, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged due to absenteeism that was attributable to illness. The parties were properly notified of the hearing. A telephone hearing was held on February 16, 2017. The claimant, Isidora Emigdio Panchillo, did not register a telephone number at which to be reached and did not participate in the hearing. The employer, Swift Pork Company, participated through Rogelio Bahena, HR. Employer's Exhibits 1 through 8 were received and admitted into the record. The administrative law judge took official notice of the fact-finding documentation and the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a production employee in the loin bone department, from July 23, 2012, until December 19, 2016, when she was discharged due to unexcused absenteeism. Claimant last reported to work on October 20, 2016. After that day, she called in each day to the employer's automated line. Bahena testified that the employer did not know why claimant was absent. The employer's attendance policy states that an employee who calls in must report a reason for her absence. (Exhibit 1) This is a no-fault attendance policy, and absences due to illness are treated the same as absences for any other reason.(Exhibit 1)

On December 7, 2016, the employer sent claimant a letter and instructed her to return to work or provide additional information about her absences within ten days. Claimant reported back on December 19, 2016, which was the Monday following the expiration of the employer's stated ten-day deadline. She notified the employer that she was experiencing a personal health issue that caused her absences. Claimant stated that she could not afford to go to the doctor. Because claimant had exceeded the number of allowed absences and had no documentation to show her absences were due to illness, she was discharged upon her return. The employer also provided written warnings documenting the dates on which claimant reached certain attendance point levels. However, these warnings were all signed and dated December 19, indicating claimant did not receive these prior to her final day of employment. Prior to the extended absence that began on October 21, claimant had two other absences due to illness and no absences for any other reason. The attendance record submitted by the employer indicates both of these absences were unexcused. (Exhibit 8)

Bahena testified that had claimant provided medical documentation, she could have qualified for short-term disability and preserved her employment. The fact-finding documentation shows that claimant had no available short-term disability leave or FMLA leave to cover any of her absences. Bahena also testified that he participated in the fact-finding interview, yet the fact-finding documentation shows the employer participated through Kristy Knapp-Steele. During the fact-finding interview, claimant stated that she had no health insurance and could not afford to go to the doctor during her absence.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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.

Iowa Admin. Code r. 871-24.32(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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of

unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10.

The outcome in this case rests in part on the credibility of the parties. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds Rogelio Bahena is not a credible witness. Bahena gave statements that contradicted the statements from the fact-finding interview, and he falsely stated that he participated in that interview. The administrative law judge believes that claimant did not have health insurance or access to affordable medical care, which prevented her from providing the employer with medical documentation.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant called in each day and reported that she would be absent from work. The documentation submitted by the employer shows this was the standard practice for reporting an absence. Because claimant's last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed. As claimant's separation qualifies her for unemployment insurance benefits, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The January 17, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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