

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**CIRILO HERNANDEZ GARCIA**  
Claimant

**SWIFT PORK COMPANY**  
Employer

**APPEAL 18A-UI-02312-CL-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 01/21/18**  
**Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
871 IAC 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 February 8, 2018, (reference 01) unemployment insurance decision that allowed benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on March 15, 2018. Claimant participated personally and through Interpreter 4949 with CTS Language Link. Employer participated through assistant human resource manager Emily Potorff. Employer's Exhibit 1 was received.

**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 began working for employer on July 5, 2016. Claimant last worked as a full-time general laborer. Claimant was separated from employment on January 23, 2018, when he was terminated.

Employer has an attendance policy stating employees will be terminated after accruing nine attendance points. It is a no-fault policy. Employees are given one point for each properly reported absence. Claimant was aware of the policy.

Claimant was absent on 75 days during the last 13 months of his employment due to family emergencies and for other reasons. Employer excused many of the absences and did not assign claimant points. However, by November 8, 2017, claimant had accrued 19 attendance

points. On that date claimant signed a Last Chance Agreement stating that if he had any further absences he would be terminated.

On January 14, 2018, claimant's mother passed away. Claimant's mother resided in Mexico. Claimant informed employer of the issue immediately. Claimant told human resource director Nicolas Aguirre he would need to take two weeks off from work. Aguirre informed claimant that the employer only allowed three days of paid bereavement leave and that if claimant was gone beyond three days, he could not guarantee his continued employment.

Claimant was absent from work from January 15 through January 22, 2018. Claimant flew to Mexico on January 16, 2018, and attended the funeral on January 17, 2018. Claimant flew back to Iowa on January 22, 2018. Claimant returned to work on January 23, 2018, and was informed he was terminated due to excessive absenteeism.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,913.00, since filing a claim with an effective date of January 21, 2018, for seven weeks until the week ending March 10, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. 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).

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 term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and that he would only be allowed three days of bereavement leave. While it would have been difficult to make the trip to Mexico in three days, claimant did not establish it would have been impossible. Claimant could have spent one day traveling to Mexico, one day attending the funeral, and one day traveling back to Iowa. Instead, he stayed in Iowa one day before flying out, and stayed in Mexico for several days after the funeral. The administrative law judge is sympathetic to the situation claimant was facing with his mother passing away. However, claimant used, and frankly abused, the employer's goodwill by missing 75 days of work in the previous year. Had claimant not missed so much work in the previous year, the employer likely would have allowed him more time to attend his mother's funeral. In this case, claimant had excessive absenteeism, and the final absence was not excused. Benefits are withheld.

The next issue is whether claimant was overpaid benefits and should have to repay those benefits. Iowa Code § 96.3(7)a-b provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to

§ 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to § 602.10101.

Iowa Admin. Code r. 871- 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code § 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code § 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code § 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division

administrator constitutes final agency action and may be appealed pursuant to Iowa Code § 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code § 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

**DECISION:**

The February 8, 2018, (reference 01) decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$3,913.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Christine A. Louis  
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Decision Dated and Mailed

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