

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RICARDO L PALMAREZ
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 17A-UI-12102-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/15/17
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 13, 2017, (reference 02) unemployment insurance decision that denied benefits based on his discharge for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on December 14, 2017. The claimant participated and testified. Also present on behalf of the claimant, but not testifying, was Amy Rees. The employer participated through Human Resource Manager Nicholes Aguirre. Employer's Exhibit 1 was received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a mechanic from May 22, 2017, until this employment ended on October 18, 2017, when he was discharged.

The employer has a points-based attendance policy in place, of which claimant was aware. The policy allows employees to accumulate nine points prior to being discharged from employment. If an employee is tardy or needs to leave early they are issued a half point, reported absences are one point, and a no-call/no-show is two points. If employees are going to be late to or absent from work, they are to call the attendance hotline prior to the start of their shift.

On October 3, 2017, claimant entered into a last chance agreement (LCA) due to his accumulation of attendance points. According to the employer claimant was tardy July 29, August 5, and September 30; absent August 21, September 15 and 16, and September 26 through 28; and was a no-call/no-show on September 23. Claimant testified at least four of his absences were due to illness and his tardies were attributable to issues with transportation, as he did not have a license. Two of claimant's absences were also due to issues with transportation. Claimant could not recall why he was absent on September 23, but testified he knew he called and properly reported his absence. Claimant further noted that his absences

from September 26 to 28 should only be counted as one point, since he brought in a doctor's note excusing him from work due to illness. At the time claimant was issued to LCA, he was advised that further attendance violations within the next 12 months would lead to him being discharged from employment.

Following the issuance of the LCA, claimant was late to work on October 12, 14, 15, and 17. Claimant was tardy of October 12 due to issues with transportation. On October 14 and 15, claimant had received prior permission from management to be late to work so he could attend a class. Those absences were listed in the employer's system as excused. On October 17, 2017, claimant was late to work due to a family emergency. Claimant admitted he did not call in to report he would be late to work that day and that he did not have a good reason why he was unable to call in. Claimant was discharged following his final tardy on October 17.

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.

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(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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.

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. 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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law." The requirements for a finding of misconduct based on absences are therefore 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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. While claimant's properly reported absences due to illness are excused for the purposes of unemployment insurance benefits, his absences due to issues with transportation are not excused. Similarly, while claimant's final tardy of October 17 would normally be excused due to the non-volitional nature of a family emergency, he did not properly report this absence to the employer, making it unexcused. Claimant was aware of the employer's attendance policy and was issued a last chance agreement regarding his attendance on October 3, 2017. The employer has established that the claimant was warned that further improperly reported or unexcused absences could result in termination of employment and the final absence was not properly reported. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The November 13, 2017, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs