

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CECILIA SALES BARRIGA
Claimant

APPEAL NO. 17A-UI-01240-TNT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 01/01/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated January 23, 2017, reference 01, which denied unemployment insurance benefits, finding that the claimant was discharged from work on January 5, 2017, for excessive unexcused absenteeism after being warned. After due notice was provided, a telephone hearing was held on February 23, 2017. Claimant participated. Employer participated by Ms. Kristy Knapp-Steel, company human resource and FMLA representative.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with the work.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Cecilia Sales Barriga was employed by Swift Pork Company from June 28, 2004 until January 5, 2017, when she was discharged. The claimant had exceeded the permissible number of attendance infractions allowed under the company's "No Fault" attendance policy. The claimant was employed as a full-time ham skinner and was paid by the hour.

Under the terms of the company's attendance policy, employees are subject to termination if they accumulate ten attendance infraction points within a one year rolling period. Employees are assessed one attendance infraction point for each day's absence and are assessed an additional point for each day's absence if they fail to notify the employer prior to the beginning of the work shift of the impending absence.

Ms. Sales Barriga was discharged after she was absent from work on a number of occasions due to illness which caused her call off work on December 16, 2016. The claimant subsequently submitted family medical leave documentation supporting her need to be absent for intermittent FMLA. The company was willing to excuse the claimant's absences from December 19, 2016 through December 22, 2016. But, the company was unwilling to remove an extra infraction point that the claimant had been given on December 16, 2016, because she had not called in prior to the beginning of her work shift. On December 27 and December 28, 2016, the claimant was ill due to migraines and unable to report to work. Because of the nature of her illness, she was unable to notify the employer prior to the beginning of her work shift on those

days and the claimant did not call the employer later during either of those days to explain why she had been absent, because she believed from the one experience from December 16, 2016, the company would not excuse a late call for any reason.

Employees who are using family medical leave on an intermittent basis are expected to notify the employer each day that they are going to be absent by calling the company before the beginning of their work shift, to not only inform the company of the absence but also to trigger the application of family medical leave so that the absence would not be held against the worker's attendance record. When the claimant failed to call in, she received an attendance infraction point for each day's absence and for each day's failure to call in, totaling four points, resulting in the claimant's termination of employment.

It is the claimant's position that she was so ill with migraines that she was unable to call the employer prior to the beginning of the work shift and she felt that calling later would be to no avail based upon her previous experience.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits; it does not.

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.

The Supreme Court of the State of Iowa in the case of *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984), held that excessive absenteeism is a form of job misconduct. The court held that the absences must both be excessive and unexcused. The court further held that absences due to illness and other excusable reasons are deemed excused if the employee properly notifies the employer.

The court further held in *Roberts v. IDJS* 35 N.W.2d 218 (Iowa 1984) and *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36 (Iowa Ct. App. 1992) that unreported absences due to mental incapacity or the nature of the reason for the absence are considered excused.

In this case, the evidence in the record establishes that the claimant failed to call in on December 27 and 28, 2016, because she was prevented from doing so by her medical condition. The claimant did not call in later during those days, because, based on her previous experience, she reasonably believed that the employer would not accept the late call.

The employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as the claimant's absences were due to illness, they were excused. The claimant's failure to provide notice on these two particular occasions are deemed excused because the claimant was unable to provide the required notice due to the nature of her illness. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reason, the administrative law judge concludes that intentional disqualifying misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits has not been shown. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision date January 23, 2017, reference 01, is reversed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed provided the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

rvs/rvs