IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ZEILA FIGUEROA MATA Claimant	**APPEAL NO. 17A-UI-01615-S1-T**
	ADMINISTRATIVE LAW JUDGE DECISION
SWIFT PORK COMPANY Employer	
	OC: 01/15/17 **Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Swift Pork Company (employer) appealed a representative's February 3, 2017, decision (reference 01) that concluded Zeila Figueroa Mata (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for March 3, 2017. The claimant participated personally through Claudio Sarmiento, Interpreter. The employer participated by Kristy Knapp Human Resources/Family Medical Leave Act Coordinator. Exhibit D-1 was received into evidence. The claimant offered and Exhibit 1 was received into evidence. The employer offered and Exhibit A was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on December 20, 2004, as a full-time production worker on the cut floor. The claimant signed for receipt of the employer's handbook on December 20, 2004. The employer has a policy that states an employee will be terminated if an employee accumulates ten attendance points in a twelve month rolling calendar year.

The employer issued the claimant two written warnings on August 19, 2016, for accumulating six and eight attendance points. On October 3, the employer issued the claimant a written warning for accumulating eight attendance points. On October 4, 2016, the employer issued the claimant a written warning for accumulating ten attendance points. All of the claimant's absences were properly reported and due to medical issues. The employer notified the claimant each time that further infractions could result in termination from employment. The claimant was not terminated so long as she was applying for Family Medical Leave (FMLA) or short term disability.

The claimant properly reported she was absent due to illness from January 4 to January 11, 2017. She provided a doctor's note to the employer for her absences from January 4 to January 10, 2017. She applied for FMLA and was approved for leave on January 11 and 12, 2017. The employer terminated the claimant on January 12, 2017, for her absences in October 2016.

The claimant filed for unemployment insurance benefits with an effective date of January 15, 2017. The employer did not participate in the fact-finding interview on February 2, 2017, because it did not dispute the claim.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes she was not discharged for 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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's February 3, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs