

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AMANDA MACIAS
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 21A-UI-08252-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/03/21
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 22, 2021, (reference 01) unemployment insurance decision that denied benefits based upon her voluntary quit. The parties were properly notified about the hearing. A telephone hearing was held on June 14, 2021. Claimant participated and testified. Employer participated through Human Resources Manager Patty Taylor. Exhibits 1 and 2 were admitted into the record.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full-time as a bone loin production worker from September 2, 2020, until she was separated from employment on December 7, 2020, when she was terminated. The claimant worked from 6:45 a.m. to 3:15 p.m. Monday through Friday. Her immediate supervisor was Production Supervisor Alfredo Rico.

The employer has an attendance policy. It states an employee is supposed to call in to a hotline to report an expected absence two hours before the shift begins. The absentee policy issues the following progressive discipline with the accrual of corresponding point totals: written warning (five points), final written warning (seven points), and termination (ten points). The claimant was aware of the attendance policy because he was trained on it during orientation. During the hearing, Ms. Taylor alleged the employer has a policy stating that if an employee is a no call no show for three consecutive days. Ms. Taylor was not certain if it was in the employee handbook but it was covered orally during orientation.

On September 9, 2020, the claimant was reported to work late for the start of her shift.

On October 15, 2020, the claimant reported she would not be at work because she was sick. The employer assessed one point against her for this incident.

On October 27, 2020, the claimant reported she would not be at work because she was sick. The employer assessed one point against her for this incident.

On November 7, 2020, the claimant reported she would not be at work because she was sick. The employer assessed one point against her for this incident.

On November 12, 2020, the claimant reported she would not be at work because she was sick. The employer assessed one point against her for this incident.

On November 23, 2020, the claimant reported she would not be at work because she was sick. The employer assessed one point against her for this incident.

On December 3, 2020, the claimant reported she would not be at work because she was sick. The employer assessed one point against her for this incident. This absence extended into the next working day, December 4, 2020, because she was still sick.

On December 7, 2020, the claimant worked her final shift.

On December 8, 2020, the claimant reported she would not be at work because she was sick. The employer assessed one point against her for this incident. This absence extended into the next working day because she was still sick. Later that day, Mr. Rico informed the claimant that she was being terminated because she had accrued too many absenteeism points. Mr. Rico explained that the final incident occurred earlier that day, when she called in sick.

Exhibit 2 shows the claimant was absent and did not inform the employer of her expected absence from December 9, 2020 to December 19, 2020. Exhibit 1 states the claimant's termination date is December 24, 2020.

The claimant did not ever receive formal discipline regarding absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to non-disqualifying conduct.

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).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

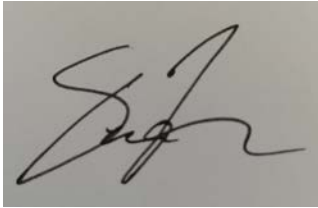
After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events.

The administrative law judge finds the claimant more credible because Ms. Taylor's knowledge regarding the circumstances of the claimant's termination appeared to be based on faulty records. In particular, the administrative law judge finds the claimant's claim she was terminated in the first week of December 2020 credible. Although he believes the claimant is mistaken that it occurred on December 5, 2020, the administrative law judge finds her allegation that she was discharged for being sick credible.

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. The claimant's attendance history prior to December 8, 2020 consists of one time that was not excused by Iowa law. The remaining eight points are properly excused because the claimant reported each absence was due to illness. The employer has failed to meet its burden. Benefits are granted.

DECISION:

The March 22, 2021, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to a non-disqualifying reason. Benefits are granted, provided the claimant is otherwise eligible.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is written over a light gray rectangular background.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 725-9067

June 29, 2021
Decision Dated and Mailed

smn/scn