IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARIA DE JESUS NUNEZ DE ALVIZ
Claimant

SWIFT PORK COMPANY
Employer

APPEAL NO. 12A-UI-02204-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/01/12
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Leaving

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 29, 2012 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on March 21, 2012. Claimant participated with daughter Marie Rodriguez through interpreter Ike Rocha. Employer participated through human resources manager Aureliano Diaz.

ISSUE:

Did the claimant quit the employment without good cause attributable to the employer or was she discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a second shift production worker from January 1999 and was separated from employment on December 30, 2011. Her last day of work was December 19. From December 24 through 26 she was not scheduled because of the holiday. She gave the original medical excuse to the secretary in the human resources office on December 20 and she returned a copy to the claimant. The note excused her from work because of ear and throat pain (acute sinusitis) related to her work in a cold environment from December 20, 2011 through January 9, 2012. She called to report her illness starting December 20 but missed calling on two days, December 22 and either December 27 or 28. An employer representative told her she was fired on January 2, 2012 when she called to say she was feeling better and wanted to return to work before the medical release date. She reported on January 3 and confirmed she had already been fired. The employer had not warned claimant, either verbally or in writing, that her job was in jeopardy for any reason.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Since the claimant provided a medical excuse for the period of absence and even advised the employer of her desire to return to work earlier than the release date, the separation was a discharge and not a voluntary leaving of employment.

Iowa Code section 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.

871 IAC 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 and unexcused absenteeism can constitute misconduct. Iowa Admin. Code section 871-24.32(7). The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

In spite of the failure to call on two or even three days, the employer was aware of the period of time she would be absent so the absences are considered to have been properly reported for the purpose of determining unemployment insurance eligibility. Because her absences were related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed.

DECISION:

The February 29, 2012 (reference 01) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs