

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JASON WEBSTER
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 17A-UI-08551-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/23/17
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the August 10, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 6, 2017. Claimant participated. Employer participated through human resources manager Chelsee Cornelius. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history and the fact-finding documents, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a production worker from December 19, 2016, and was separated from employment on July 25, 2017, when he was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. Employer Exhibit 1. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving ten points in a rolling twelve month period. Employer Exhibit 1. The employer requires employees contact the employer and report their absence at least thirty minutes prior to the start of their shift. Employer Exhibit 1. The employer has an automated call in line that allows the employees to choose from options (sick, other, leave of absence, FMLA, or personal business) to report their absences. Claimant was aware of the employer's policy.

On July 21, 2017, during claimant's shift, he received a call from his wife that the babysitter had called and there was an emergency. The babysitter told claimant's wife that someone needed to come get claimant's children. Claimant's wife was in Des Moines, Iowa, and she was not able to get back in time to pick up the kids. Claimant spoke to human resources regarding the situation. The human resources supervisor told claimant to get his kids and they would speak on July 24, 2017 regarding him leaving early. Claimant then left work early on July 21, 2017.

The final incident occurred when claimant was absent on July 24, 2017, for his scheduled shift. Claimant came to work early on July 24, 2017 to speak with human resources, but he got sick. Claimant called the employer and properly reported his absence. Claimant used the employer's call in line and he selected the sick option. Claimant then went to the emergency room. Claimant received a doctor's note showing he was at the emergency room for his illness on July 24, 2017. Claimant received one point for this absence, which gave him ten total points. On July 25, 2017, claimant returned to work with his doctor's note and paperwork regarding the babysitting issue, but the employer discharged him for violating the attendance policy.

Claimant was issued written warnings for his attendance infractions on April 19, 2017 and April 25, 2017. Claimant received a written warning on May 1, 2017, that he faced termination from employment if he did not bring in a doctor's note. Claimant informed the employer he would bring in a doctor's not, but he failed to bring in a doctor's note and on May 8, 2017, the employer discharged claimant due to absenteeism. Claimant was reinstated on May 26, 2017 and he signed a reinstatement agreement that started him at nine attendance points. Claimant was warned that further absences would result in termination from employment. Claimant was absent during his employment on: December 31, 2016 (sent home sick), March 3 (sick), 6 (sick), 7 (sick), and 23 (birthday), 2017; April 11, 17 (left work early because grandmother passed away), 27 (wife under medication), and 28 (wife under medication), 2017; July 21 (left early due to child care issues) and 24 (sick), 2017. Employer Exhibit 1.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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(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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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 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, supra*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). See, *Gimbel v. Emp't Appeal Bd.*, 489 N.W.2d 36 (Iowa Ct. App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved; and *Roberts v. Iowa Dep't of Job Serv.*, 356 N.W.2d 218 (Iowa 1984) where unreported absences are not misconduct if the failure to report is caused by mental incapacity.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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.*, 743 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 absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. Although claimant had multiple absences during his employment, his final absence on July 24, 2017 was due to illness. On July 24, 2017, claimant became ill and went to the emergency room. Claimant properly reported to the employer he was going to be absent on July 24, 2017 due to illness.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because claimant's last absence on July 24, 2017 was related to properly reported illness or other reasonable

grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The August 10, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs