

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**ELIZABETH M HAYNES**  
Claimant

**SWIFT PORK COMPANY**  
Employer

**APPEAL 16A-UI-12335-LJ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/23/16  
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism  
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 November 8, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon a determination that the employer did not furnish sufficient information to show claimant was discharged for disqualifying misconduct. The parties were properly notified of the hearing. A telephone hearing was held on December 5, 2016. The claimant, Elizabeth M. Haynes, did not register a telephone number at which to be reached and did not participate in the hearing. The employer, Swift Pork Company, participated through Rogelio Bahena, HR supervisor. Employer's Exhibits 1, 2, and 3 were received and admitted into the record. The administrative law judge takes official notice of the fact-finding interview documents, administrative record, and claims information to determine the amount of benefits claimant has received and to determine whether the employer participated in the fact-finding interview.

**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, most recently as a production employee, from August 15, 2016, until October 25, 2016, when she was discharged for absenteeism. Claimant's final absences occurred on October 21 and 22, 2016. The employer did not know why claimant was absent those days or whether she called in to report that she would be absent. Bahena testified that he recalled there was an issue related to the call-in system for reporting absences that caused

some of claimant's absences to appear as no-call/no-shows, even though she had properly called in and reported. At the time she was discharged, claimant was still in her probationary employment period. During this initial 45 days of employment, the employer does not permit a new employee to accrue more than 1.5 attendance points. At the time claimant was discharged, she had accumulated eight points. Claimant was absent from work on the following prior occasions: August 23 and 26; September 3 and 29; October 14, 19, and 21. Claimant received at least one write-up related to her attendance. (Exhibit 1)

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1102.00, since filing a claim with an effective date of October 23, 2016, for the six weeks ending December 3, 2016. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a first-hand witness available for rebuttal or provide written documentation that, without rebuttal, would have resulted in disqualification.

### **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 § 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(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).

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. 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).

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. The employer did not provide any evidence showing that claimant's absences were for reasons other than personal illness or other reasonable grounds. While the employer's no-fault attendance policy may treat all absences the same, the employer's policy does not govern how absences are viewed and treated for unemployment purposes. As the employer did not provide any reason for claimant's final absence, 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, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed. As claimant's separation qualifies her for unemployment insurance benefits, the issues of overpayment, repayment, and chargeability are moot.

#### DECISION:

The November 8, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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