

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JANA M HINES
Claimant

SWIFT PORK CO
Employer

APPEAL 16A-UI-09743-DL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/14/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 2, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on September 22, 2016. Claimant participated. Employer participated through human resource supervisor Rogelio Bahena.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time box labeler/palletizer from 2009 through August 19, 2016. The employer had warned her in writing on August 3, 2016, about being at six of ten attendance points but she did not check on her Family and Medical Leave Act (FMLA) leave eligibility status. Claimant had been approved for FMLA from January 11 through July 11, 2016, and was notified of the eligibility dates but had not reapplied for leave. She worked August 4 and then was absent for nine consecutive days from Friday, August 5 through Wednesday, August 17 related to reported FMLA and personal business. She did not report the reason for her absences to the employer until August 17 when she explained that she was absent due to her mother-in-law's death on Saturday, August 6. The employer excused five days' leave on August 8, 9, 10, 11 and 12. The funeral was in Alabama on Friday, August 12 so the employer excused the usual three days' bereavement leave plus two travel days. Claimant reported her absences due to personal business and/or FMLA leave on August 15, 16 and 17 when the actual reason for the absence was related to the bereavement and estate issues. The August 17 absence resulted in the tenth attendance point and her termination from employment. She believed the FMLA would cover additional bereavement days.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5(2)a provides:

Causes for disqualification.

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.

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). 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); 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.

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. FMLA provisions were enacted to protect an individual's employment, not to be used as a weapon by an employer against its employee. Likewise, an employee bears responsibility for compliance with FMLA terms and cooperative communication with the employer. The employer reasonably granted five days' bereavement leave including travel time retroactively since claimant did not report an accurate reason for the absences until August 17. The employer has established that the claimant was warned that further improperly reported or unexcused absences could result in termination of employment and the final unexcused absences were not properly reported or excused because the reason given as related to FMLA was not genuine,

the claimant did not have FMLA leave time, and even if she had authorized time it would not cover bereavement or estate handling issues for her mother-in-law. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The September 2, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs