

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DAMON L MCFARLAND
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 17A-UI-12169-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/29/17
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 November 17, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 18, 2017. Claimant did not register for the hearing and did not participate. Employer participated through human resources manager Chelsee Cornelius. 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 June 7, 2017, and was separated from employment on October 23, 2017, when he was discharged.

The employer has an attendance policy that applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. 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. The employer requires employees contact the employer and report their absence at least thirty minutes prior to the start of their shift. The employer uses a call-in line that has six options for employees to choose from when they report their absence: sick, FMLA, business, other, leave of absence, and injury. Claimant was aware of the employer's policy.

The final incident occurred when claimant was absent from his scheduled shift and called off late on October 19, 2017. Claimant called the employer at 9:16 a.m. and reported he was going to be absent due to sickness. Claimant's absent on October 19, 2017, combined with his late call, gave him two attendance points, which gave him a total of ten attendance points. Claimant's absence on October 19, 2017 violated the employer's attendance policy. Claimant was next scheduled to work on October 20, 2017, but he was absent. Claimant properly reported his absence on October 20, 2017 was due to sickness. Claimant was not scheduled to work on October 21 and 22, 2017. On October 23, 2017, the employer informed claimant he was discharged for violating its attendance policy.

Claimant was last warned on August 25, 2017, regarding his absenteeism because he had reached eight attendance points. Claimant was warned his job was in jeopardy. Claimant was also issued a written warning for his attendance infractions on August 21, 2017 after he accumulated six attendance points. Claimant accumulated attendance points on: July 5, 2017 (absent due to a properly reported sickness, 1 attendance point); August 11, 2017 (absent due to a properly reported sickness, 1 attendance point); August 14, 2017 (absent due to a properly reported sickness, 1 attendance point); August 15, 2017 (absent due to a properly reported sickness, 1 attendance point); August 18, 2017 (absent due to a properly reported sickness, 1 attendance point); August 21, 2017 (absent due to a properly reported sickness, 1 attendance point); August 22, 2017 (absent due to a properly reported sickness, 1 attendance point); August 23, 24, and 25, 2017 (absent due to a properly reported sickness, 1 attendance point because he provided a doctor's note); and October 19, 2017 (absent due to sickness, but not properly reported, 2 points). Claimant was also absent on October 20, 2017 due to sickness. Claimant properly reported this absence.

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*.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive.

In the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 557-58 (Iowa Ct. App. 2007). 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. Claimant's last absence on October 19, 2017 was due to illness; however, he did not properly report his absence. The employer's policy requiring employees report their absences at least thirty minutes prior to the start of their shift is reasonable. Furthermore, claimant properly reported his absences to the employer on all of his previous absences. On October 19, 2017, claimant waited over three hours after his shift

started before notifying the employer that he would be absent, therefore, this absence is considered unexcused. Even though claimant's final absence on October 19, 2017 is considered unexcused, the employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. From June 7, 2017 through October 19, 2017, claimant was absent eleven days. Claimant properly reported his absences were due to illness for ten of the eleven days. Therefore, the employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. The employer has not met the burden of proof to establish misconduct. Benefits are allowed.

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

DECISION:

The November 17, 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