

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERESA ADAMS

Claimant

APPEAL NO. 11A-UI-04404-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 02/13/11

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 28, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on April 29, 2011. Claimant participated through interpreter Ike Rocha. Employer participated through acting human resources manager, Aureliano Diaz.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full time as a kill floor production employee on second shift from March 2009 and was separated from employment on February 3, 2011. Claimant was injured at work in June 2010 and had surgery on her hand. She last worked on August 27, 2010 and was not allowed to work because of medical restrictions until January 31, 2011 when she was released to full duty according to the employer's designated medical provider McFarland Clinic. Claimant told that doctor, human resources representative Aaron Vauder and Javier that she intended to seek a second opinion and they told her they wanted to give her a warning for doing so. On February 7, 2011 she provided the employer with a medical note from her personal treating physician Dr. Willey that restricted her from working from January 31 through February 13, 2011. She is looking for work in service industries and is able to work.

REASONING AND CONCLUSIONS OF LAW:

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

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.

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.

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). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Claimant did report to Aaron and Javier that she intended to seek a second opinion after the employer's medical provider released her to return to work. It was unreasonable for the employer to expect that she would be able to set an appointment the same day. Her visit to a physician for a second opinion within a week and presentation of that medical excuse to the employer upon its receipt excused the period of absence from January 31 through February 13, 2011. Thus no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

DECISION:

The March 28, 2011 (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css