

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSE E GUTIERREZ AGUILERA
Claimant

APPEAL NO. 12A-UI-03862-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 02/26/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the April 2, 2012 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on April 30, 2012. Claimant participated. Employer participated through human resources manager Aureliano Diaz.

ISSUE:

Did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

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 and was separated from employment on February 15, 2012. His last day of work was February 3, 2012. He took an approved leave for a vacation in Mexico from February 6 through 10, 2012. He traveled with his mother who lives with him, to his grandmother's home in Mexico. While there, his mother became ill with hypertension and was hospitalized on February 8 and 9, 2012. He called the Swift human resources office to request an extension of his leave from February 13 through 17, 2012. The human resources clerk received a fax from the doctor in Mexico confirming the hospitalization. Swift did not contact claimant to notify him the leave extension was denied but told the claimant's brother on February 9 to tell claimant his leave was not approved and he must be back to work by Monday, February 13, 2012. Claimant called the human resources office on February 13 to check on the status of his extended leave request and was put on hold for a lengthy period of time so eventually he called his brother who told him the leave was not approved. His mother was not allowed to travel until February 17 since she was at risk of a stroke because of the hypertension. He left Mexico and returned to the United States on February 19 and to work on Monday, February 20 when he was notified his leave was not approved and he was discharged.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 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.

Excessive and unexcused absenteeism can constitute misconduct. Iowa Admin. Code r. 871-24.32(7). 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). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the absence period from February 13 through 17, 2012 was related to the properly reported illness of his mother and her related inability to travel, the reasons for the extended absence was reasonable and no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed.

DECISION:

The April 2, 2012 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs