

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN R BURTLOW
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 17A-UI-08543-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/23/17
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 August 11, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 6, 2017. Claimant participated. Employer participated through human resources manager Chelsee Cornelius. Employer Exhibit 1 was admitted into evidence with no objection. 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 maintenance employee from November 1, 2016, and was separated from employment on July 25, 2017, when he was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. Employer Exhibit 1. 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. Employer Exhibit 1. The employer requires employees contact the employer and report their absence at least thirty

minutes prior to the start of their shift. Employer Exhibit 1. Claimant was aware of the employer's policy. Employer Exhibit 1.

On July 17, 2017, claimant had formally requested time off due to a civil court hearing (involving claimant's minor child) on July 24, 2017. Claimant attached the court order, which included the date and time of the hearing, with his request for time off. Prior to July 24, 2017, the employer denied claimant's request for time off. On July 21, 2017, claimant was subpoenaed to attend the court hearing. Claimant gave the employer a copy of the subpoena on July 21, 2017.

The final incident that led to claimant's discharge occurred on July 24, 2017 when claimant was absent from his scheduled shift. Employer Exhibit 1. Claimant properly reported his absence to the employer. Claimant selected other as the reason for his absence and left a message that he was going to be absent for a civil court hearing. Claimant received one point for his absence on July 24, 2017, which gave him 10.5 total points. Employer Exhibit 1. On July 25, 2017, the employer discharged claimant for violating its attendance policy. Employer Exhibit 1.

Claimant was given a second written warning for his attendance infractions on March 27, 2017 and he was warned that his job was in jeopardy. Employer Exhibit 1. Claimant was also issued a first written warning for his attendance infractions on March 27, 2017. Employer Exhibit 1. The employer did not excuse claimant's absences on: November 9, 14 (late because he had to move), and 25, 2016; February 20 and 22, 2017; March 9 (sick), 20 (left early due to pain from an injury), 21 (left early due to pain from an injury), and 22 (left early due to pain from an injury), 2017, April 14, 2017, and July 24, 2017. Employer Exhibit 1.

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*.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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).

Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. Claimant's last absence was on July 24, 2017. Claimant was absent because he had been subpoenaed for a court hearing involving his minor child. Claimant also credibly testified he was acting as his minor child's representative for the court hearing. Claimant properly reported to the employer he would be absent and had even requested time off prior to July 24, 2017. Although claimant's final absence was not due to a properly reported illness, his final absence was not volitional (claimant was subpoenaed) and it was for other reasonable grounds (claimant's minor child had court hearing).

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because claimant's last absence was related to properly reported illness or other reasonable grounds, 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, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

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

DECISION:

The August 11, 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