

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MISTY L UNDERWOOD
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 16A-UI-11965-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/09/16
Claimant: Appellant (2)

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 October 26, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged due to excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was commenced on November 21, 2016, and was continued to November 22, 2016. The claimant, Misty L. Underwood, participated. The employer, Swift Pork Company, participated through Rogelio Bahena, HR supervisor. Claimant's Exhibits A, B, and C were received and admitted into the record without objection.

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 full time, most recently as a general worker, from July 13, 2015, until October 11, 2016, when she was discharged.

Claimant's final absence occurred on October 5, 2016. That day, claimant left less than two hours before her shift ended. Claimant testified that she received a telephone call from her daughter's school informing her that her daughter was sick, so claimant had to leave work, pick up her daughter, and take her home. Claimant is the sole caretaker for her daughter. Claimant was absent on the following prior dates: September 8; August 6 and 7; June 30; May 13; March 25 and 26; March 4; February 16; January 18; and January 14. On each of these dates, claimant reported that she would not be at work due to illness. Claimant was also absent on June 9, and she could not recall the reason for this absence.

The employer maintains a no-fault attendance points policy. Under this policy, if an employee misses one day of work, she will receive one attendance point regardless of the reason for her absence. If she misses two or three consecutive days due to illness, she may bring in a doctor's excuse and have her points for that multiple-day absence dropped to only one point.

Claimant received warnings on May 16 and August 5, both related to her attendance points. She was aware her job was in jeopardy based on the amount of points she had accrued.

Received warnings: May 16 warned for 6 points; August 5 warned for 8 points
Informed her job was in jeopardy through the warnings

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 § 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.

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).

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). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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*. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991).

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant's final absence was due to the illness of her daughter, for whom claimant is the sole caretaker. This partial-day absence is based on reasonable grounds. Therefore, 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, without such, the history of other incidents need not be examined. Additionally, even if claimant's final absence were not for reasonable grounds, she does not have a history of unexcused absences. All but one of claimant's absences are based on personal illness. As claimant only has at most two unexcused absences in her work history, counting the final incident, she does not have a history of absences that are both excessive and unexcused. Accordingly, benefits are allowed.

DECISION:

The October 26, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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