

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANA L MENDEZ
Claimant

SMITHFIELD FARMLAND CORP
Employer

APPEAL 19A-UI-00783-LJ-T
ADMINISTRATIVE LAW JUDGE
AMENDED DECISION

OC: 12/30/18
Claimant: Appellant (4)

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 January 29, 2019, (reference 02) unemployment insurance decision that denied benefits based upon a determination that the separation had previously been adjudicated and claimant was denied benefits. The parties were properly notified of the hearing. A telephonic hearing was held on February 11, 2019. The claimant, Ana L. Mendez, participated and was represented by Dennis M. McElwain, Attorney at Law. Witness Leo Kanne and Sergio Trejo also testified on behalf of the claimant. The employer, Smithfield Farmland Corporation, participated through Rebecca Jackson, Associate Human Resource Manager. Spanish/English interpreter Florencia (ID number 11097) provided interpretation services for the hearing. Claimant's Exhibits A and B and Employer's Exhibits 1 through 7 were received and admitted into the record without objection.

The administrative law judge took official notice of the administrative record. For administrative efficiency, this hearing was consolidated with and held at the same time as the hearing for Appeal Number 19A-UI-00782-LJ-T.

This amended decision is being issued for the purpose of clarifying that the administrative law judge is modifying the underlying fact-finding decision in favor of claimant Ana L. Mendez. The decision paragraph now reflects that correct language, and the above disposition code has been changed from "5" to "4". This amended decision is also being issued to reflect that the correct employer name is Smithfield Farmland Corporation, not Smithfield Fresh Meats Corporation. This amended decision makes no other substantive changes.

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 production worker, from May 5, 2008, until December 21, 2018, when she was discharged due to unexcused absenteeism. Claimant last

reported to work on November 6, 2018. After that date, she was absent from work due to a range of medical issues. Claimant called in each day and reported that she would be absent from work due to illness.

Due to the extended length of absence, the employer required claimant to provide doctor's notes to excuse every day of her absence. This requirement is consistent with the employer's attendance policy. (Exhibit 7) On December 12, 2018, the employer sent claimant a letter stating it did not have medical notes excusing five absences: November 5, November 9, November 10, November 21, and November 24. The letter instructs claimant that she must provide documentation excusing these absences by December 20, 2018, in order to preserve her employment. Claimant did not receive this letter. It was delivered to her PO Box and not her physical address, and claimant was medically unable to operate a vehicle and leave her home to travel four miles to the post office and check her PO Box. The employer discharged claimant via letter dated December 21, 2018. Again, this letter was delivered to claimant's PO Box and she did not receive it.

Claimant attempted to return to work on December 31, 2018. When she arrived at work, she learned that she no longer had a job. At that point, claimant went to her PO Box and discovered the letters from the employer. Claimant denies she ever received a call from the employer letting her know about the five dates for which it did not have medical excuses.

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*, 321 N.W.2d at 6; *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*, 734 N.W.2d at 554. 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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant's testimony credible. The administrative law judge believes claimant's firsthand testimony that she did not receive a call from the employer letting her know she was missing medical documentation for five absences.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. The administrative law judge finds that claimant called in and properly reported each of her absences, and all of claimant's absences were due to illness. The employer has not established that claimant was aware she needed to submit additional medical documentation in order to preserve her employment. Claimant had no warning that her job was in jeopardy and no notice that she needed to take any additional actions to keep her job. Accordingly, benefits are allowed.

DECISION:

The January 29, 2019, (reference 02) unemployment insurance decision is modified in favor of claimant/appellant. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn