

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**HEATHER D BABCOCK**  
Claimant

**SWIFT PORK COMPANY**  
Employer

**APPEAL 17A-UI-13447-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 12/03/17**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the December 26, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 22, 2018. Claimant participated. Employer participated through human resources manager Chelsea Cornelius.

**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 as a production worker from June 19, 2017, and was separated from employment on December 8, 2017, when she was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences, tardies, and leaving early, regardless of reason for the infraction. 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. The employer requires employees contact the employer and report their absence at least thirty minutes prior to the start of their shift. The employer uses a call-in line for employees when they call off from work. Employees can select from different options (sick, other, business, Family and Medical Leave Act (FMLA) leave, leave of absence, or injury) when they use the call-in line or they can skip selecting an option. Claimant was aware of the employer's policy.

The final incident that led to discharge occurred when claimant left early from her schedule shift on December 7, 2017. Claimant left approximately four hours early. Claimant left early because she had a seizure in the bathroom due to her epilepsy. Claimant told the human resources supervisor she was leaving early because she had a small seizure and did not want

to have a large seizure due to her epilepsy. The employer was aware when claimant was hired that she had epilepsy, which caused her to have seizures. The human resources supervisor told claimant he was not sure if she would receive an attendance point for leaving early. The employer assessed claimant one attendance point for leaving early December 7, 2017, which gave her a total of 10.5 attendance points. Claimant returned to work on December 8, 2017, but the employer informed her she was discharged due to absenteeism.

Claimant was last warned on November 13, 2017, that she faced termination from employment upon another incident of unexcused absenteeism. Claimant was also issued a written warning for her attendance infractions on October 18, 2017. The employer gave claimant attendance points on: July 10, 2017 (she properly reported she would be absent; claimant was absent because her grandmother had a doctor's appointment); August 25, 2017 (she properly reported she would absent due to illness); September 9, 2017 (she properly reported she would absent due to illness and she provided a doctor's note to the employer); September 14, 2017 (tardy); October 6, 2017 (she properly reported she would absent due to illness); October 13, 2017 (she was absent; the employer sent her home because she dizzy); October 17, 2017 (she properly reported she would absent due to illness); October 26, 2017 (she left early due to her epilepsy; she informed her supervisor); November 9, 2017 (she properly reported she would absent due to illness); December 1, 2017 (she left early because her mom was in the emergency room; she reported to the employer the reason she was leaving early); and December 7, 2017 (she left early after having a seizure; she informed the human resources supervisor).

#### **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*. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 557-58 (Iowa Ct. App. 2007).

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. The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. The employer discharged claimant after eleven attendance infractions; however, eight of her attendance infractions were related to illness, including seizures due to her epilepsy. Claimant properly reported her absences either using the employer's call-in line or notifying the employer in person. Because claimant last absence was related to properly reported illness or other reasonable grounds (she had a seizure, which she reported to the human resources supervisor), 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.

Furthermore, over half of the points were assessed due to illness, which are not considered unexcused. The employer has not met the burden of proof to establish misconduct. Benefits are allowed.

**DECISION:**

The December 26, 2017, (reference 01) unemployment insurance decision is reversed. 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.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs