

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

HASNIJA PIVIC
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 15A-UI-12014-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/04/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 29, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 16, 2015. Claimant participated. Employer participated through human resources manager, Stacey Santillan.

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 general laborer from June 15, 2015, and was separated from employment on September 29, 2015, when she 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. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving nine points in a rolling calendar year. The employer has a call-in procedure that requires employees to call in at least 30 minutes prior to the start of their scheduled shift. Claimant was made aware of the employer's policy during orientation.

The final incident occurred when claimant was absent for her shift on September 28, 2015. Claimant was absent because she was sick. Claimant followed the call-in procedure and called the employer over 30 minutes before her shift was scheduled to start. Claimant left a message, but for some reason the employer did not receive the message. Claimant provided documentation to the employer that showed she had called the call-in line on September 28, 2015. The employer and claimant are not aware of why a message was not received when the employer reviewed the call-in messages.

Claimant was last warned on September 4, 2015, that she faced termination from employment upon another incident of unexcused absenteeism. Claimant was also issued a written warning for her attendance infractions on August 21, 2015. Claimant was absent on June 19 (failing to attend a required class), July 23 (left early), July 29 (called in sick), August 7 (called in sick), August 13 (left early), August 15 (called in sick), August 21 (called in sick), August 24 (called in sick), August 26 (called in sick), August 31 (personal business), September 24 (left early), and September 28 (called in sick).

REASONING AND CONCLUSIONS OF LAW:

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

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence.

Claimant was last warned on September 4, 2015 that any further absences may lead to discharge pursuant to the employer's attendance policy. Claimant's last absence occurred on September 28, 2015 because she was sick. Ms. Santillan testified the employer did not receive a message on the call-in line from claimant stating she would be absent. However, claimant did establish at her grievance meeting with the employer that she did follow the employer's call-in procedures by calling the call-in line on September 28, 2015. The parties do not dispute that claimant showed the employer her cell phone records for September 28, 2015, verifying that she called the call-in number. The cell phone records establish claimant followed the proper call-in procedures to call off from work. The employer's argument that it does not matter whether claimant was a no-call/no-show or just absent (having followed the call-in procedure) on September 28, 2015, because she still would have had at least nine points, is not persuasive. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Claimant properly followed the employer's call-in procedure on September 28, 2015 to report she was going to be absent because she was sick. Claimant cannot control if the employer's recording system will successfully record her message. Even though under the employer's attendance policy claimant's final absence was considered unexcused, it is not considered unexcused for the purpose of the Iowa Employment Security Act. Furthermore, approximately half of the points assessed to claimant were due to illness, which are not considered unexcused.

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.

DECISION:

The October 29, 2015, (reference 01) unemployment insurance decision is reversed. 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.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/pjs