

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**THERESA BENEDICT**  
Claimant

**APPEAL NO. 16A-UI-13813-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**  
Employer

**OC: 12/04/16**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Swift Pork Company (employer) appealed a representative's December 19, 2016, decision (reference 01) that concluded Theresa Benedict (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 20, 2017. The claimant was represented by Brian Ulin, Union Representative, and participated personally. The employer participated by Rogelio Bahena, Human Resources Supervisor. The employer offered and Exhibit 1 was received into evidence. Exhibit D-1 was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on November 2, 2015, as a full-time cut out tail. She previously worked for Cargill. The employer's policies were posted at work after Cargill was purchased by the employer. The claimant did not receive her own copy of the policies. The policy stated an employee will be terminated if he accumulates ten attendance points.

On February 2, 2016, the claimant properly reported she was leaving work early for a court appearance. The claimant and four other workers were not allowed to use the restroom when it was necessary. One employee soiled himself. The other workers were menstruating and bled through their clothing. On February 19, 2016, the claimant bled through her jeans and the supervisor sent her home to change, come back and be assessed an attendance point. On March 31 and April 29, 2016, the claimant was absent due to personal issues. The claimant was absent due to properly reported medical issues on February 9, 25, April 15, and May 3, 2016, 2016. On May 5, 2016, the employer issued the claimant a written warning for accumulating six attendance points. The warning stated the April 15, 2016, was excused. The employer notified the claimant that further infractions could result in termination from employment.

On June 17, 2016, the claimant was tardy for work. The claimant was absent due to a properly reported medical issue on July 20, 2016. On July 22, the employer issued the claimant a written warning for accumulating eight attendance points. This was the first time the claimant was notified that the April 15, 2016, absence was not approved. The warning stated the February 19, 2016, absence was pending approval. The employer notified the claimant that further infractions could result in termination from employment. The employer did not notify the claimant whether the absence on February 19, 2016, absence was approved.

On August 8, 2016, the claimant properly reported she was absent due to an injury. On December 2, 2016, the claimant properly reported she would be late to work due to personal business. The employer terminated the claimant on December 2, 2016, for accumulating ten attendance points.

The claimant filed for unemployment insurance benefits with an effective date of December 4, 2016. The employer did not participate in the fact finding interview on December 16, 2016.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The claimant properly reported absences for medical issues and accumulated six attendance points. Those absences cannot be considered misconduct.

She accumulated 4.5 attendance points soiling her clothing because the employer would not allow her to use the restroom, attending a court date, two days of personal business, and one properly reported tardiness in ten months. The employer has not established that the claimant's absences were excessive. The employer has failed to provide any evidence of willful and deliberate misconduct. The claimant was discharged but there was no misconduct.

**DECISION:**

The representative's December 19, 2016, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs