

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**JEANJULIEN B BURHAMA**  
Claimant

**SWIFT PORK COMPANY**  
Employer

**APPEAL 18A-UI-05042-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/01/18  
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Overpayment of Benefits  
Iowa Admin. Code r. 871-24(10) – Employer participation at Fact-Finding Interview

**STATEMENT OF THE CASE:**

The employer/appellant filed an appeal from the April 20, 2018 (reference 01) unemployment insurance decision that found claimant was eligible for unemployment insurance benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on May 18, 2018. The claimant, JeanJulien B. Burhama, did not register a telephone number to be contacted at for the hearing and did not participate. The employer, Swift Pork Company, participated through representative Vicky Cervantes and witness Emily Pottorff. Employer's Exhibit 1 was admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any charges to the employer's account be waived?

**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. He was employed from January 1, 2018 until April 4, 2018, when he was discharged. Claimant's immediate supervisor was Isabella Acosta.

The employer has a written attendance policy, which provides that employees are subject to discharge upon reaching nine points. Claimant received a copy of the written policy. The policy further states that if an employee cannot come to work they must notify the employer within thirty minutes of the employee's scheduled shift start time. Claimant had received two verbal warnings prior to his discharge warning him that his job was in jeopardy if he continued to violate the attendance policy.

Claimant was absent from work on January 19, 2018 due to his own personal illness. He did properly report his absence pursuant to the employer's attendance policy. Claimant was absent from work January 20, 2018 due to his own personal illness. He did properly report his absence pursuant to the employer's attendance policy.

Claimant was absent on February 3, 2018 due to an ill family member. Claimant did properly report his absence pursuant to the employer's attendance policy. Claimant was tardy to work on February 27, 2018. No reason was given to the employer for claimant's tardiness and his tardiness was not properly reported pursuant to the employer's attendance policy.

Claimant was absent from work on March 5, 2018 due to an ill family member. Claimant did properly report his absence pursuant to the employer's attendance policy. Claimant was absent from work on March 9, 2018 due to an ill family member. Claimant did properly report his absence pursuant to the employer's attendance policy. Claimant was absent from work on March 12, 2018 due to his own personal illness. He did properly report his absence pursuant to the employer's attendance policy. Claimant was absent on March 27, 2018 due to his own personal illness. He did properly report his absence pursuant to the employer's attendance policy.

Claimant was absent on April 2, 2018 due to an ill family member. Claimant did properly report his absence pursuant to the employer's attendance policy. Claimant was absent on April 3, 2018 due to an ill family member. Claimant did properly report his absence pursuant to the employer's attendance policy. On April 4, 2018, claimant was discharged due to excessive absenteeism.

Throughout the course of claimant's employment, Ms. Pottorff spoke to claimant about issues he was having being absent from work. Claimant informed Ms. Pottorff that if his two-year-old child was ill, that the child was not allowed at daycare. Ms. Pottorff told the claimant that he would be able to come in and obtain a pass out slip, which allowed claimant to be off work without pay with no penalty regarding the absenteeism policy. Claimant never came to Ms. Pottorff to obtain a pass out slip to cover the absences where he was caring for ill family members. Further, it is unknown if the claimant was actually caring for his ill 2-year-old child or a different family member when he was absent from work.

Claimant has received benefits of \$0.00 since filing his initial claim for benefits effective April 1, 2018. Employer did participate in the fact-finding interview.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

As a preliminary matter, I find that Claimant did not quit. Claimant was discharged from employment for job-related 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(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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 of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *Gaborit v. Emp't Appeal Bd.*, 743 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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929\*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

In this case, the claimant had received verbal warnings that his job was in jeopardy due to attendance violations. Claimant had the following unexcused absences: February 3, 2018; February 27, 2018; March 5, 2018; March 9, 2018; April 2, 2018; and April 3, 2018. Six unexcused absences in less than a three-month period is excessive.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incident on April 3, 2018 was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, amounts to job-related misconduct. Benefits are denied.

Claimant has not received any unemployment insurance benefits since filing his initial claim effective April 1, 2018. As such, the issue of overpayment is moot.

**DECISION:**

The April 20, 2018 (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer did participate in the fact-finding interview and its account shall not be charged.

---

Dawn Boucher  
Administrative Law Judge

---

Decision Dated and Mailed

db/rvs