IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANNA B CORTES Claimant **SWIFT PORK COMPANY** Employer	**APPEAL 18A-UI-06601-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/21/18** **Claimant: Appellant (2R)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 8, 2018, (reference 03) unemployment insurance decision that denied benefits based upon her discharge for excessive unexcused absenteeism. The parties were properly notified about the hearing. A telephone hearing was held on August 20, 2018. Claimant participated with the assistance of a Spanish language interpreter from CTS Language Link. Claimant's non-attorney representative, Jon Geyer, also participated on her behalf. Employer participated through Director of Human Resources Nicolás Aguirre. Employer's Exhibit 1 and claimant's Exhibits A through D were received into evidence.

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 began working for employer on December 8, 2003. Claimant last worked as a full-time general laborer. Claimant was separated from employment on May 7, 2018, when she was discharged.

In January 2018 claimant began experiencing pain and swelling in her left hand. Claimant was going to the on-site nurse with this issue daily for approximately a week. (Exhibit 1, pg. 19). On January 23, claimant was placed on leave and given the directive that she needed to go see a doctor about the issue she was having with her hand. On February 13, 2018, claimant saw a primary care physician, who stated she could return to work without restriction. However, when claimant presented the doctor with a form she was given by the employer, the doctor declined to sign it, as it implied the injury was non-work-related and it was his belief the injury was work-related. (Exhibit A). The doctor declined to provide any further documentation to the claimant, as he did not want to become involved in any future worker's compensation litigation. The doctor then referred claimant to a specialist.

On February 26, 2018, claimant met with a specialist, who also agreed she could return to work without restrictions. However, this doctor also declined to provide documentation, as he also

did not want to become involved in any future worker's compensation litigation. In March 2018 an unemployment appeal hearing was held on the issue of whether claimant was able to and available for work. During that hearing the employer specifically testified, in claimant's presence, that she would be allowed to return to work as soon as she provided any documentation releasing her and that it did not have to be the documentation provided by the employer. In April 2018 a meeting was held with claimant. The employer again reiterated she could bring in any documentation releasing her to return to work, either with or without restriction. (Exhibit 1, pgs. 10 – 12).

On May 4, 2018, claimant was seen by Dr. Peter Chimenti, who gave her documentation diagnosing her with carpel tunnel syndrome and releasing her to return to work without restriction. (Exhibit 1, pg. 3). Claimant immediately provided this documentation to the employer. Upon receipt of the documentation the employer set up a time to meet with claimant on May 7, 2018. At that meeting claimant was discharged for violating the employer's attendance policy, which only allows for nine unexcused absences in a rolling 12-month period. (Exhibit 1, pgs. 1 and 2). Claimant had missed over three months of work by this time.

Claimant testified she was not aware that her job was in jeopardy and believed her position was being held until such time as she could return to work. Aguirre testified claimant was advised multiple times that if she did not get the appropriate paperwork from a doctor releasing her to return to work and excusing her absences since January 24 she would be discharged. The employer provided no documentation of these warnings. Aguirre testified no firm date or deadline was given to claimant to produce these documents.

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.

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(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*, supra; *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*, supra.

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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

An employer's no-fault absenteeism policy or point system 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 Iowa Employment Security Law because it is not volitional. 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.

Here, the claimant was placed on leave by the employer beginning January 24, 2018, based on the employer's concerns that claimant was suffering an injury preventing her from working. Claimant was told she needed to see a doctor and be released to return to work, either with or without restriction, before she would be allowed to work again. Claimant testified she was willing to return to work, but was not allowed to do so by the employer until she obtained a release. Claimant had difficulty obtaining the paperwork requested by the employer, but continued to maintain contact with the employer and call in her absences while she was off work. Claimant was never given a firm deadline by which she needed to have the appropriate documentation to the employer. While Aguirre testified claimant was warned her job was in jeopardy, no documentation or supporting evidence was submitted to support this claim. Claimant denies she was told her job was in jeopardy.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Inasmuch as employer had not previously warned claimant that a failure to provide the requested documentation by a specific deadline would result in termination, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed.

DECISION:

The June 8, 2018, (reference 03) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, effective May 6, 2018, provided the claimant is otherwise eligible. Benefits claimed, but withheld based upon this separation shall be paid to claimant.

REMAND:

The issue of whether claimant is able to and available for work effective May 6, 2018, is remanded to the Benefits Bureau of Iowa Workforce Development for initial investigation and determination.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs