

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**YOLANDA VICTORIA**  
Claimant

**SWIFT PORK CO**  
Employer

**APPEAL 17A-UI-09443-LJ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/20/17**  
**Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the September 11, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment due to excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on October 2, 2017. The claimant, Yolanda Victoria, participated and was represented by Brian Ulin from her union. The employer, Swift Pork Company, participated through Rogelio Bahena, Human Resources Supervisor. The hearing was facilitated with the assistance of Spanish/English interpreters Martin (ID number 6700) and Carlos (ID number 9914) from CTS Language Link. Claimant's Exhibits 1, 2, and 3 and Employer's Exhibits E-1, E-2, E-3, and E-4 were received and admitted into the record without objection.

**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, most recently as a production worker, from January 24, 2005, until August 11, 2017, when she was discharged for absenteeism. Claimant was the caretaker for her sister, who lives in California. On July 28, 2017, claimant notified the employer that she needed a leave of absence as her sister was diagnosed with cancer and had little time left to live. The employer granted claimant a one-week leave of absence, from July 31 through August 4. Ulin, who was present for the meeting with claimant and the day-shift plant manager Jimmy, recalled that claimant was asked to keep the employer informed as no one really knew what would happen when claimant got to California.

Claimant was scheduled to return to work on August 7, 2017. She did not return that day. Instead, claimant called the automated attendance line and selected "leave of absence" as the reason she was not at work. When claimant did report back on August 10, the employer discharged claimant for failing to return to work on August 7, as scheduled. Upon claimant's

return, Bahena asked claimant for medical documentation extending her leave. Claimant did not have the documentation on her at that time. She believes that her sister's medical provider had faxed an excuse from July 29 through August 13 to Jimmy back on July 28. (Exhibit 2) By the time claimant returned from her leave of absence, Jimmy had been separated from employment.

Claimant had been warned for her absenteeism in the past. She called in sick three separate days in June 2017. She was ninety minutes late for work on May 17, 2017, for an unknown reason. She was two hours late for work on May 8, 2017, again for an unknown reason. Additionally, claimant left less than two hours early on November 7, 2016. She was generally on notice because of her absence. However, claimant denies understanding that her job was in jeopardy if she failed to return immediately upon the expiration of her one-week leave of absence. Claimant believed she would receive one point for the entire second week that she missed, as she had medical documentation supporting the absence.

### **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, provided she is otherwise eligible.

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 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. 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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant's testimony more credible than the employer's testimony.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Here, claimant had been on an approved leave of absence related to the health of her sister. Claimant continued to call in each day beyond the end of her approved leave of absence, as she was still dealing with issues related to her sister, for whom she was the primary caretaker. Claimant's sister's healthcare provider had faxed in documentation excusing claimant for this second week. Finally, claimant reported back to the employer during the second week and was given no additional time to provide another copy of the healthcare provider's note excusing her absence. Claimant's final absence was related to a compelling personal reason and constitutes reasonable grounds. Therefore, 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, the history of other incidents need not be examined. Accordingly, benefits are allowed.

**DECISION:**

The September 11, 2017 (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.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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