

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALBERTO CERVANTES
Claimant

APPEAL NO: 18A-UI-02568-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 02/04/18
Claimant: Appellant (1)

Iowa Code § 96.5(1)a – Voluntary Quit/ Failure to report for three days without notification

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a decision of a representative dated February 21, 2018, (reference 01) which denied unemployment insurance benefits finding that the claimant voluntarily quit work on February 21, 2018, by failing to report to work for three days in a row and not notifying the employer of the reason. After due notice was provided, a telephone hearing was held on March 23, 2018. Claimant participated. Participating for the claimant were Ms. Laura Rivera and Ulisa Cervantes. The employer participated by Mr. Nicolas Aguirre. Employer's Exhibits 1 through 7 were admitted into the hearing record.

ISSUE:

Whether the claimant left employment by failing to report to work for three days in a row without notifying the employer, in violation of company policy.

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds: Alberto Cervantes was employed by Swift Pork Company from June 6, 2011 until February 2, 2018, when he was removed from company employment rolls, because he had not returned to work and failed to notify the company that he would be absent for three or more consecutive work days. Mr. Cervantes was employed as a full-time general laborer for the company and was paid by the hour. His immediate supervisor was Francisco Mendoza.

Mr. Cervantes had suffered a work injury on April 11, 2016. Mr. Cervantes underwent knee surgery on January 18, 2018 and also received an injection in his neck by his doctor on the same day. Based upon statements that had been made to him by Ms. Daters, Mr. Cervantes believed that the company would allow him to remain away from work for additional time, to promote healing. Ms. Daters, who is employed in the company's workman's compensation division, had in the past, made a generalized statement to Mr. Cervantes on one occasion prior to his surgery stating the claimant could have more time away from work, after the surgery. Mr. Cervantes believed that the doctor who was treating him, Dr. Mahoney, had also agreed to the additional time away from work.

Prior to Mr. Cervantes being released to return to work, on January 30, 2018, Mr. Aguirre and with Ms. Toni Daters, the workman's compensation manager, met with the claimant. Both explained to the claimant that because he had been released and medical restrictions had been lifted, the company expected him to report back to work and his failure to do so would jeopardize his employment because he would be accumulating attendance infraction points.

On January 25, 2018, Dr. Mahoney, his orthopedic surgeon spoke to Mr. Cervantes about returning to work. Dr. Mahoney verified that the claimant was physically able to return to work. When the claimant stated that it was his desire to be off for two additional weeks after his surgery, Dr. Mahoney stated that because he had been medically released to return to work, any additional time away from work would be only because of Mr. Cervantes decision not to return to work, because there was no further medical reason for the claimant to stay off work.

Because of the general statement that had been made earlier by Ms. Daters, Mr. Cervantes continued to believe that he had been authorized to stay away from work even though he had been later told differently by Mr. Aguirre, Ms. Daters and Dr. Mahoney. In an effort to save the claimant's employment, the company again contacted Mr. Cervantes on January 30, 2018, and again specifically reminded the claimant that he was expected to return to work because he had been medically released and if he needed to miss work, he was to call in each day, but additional absences were unexcused. The employer had also reminded Mr. Cervantes that if he wished to have additional time away from work excused, he needed to contact his supervisor, Francisco Mendoza, to request time off of work and that the request needed to be approved by Mr. Mendoza.

Mr. Cervantes did not request time away from work from his supervisor and did not report for work or notify the employer that he would be absent on January 30 through February 2, 2018. Under established company policy, employees who fail to report for work for three consecutive workdays and who have not notified the employer of the reason are considered to have voluntarily quit employment. Based upon the claimant's failure to report or to provide notification for the period January 30 through February 2, 2018, employer removed Mr. Cervantes from the company employment rolls.

It is the claimant's position that Ms. Toni Daters, the workman compensations manager, had "promised" him early on, that he would be allowed two weeks' time away from work after his surgery he had no obligation to report to work or notify the employer for that period.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.5-1 provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa

Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

No contract for employment is more basic than the right of the employer to expect employees to report for work on the date and hour agreed upon and recurrent failure to honor that obligation shows a substantial disregard for the employers interests and standards of behavior that an employer has a right to expect of its employees under the Iowa Employment Security Law.

The evidence in this matter establishes that although Mr. Cervantes may have earlier on believed that he would be authorized to stay away from work for two weeks after his knee surgery, the evidence clearly establishes that Mr. Cervantes was repeatedly placed on notice that he was expected to report for work on January 30, 2018 and thereafter, or in the alternative to notify the employer each day he was to be absent. Although Mr. Cervantes was informed of the company's expectation by Mr. Aguirre, and also by the workman's compensation manager, as well as his doctor, the claimant still stated his belief he was authorized to be off work. In a final effort to convince the claimant that he was expected to report to work or in the alternative provide notice of each absence, following company call-in procedures, the company made one last attempt by personally calling the claimant on January 30, 2018. Mr. Cervantes chose to ignore all the information and warnings and was separated from his employment after he failed to report for work and did not provide notification as to why he was not reporting for three or more consecutive work days, in violation of company policy. The claimant has not established good cause attributable to the employer. Unemployment insurance benefits are denied.

DECISION:

The representative's decision dated February 21, 2018, reference 01 is affirmed. Claimant left employment without good cause attributable to the employer by failing to report for work for three days in a row and not notifying the employer of the reason. Claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

tn/scn