

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DAYANA RIVERA HERNANDEZ
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 20A-UI-14086-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/03/20
Claimant: Appellant (2R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Dayana Rivera Hernandez, the claimant, filed an appeal from the October 28, 2020, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on January 6, 2021. Ms. Rivera participated and testified. A Spanish language interpreter from CTS Language Link provided interpretation services. The employer did not participate. Claimant's Exhibits A and B were admitted into evidence. Official notice was taken of the administrative record.

ISSUE:

Was Ms. Rivera laid off, discharged for misconduct or did she voluntarily quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Rivera began working for the employer on December 9, 2019. She worked full time as a meat cutter.

In March 2020, the United States declared a public health emergency because of the COVID 19 pandemic. As a precaution due to the pandemic, the employer checked employees' temperatures before the employees' shifts. On May 5, 2020, Ms. Rivera's temperature was checked by the employer before her scheduled shift. She had a fever, which is a symptom of COVID-19. The employer didn't allow Ms. Rivera to enter the workplace. Instead they sent her to take a COVID-19 test. Ms. Rivera took a COVID-19 test on May 5 and was excused from work on May 5 through May 19. Claimant's Exhibit A. On May 8, Ms. Rivera tested positive for COVID-19. Claimant's Exhibit B.

Ms. Rivera called the employer several times before May 19 to ask if she could return to work. The employer told Ms. Rivera that she could not come back to work and that the City of Ottumwa or the State of Iowa would contact her to let her know when she could return to work. Ms. Rivera contacted the clinic where she was tested for COVID-19 to ask for the number for the City of Ottumwa or the State of Iowa so she could call them. The nurse at the clinic did not

give Ms. Rivera the numbers and told Ms. Rivera that someone from the City or the State would call her. Ms. Rivera continued to call the employer after May 19 to ask if she could return to work. The employer continued to tell Ms. Rivera that she could not return to work and that the City of Ottumwa or the State of Iowa would contact her to let her know when she could return to work. No one from the City or State ever called Ms. Rivera.

In late May 2020, Ms. Rivera learned from another employee that the employer had removed her personal belongings from her work locker. Ms. Rivera continued to contact the employer about returning to work and continued to get the same response as before. To Ms. Rivera's knowledge, the employer never closed due to the pandemic.

The employer paid Ms. Rivera 60-70 percent of her usual pay for May 5-19. The issue of whether Ms. Rivera was overpaid regular unemployment benefits and Federal Pandemic Unemployment Compensation (FPUC) benefits for the weeks of May 9 and May 16 have not yet been investigated by the Benefits Bureau.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Ms. Rivera's separation from the employment was with attributable to the employer.

Iowa Code section 96.5(1)d provides:

An individual shall be disqualified for benefits:

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. But the individual shall not be disqualified if the department finds that:

The individual left employment because of illness, injury, or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury, or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.25 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.

Iowa Admin. Code r. 871-24.26(6)a provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

Separation because of illness, injury, or pregnancy. *Nonemployment related separation*. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

In this case, Ms. Rivera has met her burden and the employer has not. Ms. Rivera left employment due to illness upon advice of her doctor from May 5 through May 19. Ms. Rivera repeatedly offered to return to work after her recovery. Ms. Rivera expressed no intention of end the employment relationship. The employer did not participate in the hearing, and therefore, did not meet its burden to show that Ms. Rivera is disqualified for benefits. Benefits must be allowed.

DECISION:

The October 28, 2020, (reference 01) unemployment insurance decision is reversed. Ms. Rivera separation from employment was attributable to the employer. Benefits are allowed, provided she is otherwise eligible.

REMAND:

The issue of whether Ms. Rivera was overpaid regular unemployment benefits and Federal Pandemic Unemployment Compensation (FPUC) benefits for the weeks of May 9 and May 16 have not yet been investigated by the Benefits Bureau.



Daniel Zeno
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January 25, 2021
Decision Dated and Mailed

dz/mh