

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ORETHA SLEH

Claimant

APPEAL NO. 11A-UI-04484-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 02/13/11

Claimant: Appellant (2)

871 IAC 24.1(113)(a) - Layoff

STATEMENT OF THE CASE:

Oretha Sleh filed a timely appeal from the March 29, 2011, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was held on May 13, 2011. Ms. Sleh participated. Aureliano Diaz, Acting Human Resources Manager, represented the employer. Krahn-English interpreter Laura Solo assisted with the hearing. Exhibits One, Two, Three, and A through D were received into evidence.

ISSUE:

Whether Ms. Sleh separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Oretha Sleh was employed by Swift Pork Company/JBS as a full-time production worker from June 2009 and last performed work for the employer on November 13, 2010. Ms. Sleh's native language is Krahn and Ms. Sleh has very limited English skills. Toward the end of the employment, Ms. Sleh suffered from pain in her right leg. Ms. Sleh mentioned this to her immediate supervisor, who recommended that she seek medical evaluation and elevate her leg after her shift. On November 15, 2010, Ms. Sleh was admitted to Mercy Hospital in Des Moines and diagnosed with chronic lymphangitis. On November 15, 2010, Ms. Sleh notified JBS by telephone that she had been admitted to the hospital. A JBS representative documented this contact in a daily call-in log. The JBS representative told Ms. Sleh to bring a doctor's note when she was discharged from the hospital. Under JBS's attendance policy, Ms. Sleh was required to contact the employer once a week during an extended illness-based absence. The employer now considers Ms. Sleh's contact on November 15, 2010 sufficient to excuse her absences through Saturday, November 20, 2010. At the time of the absences, the employer documented the absence on November 15 and those that followed as no-call, no-show. Ms. Sleh's health condition is bacterial in nature and non-work related. Ms. Sleh was discharged from the hospital on November 19, 2010. The discharging physician directed Ms. Sleh to follow up with her primary care physician. The discharging physician had also provided Ms. Sleh with a

prescription for a diuretic. Ms. Sleh did not fill the prescription. Ms. Sleh went home and continued to be ill.

Within a week of being discharged from the hospital, Ms. Sleh made contact with the employer to indicate that she was still ill. A JBS representative told Ms. Sleh that she would need to bring medical documentation with her when she was able to return to work.

Ms. Sleh continued to believe that she was on an approved leave from the employment and that all she needed to do was to bring medical documentation with her when she was ready to return to the employment. Ms. Sleh intended to return to the employment once her health improved.

According to a partial discharge summary Ms. Sleh provided for the hearing, she made another trip to the hospital toward the end of November and was discharged on November 27 or 28, 2010. See Exhibit D.

On February 8, 2011, Ms. Sleh was seen at the Marshalltown Clinic and was released to return to light-duty work. Other aspects of the release document are less than clear. See Exhibit B. Thereafter, Ms. Sleh went to JBS with the medical release form. A JBS representative told Ms. Sleh that she no longer worked for the employer.

The employer documented no-call, no-show absences on November 15, 16, 17, 18, 19, 20, 22, 23, 25, 29, and 30, 2010. The employer documented a voluntary quit on December 1, 2010. The employer has a written no-call, no-show policy that deemed three days of no-call, no-show absence a voluntary quit. When Ms. Sleh underwent orientation to the employment, she did so without the assistance of a Krahn-Interpreter. Ms. Sleh was unable to read the written policies or fully understand the policies that were reviewed with her in English.

The employer's representative at the hearing, Aureliano Diaz, Acting Human Resources, has only been in the JBS Human Resources Department a short while and did not have any contact with Ms. Sleh during her employment.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of labor-saving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

Iowa Administrative Code section 871 IAC 24.22(2)(j) provides as follows:

- j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee–individual, and the individual is considered ineligible for benefits for the period.
- (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee–individual, the individual is considered laid off and eligible for benefits.
 - (2) If the employee–individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.
 - (3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer's representative at the hearing did not have contact with Ms. Sleh during her employment. The employer did not present testimony from anyone with personal knowledge of Ms. Sleh's employment. The language barrier impeded Ms. Sleh's ability to readily understand and follow the employer's written policies. The weight of the evidence fails to establish that the employer oriented Ms. Sleh to the employment in a way that she and the employer could be assured that Ms. Sleh understood the employer's written policies. The weight of the evidence establishes that Ms. Sleh reasonably believed that she was on an approved leave of absence from the time she went off work in mid-November 2010 until she attempted to return to the employment on or about February 9, 2011 only to learn that she no longer had a job. The weight of the evidence establishes that the employer ended the employment on December 1, 2010, at a time when Ms. Sleh still reasonably believed she was on an approved leave of absence. Pursuant to Iowa Administrative Code section 871 IAC 24.22(2)(j)(1), the administrative law judge concludes that the employer failed to reemploy Ms. Sleh at the end of an approved leave of absence. Ms. Sleh is deemed laid off and is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's March 29, 2011, reference 01, decision is reversed. The claimant was laid off effective December 1, 2010. Effective February 13, 2011, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs