

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DAVID J YOUNG
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 18A-UI-01313-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/31/17
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the January 18, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 21, 2018. Claimant participated. Employer participated through human resources manager Chelsea Cornelius. Employer Exhibit 1 was admitted into with no objection. Official notice was taken of the administrative record with no objection.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a production laborer from December 17, 2008, and was separated from employment on December 20, 2017, when he was discharged.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies, regardless of reason for the infraction. Employer Exhibit 1. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving ten points in a rolling twelve month period. Employer Exhibit 1. The employer requires employees contact the employer and report their absence at least thirty minutes prior to the start of their shift. Employer Exhibit 1. Employees are to call an automated call-in line and then can select from a series of options (sick, Family and Medical Leave Act

(FMLA) leave, business, other, injury, or leave of absence) as the reason for their absence. See Employer Exhibit 1. Claimant was aware of the employer's policy. Employer Exhibit 1.

The final incident occurred when claimant was absent from work on November 28, 2017. Claimant properly reported that he was absent on November 28, 2017 due to illness. After claimant's absence on November 28, 2017, he was at ten attendance points. Employer Exhibit 1. Claimant was then absent on November 29 and 30, 2017 and December 1, 4, and 5, 2017. Employer Exhibit 1. Claimant properly reported he these absences were due to illness. On December 6, 2017, claimant worked for an hour and a half before he then left due to a health/medical issue. The employer's nurse checked claimant's heart rate and determined it was too high for him to return to work. The employer's nurse informed claimant he was not allowed to return to work until his doctor cleared him to come back. The employer wheeled claimant out of the facility in a wheelchair and had called his wife to come pick him up. Claimant did not report back to work after December 6, 2017. Employer Exhibit 1. Claimant was absent on December 7, 8, 11, 12, 13, 14, 15, 18, 19, and 20, 2017. See Employer Exhibit 1. Claimant properly reported his absences were due to illness. During this time, claimant was seeing a doctor for his health issues. On December 20, 2017, claimant was at twenty-two attendance points and the employer mailed him a letter discharging him due to excessive absenteeism. Employer Exhibit 1. On December 28, 2017, claimant's doctor cleared him to return to work without restrictions.

On March 14, 2017, the employer gave claimant a first written warning for absenteeism. Employer Exhibit 1. Claimant refused to sign the written warning. Employer Exhibit 1. On June 29, 2017, the employer gave claimant a first written warning for absenteeism. Employer Exhibit 1. Claimant refused to sign the written warning. Employer Exhibit 1. On August 8, 2017, the employer gave claimant a second written warning for absenteeism. Employer Exhibit 1. Claimant refused to sign the written warning. Employer Exhibit 1. On October 25, 2017, the employer discharged claimant due to absenteeism; however, on November 3, 2017, the employer brought claimant back. Employer Exhibit 1. The employer reinstated claimant with full seniority and benefits in accordance with a reinstatement agreement. Employer Exhibit 1. The employer informed claimant he was reinstated with nine attendance points and he was warned that he faced termination from employment upon another incident of unexcused absenteeism. A majority of claimant's absences during 2017 were due to health issues, which he properly reported. Claimant also provided doctor's notes to the employer.

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.

Iowa Code section 96.5(2)a provides:

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

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 disqualification shall continue 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*. In the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 557-58 (Iowa Ct. App. 2007).

Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. 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.*, 743 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 employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant was absent or left early from the employer every scheduled work day from November 28, 2017 through December 20, 2017 due to a properly reported illness. Although the employer had warned claimant on November 3, 2017 that any further absences would result in discharge,

because his last absences (November 28, 2017 through December 20, 2017) were related to properly reported illness or other reasonable grounds, 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, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The January 18, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs