

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROSALINDA M TORRES
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 18A-UI-01979-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/14/18
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 31, 2018, (reference 01) unemployment insurance decision that allowed benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on March 9, 2018. Claimant did not register for the hearing and did not participate. Employer participated through assistant human resources manager Emily Pottorff. Employer's Exhibit 1 was received.

ISSUES:

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 began working for employer on May 2, 2012. Claimant last worked as a full-time general laborer. Claimant was separated from employment on January 10, 2018, when she was terminated.

Employer has an attendance policy stating employees will be terminated if they accrue nine attendance points in 12 months. Claimant was aware of the policy.

Claimant had numerous absences during her last years of employment. By May 2017, claimant had accrued 15.5 points. Claimant was put on a "Last Chance Agreement." Claimant's points were reset to eight, and she was instructed that any further attendance infractions would lead to immediate termination.

Claimant then had a no-call/no-show absence on June 28, 2017. Claimant had a no-call/no-show absence on July 31, 2017. Claimant was absent due to illness from August 7 through 12,

2017. Claimant was absent due to illness on September 9, 2017. Claimant left work early on October 20, 2017. Claimant was absent due to illness on November 27, 2017. Claimant was absent due to illness on December 2, 7, 9, 26, and 30, 2017. On January 6, 2018, claimant was absent from work. Claimant reported the absence as a “personal day.” By this time, claimant had accrued 30 attendance points.

Claimant’s supervisor was aware of these absences, but employer took no action until it terminated her employment on January 10, 2018.

Employer gave claimant no further discipline between May 2017 and her termination in January 2018.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant’s employment. Iowa Code § 96.5(2)a. 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).

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 term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” *Higgins v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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. Absences due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra. However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991). The

second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

Here, employer terminated claimant for excessive attendance issues. While an employer's absenteeism policy is not dispositive of the issue of qualification for benefits, the employer did not follow its own policy by waiting until January 2018 to terminate claimant. According to the terms of the policy, claimant should have been terminated long ago. Instead, employer allowed claimant to have continued absenteeism issues with no apparent consequences. Although claimant was put on a last chance agreement in May 2017, she continued to have significant attendance problems, which included no-call/no-show absences, during the seven following months. Claimant was allowed to continue working without being disciplined. In summary, employer acquiesced to claimant's poor conduct and claimant reasonably believed her poor conduct would be allowed to continue. Employer failed to establish it terminated claimant for misconduct because of its own inaction toward claimant's poor conduct throughout her employment.

Because claimant is qualified to receive benefits, the issues regarding overpayment are moot and will not be discussed further.

DECISION:

The January 31, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Christine A. Louis
Administrative Law Judge
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Decision Dated and Mailed

cal/scn