

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

EVERARDO TORRES
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 18A-UI-03102-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/18/18
Claimant: Appellant (2R)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 5, 2018, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant voluntarily quit by failing to come to work for three consecutive shifts and failing to report his absences to the employer. The parties were properly notified of the hearing. A telephone hearing was held on April 5, 2018. The claimant, Everardo Torres, participated and was represented by Aron Vaughn, Attorney at Law. The employer, Swift Pork Company, participated through Nicolas Aguirre, Human Resources Director. Claimant's Exhibit A and Employer's Exhibits 1, 2, and 3 were received and admitted into the record without objection. Spanish/English interpreter Alex (ID number 11184) from CTS Language Link assisted with the hearing.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time, most recently as a general laborer, from May 7, 2008 until February 15, 2018, when he was discharged.

The procedure for taking vacation time is to get approval from a supervisor, who then completes paperwork and submits it to management. Claimant had followed this procedure in the past throughout his employment. On February 12, claimant talked to his supervisor, Matt Probasco, about a last-minute vacation request. Claimant's mother was ill and he needed to travel out-of-state to assist her. Claimant asked Probasco if he could take a week of vacation beginning the following day. Probasco told him that he could take one week of vacation and indicated he would complete the necessary paperwork for this vacation request. Probasco then directed claimant to speak with Human Resources, as there may be other leave options available for claimant if he needed an extended absence beyond just one week.

Claimant went to Human Resources and spoke to Aguirre. When they spoke, claimant indicated his supervisor had approved his vacation request. Aguirre found this strange, because if the vacation request had been approved then there would be no need for him to speak to Human Resources about anything. Aguirre told claimant that he may be able to use FMLA leave for this absence. Claimant had used FMLA leave in the past, and he was aware of the process. The employer did not receive any paperwork from claimant or Probasco approving claimant's use of vacation time for February 2018.

On Monday, March 26, the employer held a meeting regarding a grievance claimant filed. As a result of this meeting, claimant was approved for reinstatement to employment and he was given the opportunity to return to work. The employer offered claimant his choice of either (1) his former job on third shift or (2) a similar job on first shift. Claimant did not respond to the offer to return to employment.

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 § 96.5(2)a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

Excessive absences are not considered misconduct unless unexcused. 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*, 321 N.W.2d at 6; *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*, 734 N.W.2d at 554. 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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses

who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant's testimony more credible than the employer's testimony.

In this case, claimant requested and received approval for a short-notice vacation to care for his mother. The fact that Probasco failed to submit the proper paperwork to excuse claimant's absence is not claimant's fault. The employer did not produce Probasco to contradict claimant's testimony, and the administrative law judge found claimant credible. Claimant was discharged immediately upon his return from his vacation. The employer has not established that claimant was discharged for any disqualifying reason. Benefits are allowed, provided he is otherwise eligible. This matter will be remanded to determine whether claimant refused a suitable offer of work.

DECISION:

The March 5, 2018, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

REMAND:

The issue of whether claimant refused a suitable offer of work, as delineated in the Findings of Fact, is remanded to the Benefits Bureau of Iowa Workforce Development for initial investigation and determination.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn