

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RONDA L LARSONCHESICK
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 18A-UI-06876-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 05/20/18
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Admin. Code r. 871-24(10) – Employer participating in Fact-Finding Interview

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the June 13, 2018 (reference 01) unemployment insurance decision that allowed unemployment insurance benefits to the claimant. The parties were properly notified of the hearing. A telephone hearing was held on July 11, 2018. The claimant, Ronda L. Larsonchesick, participated personally and was represented by attorney Leonard Bates. The employer, Swift Pork Company, participated through witness Vicky Cervantes. Claimant's Exhibits A through G were admitted. Employer's Exhibits 1 through 8 were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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 clerk. She was employed from October 1, 2012 until May 25, 2018. Her job duties included data entry. Claimant's immediate supervisor was Joyce Blelai.

The employer has a written policy in place regarding absenteeism. Employees accrue points for absences, unless they are approved for a leave of absence. Once an employee reaches a certain number of points, they are subject to discharge. The employer has a written policy in place requiring employees to report that they will be absent from a scheduled shift at least thirty minutes prior to the start time of the employee's scheduled shift by calling the attendance hotline.

Claimant was absent from her scheduled work shifts April 30, 2018 through May 18, 2018 due to her travelling out of the State of Iowa to undergo surgery for a personal injury. Claimant travelled to Oklahoma on April 30, 2018. Claimant attended pre-operation testing on May 1, 2018 and May 2, 2018 in Oklahoma. Claimant underwent surgery on May 3, 2018. Claimant properly reported her absences to the employer pursuant to the written policy for each shift she was absent during this period, except April 30, 2018 when she called in late to the attendance hotline.

On March 15, 2018, claimant had notified her direct supervisor, Ms. Blelai, that she would be traveling to Oklahoma for her surgery after her vacation ended. See Exhibit B. On May 8, 2018, claimant's physician faxed Family and Medical Leave Act ("FMLA") paperwork to the employer for processing. See Exhibit D. The paperwork was not processed by the employer.

On May 1, 2018, claimant sent a text message to her direct supervisor advising her that she would be off work until May 21, 2018 due to her surgery. See Exhibit F. On May 4, 2018, claimant sent a text message to her direct supervisor advising her that her surgery went well and that she could return to work on May 21, 2018. See Exhibit F. Her supervisor responded "ok". See Exhibit F.

Claimant was absent from her scheduled work shift on February 23, 2018 due to personal illness. She did properly report this absence. Claimant was absent from work May 27, 2017 through August 18, 2017 due to a personal injury to her back. She did properly report her absences to her employer during this period, except for July 25, 2017, when she was late in calling the attendance hotline.

Claimant received written discipline on June 8, 2016 and August 22, 2017 regarding her absences from work. See Exhibits 5 and 8. The August 22, 2017 discipline was a last chance contract regarding her attendance. See Exhibit 5. Under the agreement, claimant was not able to be absent from work for the next three months without prior approval from management. See Exhibit 5. Claimant completed the agreement and was not absent from work for three months without prior approval. No additional discipline was given to claimant after the August 22, 2017 last chance contract.

Claimant has received unemployment insurance benefits of \$2,682.00 between May 20, 2018 and July 7, 2018. Employer did participate in the initial fact-finding interview.

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. 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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. 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. *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. *Id.* at 558.

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*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

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. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

In this case, the claimant properly reported all of her absences except April 30, 2018 and July 25, 2017. The absences on April 30, 2018 through May 2, 2018 were directly related to her personal injury and were necessary absences for the purpose of attending her surgery in Oklahoma. As such, for the purposes of unemployment insurance benefits, claimant had two unexcused absences from work during this year-long period. Two unexcused absences in one year is not considered excessive.

The employer has failed to establish that the claimant was discharged for job-related misconduct which would disqualify her from receiving benefits. Benefits are allowed. Because benefits are allowed, the issue of overpayment is moot. The employer's account may be charged for benefits paid.

DECISION:

The June 13, 2018 (reference 01) unemployment insurance decision allowing benefits is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs