IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DRISS KHALDOUN Claimant **SWIFT PORK COMPANY** Employer	**APPEAL 18A-UI-01314-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/13/17** **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 generalist Jennifer Glosser. Official notice was taken of the administrative record with no objection.

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 was employed full-time as a production worker from May 5, 2003, and was separated from employment on December 30, 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. 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. The employer requires employees contact the employer and report their absence at least thirty minutes prior to the start of their shift. Employees are to call an automated call-in line and then can select from a series of options (sick, FMLA leave, injury, or leave of absence). Claimant was aware of the employer's policy.

On October 23, 2017, claimant informed the employer that his mother was very sick in Africa. Claimant told the employer he needed to leave on October 25, 2017. Claimant also informed the employer he wanted to apply for Family and Medical Leave Act (FMLA) leave to cover his

absences. The employer informed claimant he needed to report his absences on every Monday while he was absent. Claimant told the employer he would be absent for five weeks.

On October 25, 2017, claimant left work early. After claimant left on October 25, 2017, he properly reported his absences due to FMLA leave. The employer considered claimant to have properly reported his absences even though the employer had not yet approved his FMLA leave. The employer received an e-mail around November 9, 2017 containing pictures of claimant's completed FMLA leave paperwork. The FMLA leave paperwork claimant provided to the employer was written in French; the doctor treating claimant's mother only spoke French.

Claimant denied receiving a written tenth point warning for absenteeism on November 29, 2017. Ms. Glosser testified claimant returned to work for the employer on November 30, 2017. After claimant returned to work on November 30, 2017, he provided the employer with the doctor's paperwork, which was in French. Claimant testified that the employer did not demand he provide the paperwork in English. The employer looked for someone to translate the paperwork from French to English. Claimant testified that another employee told him that the employee had translated claimant's paperwork for the employer. Ms. Glosser testified she met with claimant at some point after he returned to work and requested he provide the FMLA leave paperwork in English. Ms. Glosser testified she was not sure when this meeting took place. Ms. Glosser testified that during the meeting, she told claimant that the employer was unable to translate the paperwork. Claimant told the employer that his mother's doctor was unwilling to translate the paperwork. Ms. Glosser requested claimant to find someone to translate the paperwork. Ms. Glosser did not give claimant a deadline to get the paperwork translated to English.

On December 30, 2017, human resources supervisor Rogelio Bahena met with claimant. Mr. Bahena told claimant that his FMLA leave paperwork was in French and the employer did not understand French. Mr. Bahena asked claimant to translate the FMLA leave paperwork into English. Claimant told the employer that the FMLA leave was because his mom was sick. Claimant testified that the employer did not tell him he was going to be discharged if he did not translate the paperwork to English. Claimant did not provide the FMLA leave paperwork in English and on December 30, 2017, the employer discharged claimant due to absenteeism.

Ms. Glosser testified that on November 29, 2017, the employer gave claimant a tenth point warning for absenteeism. Claimant denied receiving this warning. Ms. Glosser testified that claimant was not discharged on November 29, 2017 because he had a pending FMLA leave request. Claimant was also issued written warnings for his attendance infractions on July 6, 2017 and April 8, 2017. Claimant properly reported his absences, but the employer gave him attendance points on: February 17, 2017 (sick), March 1, 2017 (injury), March 13, 2017 (injury), March 18, 2017 (injury), April 4, 2017 (injury), April 8, 2017 (injury), May 16, 2017 (injury), July 6, 2017 (injury), August 11, 2017 (injury), and October 25, 2017.

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.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events. It is noted that Ms. Glosser testified claimant was given a written warning for absenteeism on November 29, 2017, even though she had earlier testified he did not return to work until November 30, 2017.

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(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(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 an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the incident under its policy. 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 question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

Prior to October 25, 2017, the majority of claimant's attendance points were assessed due to illness or injury, which are not considered unexcused. On October 23, 2017, claimant informed the employer he needed to use FMLA leave because his mother was very sick in Africa. On October 25, 2017, claimant left to be with his mother. Claimant had his mother's doctor fill out his FMLA leave paperwork. Claimant provided the employer with his FMLA leave paperwork to cover his absences from October 25, 2017 until the returned to work (November 30, 2017), but the paperwork was written in French. After claimant returned to work, he had conversations with the employer about his FMLA paperwork being in French. Claimant credibly testified that although the employer requested the FMLA paperwork to be translated to English, he was never warned by the employer that his job was in jeopardy if he did not get the paperwork translated to English. Claimant also credibly testified his mother's doctor only spoke French. Claimant further credibly testified that he did inform the employer the reason for his FMLA leave request was due to his mothers' illness.

The conduct for which claimant was discharged (not providing a translated copy of his FMLA leave paperwork) was a merely an isolated incident of poor judgment or a misunderstanding. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met its burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. The employer has not met its burden of proof to establish misconduct. 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.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs