

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

ROSALVA OCHOA
Claimant

APPEAL NO: 12A-UI-02411-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 01-15-12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 1, 2012, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 27, 2012. The claimant participated in the hearing with Interpreter Ike Rocha. Aureliano Diaz, human resources generalist, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time production worker for Swift Pork Company from September 10, 2007 to January 11, 2012. She was discharged from employment due to a final incident of absenteeism that occurred on January 9, 2002. The employer uses a no-fault, occurrence-based attendance policy. Employees are assessed one point for a properly reported absence, one point for a properly reported absence of more than one consecutive day, two points if they fail to call in at least 30 minutes before the start of their shift, and two points for a no-call, no-show absence. Employees are discharged upon reaching ten occurrences during a rolling calendar year. The claimant was absent due to properly reported illness September 26, 2011, and received one occurrence; December 16 and 17, 2011, and received one occurrence; December 16, 2011, and received one occurrence; and December 27, 2011, and received one occurrence. The claimant was absent due to illness December 20, 2011, but called in twenty minutes late and received two occurrences; she was absent due to illness January 4, 2012, but called in one hour and nine minutes late and received two occurrences; she was absent due to illness January 5, 2012, but called in 17 minutes late and received two occurrences; she was absent due to illness January 6, 2012, but called in 43 minutes late and received two occurrences; she was absent due to illness January 7, 2012, but called in 22 minutes late and received two occurrences; and was listed as a no-call, no-show January 9, 2012, and received two occurrences for a total of 15 occurrences. The claimant denies that she

was a no-call no-show January 9, 2012. She had not worked since December 16, 2011, because she was ill and had a doctor's excuse but the employer still requires employees to call in daily. The employer's policy states that employees will receive a written warning upon reaching five occurrences and another written warning upon reaching eight points. The claimant did not receive those warnings because she was not at work anytime after her second occurrence.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

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.

Iowa Code section 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.

871 IAC 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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While five of the claimant's last 15 occurrences were not properly reported, according to the employer's attendance policy, they were consecutive absences and covered by a doctor's excuse. She called in late, but before the start of her shift, December 20, 2011, and January 5, 6 and 7, 2012. She called in one hour and nine minutes late January 4, 2012. The claimant credibly testified she called in to report her absence January 9, 2012, and was not a no-call, no-show. Although it is not unreasonable for the employer to expect employees to call in to report an absence at least 30 minutes before the start of their shift, in this case the employer had notice of the claimant's absences because she provided a doctor's excuse for her illness and, while not at least 30 minutes before the start of her shift, she did call. Additionally, the employer did not have a chance to warn the claimant about her number of occurrences, because she was absent due to illness. Because the final absence was related to reported illness, and no warnings were issued, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

DECISION:

The March 1, 2012, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw