

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NAJAT LAZAR
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 16A-UI-09049-CL

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/24/16
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 15, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a discharge for misconduct. The parties were properly notified about the hearing. A hearing was held in Ottumwa, Iowa on October 17, 2016. Claimant participated personally and through interpreter Belaid Hiyani. Claimant was represented by attorney Philip Miller. Employer did not participate. Claimant's Exhibits A through D were received. Official notice was taken of the administrative record, including the documents submitted by employer for the fact finding interview.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on June 4, 2008. Claimant last worked as a membrane skinner. Claimant was separated from employment on July 26, 2016, when she was terminated.

Employer has a policy stating employees who incur 10 attendance points will be terminated. Employer has a policy requiring employees to report absences to an attendance hotline. Claimant was aware of the policy.

Claimant's sister, Fatima Lazar, also works for employer. Fatima Lazar filed a work injury report in December 2015. The general foreman was upset about Fatima Lazar filing a work injury report and tried to discourage her from doing so. Fatima Lazar reported the injury to the human resource department and also reported that the foreman was engaging in intimidating conduct.

Claimant's husband also works for employer. After Fatima Lazar filed a report of work injury, the general foreman spoke about the issue with claimant's husband and questioned Fatima Lazar's actions. Claimant's husband stated he did not want to be involved in the matter.

Soon thereafter, the general foreman began treating claimant and her sister poorly. When claimant walked into a meeting, the general foreman gave her a look of disgust in front of a group of people. It made claimant feel unwelcome. The general foreman gave claimant looks of disgust when encountering her in the hallway and in the cafeteria. In group settings, the foreman spoke with everyone but claimant. The foreman set work in front of claimant with small errors for her to fix without speaking to her. The foreman did not treat other employees the same way. The general foreman assigned claimant to do extra work instead of sending employees with less seniority in violation of company practice. Employees commonly used a hand gesture to request permission to use the restroom due to the noise of the plant. On one occasion, claimant asked twice to use the restroom but the general foreman intentionally ignored her.

Claimant tried twice to bid out of the job, but she did not get the position either time.

Sometime in the end of June 2016, claimant reported the general foreman's conduct to the human resource department. The human resource department investigated, but found the allegations unsubstantiated. The claimant explained she had been missing work due to the stress of the situation. The employer was not willing to transfer claimant to a position or shift where she would not be required to work with the general foreman.

By July 12, 2016, claimant had incurred nine attendance points. Employer had talked to claimant about her attendance points and she knew her job was in jeopardy.

Claimant felt depressed and anxious. Claimant could not sleep at night, and felt very weak as a result. Claimant never felt this way before she began having problems with the general foreman.

On July 23, 2016, claimant was absent from work due to the stress she was experiencing in the work place. The absence was properly reported.

On July 26, 2016, employer terminated claimant for excessive absenteeism.

After her separation from employment, claimant went to a doctor and was diagnosed with a mental health condition and was prescribed medicine. Claimant had never been diagnosed with a mental health condition prior to the situation with the general foreman.

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.

An employer’s no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. In this case, claimant experienced stress-related symptoms after working in a hostile environment for six months. Claimant informed the employer that she felt she was being mistreated and was missing work as a result of stress she underwent due to the mistreatment. Employer took no actions to remove claimant from the situation. Thus, claimant was absent from work on July 23, 2016, as a result of the stress. In this situation, the last absence was for reasonable grounds and is considered excused for purposes of unemployment law.

Because her last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined.

DECISION:

The August 15, 2016, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

Christine A. Louis
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Decision Dated and Mailed

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