

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRAYAN N DIAZ
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 22A-UI-07314-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 02/20/22
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Interview

STATEMENT OF THE CASE:

Swift Pork Company., the employer/appellant, filed an appeal from the March 11, 2022, (reference 01) unemployment insurance (UI) decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on May 4, 2022. The employer participated through Jennifer Glosser, training and development manager. Tim Ash, human resources manager and Yolanda Magana, human resources generalist observed the hearing. Mr. Diaz did not participate in the hearing. The administrative law judge took official notice of the administrative record. Employer's Exhibit 1 was admitted as evidence.

ISSUE:

Did the employer discharge Mr. Diaz from employment for disqualifying job-related misconduct?
Was Mr. Diaz overpaid benefits?
If so, should he repay the benefits?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Mr. Diaz began working for the employer on February 3, 2021. He worked as a full-time general production worker. His employment ended on February 24, 2022.

The employer uses a rolling calendar year attendance point system. The employer issues warnings to employees who accrue six points and eight points. If an employee accrues ten points, the employee is up for termination review.

The employer gave Mr. Diaz a first warning on April 22, 2021 for accruing 6.5 points. The employer gave Mr. Diaz a second warning on June 10, 2021 for accruing 8 points. The employer gave Mr. Diaz a final warning on August 14, 2021 for accruing 10 points. Mr. Diaz was either absent or tardy numerous times after the August 14 warning.

Mr. Diaz called in sick on Monday, February 21, 2022 and gave the employer a doctor's note for that absence. Mr. Diaz attended work on Tuesday, February 22. On Wednesday, February 23, the employer called Mr. Diaz into the office and terminated his employment for attendance issues.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer discharged Mr. Diaz 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(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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(7) and (8) provide:

(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.

(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.

The purpose of subrule eight is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises.

The employer has the burden of proof in establishing disqualifying job misconduct. *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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Excessive absences are not considered misconduct unless unexcused. The requirements for a finding of misconduct based on absences are 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d 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*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 9; *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. See *Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id.*; see also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). 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.

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 impose discipline up to or including discharge for the incident under its policy.

In this case, Mr. Diaz's February 21 absence was for a reasonable ground – illness. Mr. Diaz properly reported the absences and provide the employer with a doctor's note. Therefore, this absence is excused and do not constitute misconduct.

Even if Mr. Diaz's numerous absences and incidents of tardiness after the August 14 final warning were unexcused, the most recent incident leading to Mr. Diaz's discharge must be a current act of misconduct to disqualify him from receiving benefits. In this case, the most recent act for which Mr. Diaz was discharged was for calling in sick on February 21. This is not misconduct. The employer has failed to meet its burden of proof in establishing disqualifying job-related misconduct. Benefits are allowed.

Since Mr. Diaz is eligible for benefits, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The March 11, 2022, (reference 01) unemployment insurance decision is AFFIRMED. Mr. Diaz 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.



Daniel Zeno
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May 27, 2022
Decision Dated and Mailed

dz/kmj