

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARIAH S CERVERA
Claimant

APPEAL NO. 16A-UI-09784-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 08/1416
Claimant: Respondent (5)

Iowa Code section 96.5(1)(c) – Absence to Care for Sick Family Member

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 29, 2016, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on a July 21, 2016 separation. The decision referenced a layoff, but also referenced an administrative code rule pertaining to discharges. After due notice was issued, a hearing was held on September 23, 2016. Claimant Mariah Cervera participated. Martha Gutierrez, Human Resources Manager, represented the employer. Spanish-English interpreter Luis Ruiz assisted with the hearing. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant, which record reflects that no benefits have been disbursed to the claimant in connection with her claim. Exhibits One through Nine were received into evidence.

ISSUE:

Whether Ms. Cervera separated from the employment for a reason that disqualifies her for benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mariah Cervera was employed by Swift Pork Company as a full-time pork production worker from 2001 and last performed work for the employer on or about June 6, 2016. The employer's became JBS in February 2016. Ms. Cervera's work hours were 2:15 p.m. to 1:30 a.m., Monday through Friday and some Saturdays. Ms. Cervera's immediate supervisor was Ramon Huerto. Ms. Cervera is from Mexico and is a Spanish-speaking person. Ms. Cervera lived in Ottumwa during the employment. On June 6, 2016, Ms. Cervera left her home in Ottumwa and drove for Mexico to assist in caring for her elderly and mentally ill mother. Ms. Cervera's mother suffers from depression and was at the time actively engaging in self-injurious behavior. Specifically, Ms. Cervera's mother has a pacemaker and had to be restrained to keep her from attempting to remove the pacemaker from her chest wall. Ms. Cervera's sister resides in Mexico and ordinarily cared for their mother. It was necessary for Ms. Cervera to travel to Mexico to assist her mother's care because Ms. Cervera's sister was dealing with her own serious health issues.

Before Ms. Cervera left for Mexico, she spoke with a representative in the employer's human resources office regarding her need to travel to Mexico. That representative provided Ms. Cervera with FMLA leave paperwork that set forth a June 18, 2016 return to work date. The representative also provided Ms. Cervera with a phone number that Ms. Cervera understood to be a number she should call if she had any questions about the FMLA paperwork. The phone number was in fact the fax number that Ms. Cervera was supposed to use to fax the completed paperwork from Mexico to the employer.

After Ms. Cervera traveled to Mexico, she was preoccupied with, and often overwhelmed with, caring for her ill mother. While Ms. Cervera was away from the employment, she called in to properly report some of her absences and either did not call in for or did not otherwise properly report other absences. If Ms. Cervera needed to be absent from work, the employer's attendance policy required that Ms. Cervera call the designated absence reporting line at least 30 minutes prior to the scheduled start of her shift. Ms. Cervera was aware of the attendance policy. The automated system would require Ms. Cervera to select a reason for the absence. All of Ms. Absences for the period of June 5, 2016 through about August 19, 2016 were attributable to Ms. Cervera's need to care for her ill mother. Ms. Cervera's absence on August 20, 2016 was attributable to her need to drive from Mexico to Iowa.

Ms. Cervera did not return the FMLA paperwork to the employer. Ms. Cervera believed the paperwork to be defective because it contained a June 18, 2016 return to work date. Ms. Cervera attempted to use the phone number the human resources representative had provided to contact the human resources department and discovered the number was for a fax line.

Ms. Cervera returned to Ottumwa on July 21, 2016 and appeared for work on that day. Ms. Cervera attempted to obtain a second set of FMLA paperwork that would reference a July 21, 2016 return to work date. Shortly after Ms. Cervera arrived at the workplace on July 21, the employer told her she was discharged for accruing too many attendance points.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

Iowa Code § 96.5-1-c provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:

c. The individual left employment for the necessary and sole purpose of taking care of a member of the individual's immediate family who was then injured or ill, and if after said member of the family sufficiently recovered, the individual immediately returned to and offered the individual's services to the individual's employer, provided, however, that during such period the individual did not accept any other employment.

The weight of the evidence establishes that on or about June 6, 2016, Ms. Cervera voluntarily left the employment for the necessary and sole purpose of taking care of her ill mother. When Ms. Cervera's sister had recovered sufficiently from her own illness so that she could recommence primary care of Ms. Cervera's mother, Ms. Cervera returned to the employer to offer her services. Rather than allow Ms. Cervera to return to work, the employer elected to sever the employment relationship. The employer knew in advance the basis for the absence from the employment. The claimant did not accept any other employment during her absence.

Because the employer declined to re-employ the claimant after the claimant's absence to care for a sick member of her immediate family, the claimant is eligible for benefits, provided she is otherwise eligible and the employer's account may be charged for benefits.

DECISION:

The August 29, 2016, reference 01, decision is modified as follows. The claimant voluntarily separated from the employment effective June 6, 2016 for the necessary and sole purpose of caring for a sick immediate family member. The claimant immediately returned to the employment and offered her services once another family member was able to care for the sick immediate family member. The claimant did not accept employment during her absence. The employer declined to provide further employment and instead elected to sever the employment relationship. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs