

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

MAJOK R PHILIP
Claimant

APPEAL NO. 18A-UI-04751-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 03/25/18
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 13, 2018, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant's March 20, 2018 discharge was not based on a current act of misconduct. After due notice was issued, a hearing was held on May 9, 2018. Claimant Majok Philip participated. Emily Pottorf represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant in connection with the March 25, 2018 original claim. Exhibits 1 through 7 were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Majok Philip was employed by Swift Pork Company, a/k/a JBS, as a full-time hog production worker from 2016 until March 20, 2018, when Emily Pottorf, Assistant Human Resources Manager, discharged him from the employment for attendance. Mr. Philip's usual work hours were 3:30 p.m. to 1:00 a.m., Monday through Saturday. Gama Koudi is supervisor on the Ham Line and was Mr. Philip's immediate supervisor. Mr. Philip resides in Des Moines. The workplace is in Marshalltown. Mr. Philip was responsible for his transportation to and from work. Mr. Philip commuted to the workplace by obtaining a ride with coworkers.

The final absence that triggered the discharge occurred on Monday, March 19, 2018, when Mr. Philip was absent from work because his ride did not appear. Mr. Philip did not notify the employer of need to be absent from the employment.

If Mr. Philip needed to be absent from or late for a shift, the employer's attendance policy required that Mr. Philip telephone the designated absence reporting number at least 30 minutes prior to the scheduled start of his shift and leave a message with his name, his ID number, his department, and the reason for the absence. The employer reviewed the policy with Mr. Philip at the start of his employment. Mr. Philip was aware of the absence reporting requirement at all relevant times.

The employer considered Mr. Philip's attendance record for the preceding 12-month period when making the decision to discharge him from the employment. The earliest absence the employer considered was on March 27, 2017, when Mr. Philip was absent for personal reasons and provided late notice. On April 15, 17, 18 and 19, 2017, Mr. Philip was absent due to illness and properly reported the absences. On May 27, 2017, Mr. Philip was absent without notifying the employer. On June 2, 2017, Mr. Philip was late for work for personal reasons. On June 3 and 5, 2017, Mr. Philip was absent without notifying the employer. On July 20 and 21 2017, Mr. Philip was absent for personal reasons and provided proper notice. On August 21 and 22, 2017, Mr. Philip was absent without notifying the employer. On October 23 and November 27, 2017, Mr. Philip was absent due to illness and properly notified the employer. On December 15, 2017, Mr. Philip was absent without notifying the employer. On December 16, 2017, Mr. Philip was absent due to the need to care for a sick family member and provided proper notice to the employer. On December 23, 2017, M. Philip was absent due to illness and properly notified the employer. On January 2, 2018, Mr. Philip was absent for personal reasons and properly notified the employer. A few days earlier, Mr. Philip had traveled to visit family members in Kansas City. Mr. Philip elected not to return to Iowa in time to report for his January 2 shift. On January 19, 2018, Mr. Philip was late getting to work because he needed to collect his six-year-old son from school. Mr. Philip's cousin would ordinarily transport the child to and from school, but was not available to transport the child home that day. Mr. Philip properly reported the absence. On January 20, 2018, Mr. Philip was absent due to illness and properly notified the employer. On February 17, February 24, and March 5, 2018, Mr. Philip was absent without notifying the employer. On March 6, 2018, Mr. Philip was absent from work so that he could drive his wife to their son's parent-teacher conference and properly notified the employer of the absence. Mr. Philip had requested the time off in advance, but his supervisor denied the request due to business needs. On March 8, 2018, Mr. Philip was absent for personal reasons and properly notified the employer. On March 10, Mr. Philip was absent for personal reasons and without notifying the employer. On March 17, Mr. Philip showed up for work insufficiently rested due to socializing and still feeling the effects of the alcohol he consumed that morning. Mr. Philip reported to a supervisor that he could not safely operate a forklift and requested to go home. The employer allowed Mr. Philip to leave prior to the scheduled start of his shift.

The employer's attendance policy states that an employee is subject to discharge once he incurs nine attendance points in a rolling 12-month period. With the absence on March 19, 2018, Mr. Philip had incurred 42 attendance points in the rolling 12-month period. Despite the significant number of absences, the employer had not issued any warnings or reprimands to Mr. Philips in connection with the absences. Mr. Philip's supervisor valued Mr. Philip as a hard worker and elected not to notify the human resources department of Mr. Philip's absences until the circumstances on March 17 necessitated involvement of human resources personnel.

Though the employer's stated reason for discharging Mr. Philip from the employment was excessive absenteeism, the employer also considered Mr. Philip's refusal on March 19, 2018 of

the employer's offer of assistance to address what the employer believed to be an alcohol abuse issue. The employer suspected that alcohol issues contributed to the ongoing attendance issues. Before Mr. Philip left work on March 17, 2018, a supervisor directed him to report to the human resources office prior to his shift on Monday, March 19, 2018. Mr. Philip missed that meeting, but met with the employer the following day. At that time, Mr. Philip denied he had a problem with alcohol and declined the employer's offer that he commence a 60-day leave during which time he would participate in substance abuse evaluation and treatment. Had Mr. Philip accepted the employer's offer of assistance, the employer planned to have Mr. Philip return to work on a last chance agreement at the end of the leave of absence. When Mr. Philip declined assistance, the employer moved forward with discharging him based on his accrual of attendance points.

Mr. Philip established a claim for unemployment insurance benefits that was effective March 25, 2018, but has not received benefits in connection with the claim.

REASONING AND CONCLUSIONS OF LAW:

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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The evidence in the record establishes a discharge on March 20, 2018 for misconduct in connection with the employment based on excessive unexcused absences. The evidence establishes unexcused absences in 2017 on March 27, May 27, June 2, 3, and 5, July 20 and 21, August 21 and 22, and December 15. The evidence establishes unexcused absences in 2018 on January 2 and 19, February 17 and 24, March 5, 6, 8, 10, 17, and 19. Many of these absences were no-call/no-show absences. Mr. Philip's excessive unexcused absences were sufficient to demonstrate an intentional and substantial disregard of the employer's interests and constituted misconduct in connection with the employment, even in the absence of reprimand. Mr. Philip is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Philip must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

Because no benefits have been disbursed in connection with the claim, there is no overpayment of benefits to address in the present decision.

DECISION:

The April 13, 2018, reference 01, decision is reversed. The claimant was discharged on March 20, 2018 for misconduct in connection with the employment based on excessive unexcused absences. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs