

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**FERNANDO CAMPUZANO**  
Claimant

**APPEAL NO. 17A-UI-12386-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HORMEL FOODS CORPORATION**  
Employer

**OC: 11/12/17  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Fernando Campuzano filed an appeal from the December 1, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the Benefit Bureau deputy's conclusion that Mr. Campuzano was discharged on November 12, 2017 due to excessive unexcused absences. After due notice was issued, a hearing was held on January 2, 2018. Claimant Fernando Campuzano participated and waived formal notice of the hearing. Diana Perry-Lehr of Employers Unity represented the employer and presented testimony through Elvia Rodriguez. Exhibit A was received into evidence. The administrative law judge took official notice of the fact-finding materials and labeled those materials as Department Exhibits D-1 through D-9.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Fernando Campuzano was employed by Hormel Foods Corporation on a full-time basis from July 2015 until November 15, 2017, when Elvia Rodriguez, Human Resources Manager, discharged him for attendance. At the start of the employment, the employer provided Mr. Campuzano with a copy of the employer's written Absenteeism Policy and Points System. The employer reviewed the policy with Mr. Campuzano as part of the orientation process. Under the policy, Mr. Campuzano was assigned 11 attendance points at the start of the employment, would lose a half point or full point for absences that were not preapproved by the employer, and would be subject to discharge once he reached a zero balance of attendance points. Under the policy, Mr. Campuzano could gain half an attendance point through 30 days of perfect attendance. Under the policy, Mr. Campuzano was required to call the designated absence reporting number at least 30 minutes prior to the scheduled start of his shift if he needed to be absent or late. If Mr. Campuzano needed to leave work early, the employer required that he speak with a supervisor before leaving the workplace. The employer subtracted from the attendance points

in connection with the early departure unless it had been prearranged and preapproved. Mr. Campuzano was well aware of the attendance policy.

The final absence that triggered the discharge occurred on November 10, 2017, when Mr. Campuzano was 41 minutes late for his 7:00 p.m. shift because he had gone to bed late and overslept. Mr. Campuzano called the employer at 7:20 p.m. to report that he had not gone to bed until 1:00 p.m. and had overslept.

Mr. Campuzano attributes his late arrival on November 10, 2017 and several earlier absences to events that occurred in 2016. Mr. Campuzano asserts that his former girlfriend, who is the mother of Mr. Campuzano's minor children, was sexually assaulted in May 2016 and in July 2016. Mr. Campuzano asserts that his former girlfriend suffers flashbacks that include suicidal ideation and that render her incapable of caring for the couple's children, aged seven, five and four. Mr. Campuzano asserts that his four-year-old son witnessed one of the sexual assaults and suffers anxiety attacks related to the trauma. Mr. Campuzano advises that his son does not receive any type of psychological counseling. On July 31, 2016, Mr. Campuzano consumed alcohol to the point of intoxication, operated a motor vehicle under the influence of alcohol, and crashed his car. Mr. Campuzano asserts that his actions were part of an attempted suicide. Following the crash, Mr. Campuzano was hospitalized for 72 hours, during which time he was evaluated by a psychiatrist. According to Mr. Campuzano, the psychiatrist did not recommend further evaluation and/or treatment. Despite the conclusion reached by the psychiatrist, Mr. Campuzano has continued under the belief that he suffers from depression. Mr. Campuzano has not resided with his former girlfriend and with his children since January 2017. Mr. Campuzano's former girlfriend and children reside in Cherokee. Mr. Campuzano resided and worked in Algona. The commute between Algona and Cherokee takes approximately one hour and 45 minutes.

Prior to the final incident of tardiness on November 10, 2017, Mr. Campuzano was absent three times in October 2017. On October 6, Mr. Campuzano notified the employer five minutes before his 7:00 p.m. start time that he needed to be absent due to an emergency. Mr. Campuzano was in Cherokee at the time he made the call. Mr. Campuzano was absent due to the need to calm his upset four-year-old. Mr. Campuzano had the ability to provide the employer with 30 minutes notice of his need to be absent, but did not give that matter any thought until he made the call five minutes before his shift was to start. On October 14, Mr. Campuzano was an hour and 42 minutes late because he had been providing child care for his children at a time when his former girlfriend was upset. On October 25, 2017, Mr. Campuzano was an hour late due to similar circumstances.

The employer considered three additional absences from 2017 and additional absences going back to 2015 when making the decision to discharge Mr. Campuzano from the employment. On March 9, 2017, Mr. Campuzano was absent due to illness and properly reported the absence to the employer. On April 8, 2017, was absent for personal reasons and provided proper notice to the employer. In that instance, Mr. Campuzano's had gone to visit his children in Cherokee. During the visit, Mr. Campuzano's former girlfriend threatened self-injury and Mr. Campuzano felt the need to miss work in order to calm her down. Mr. Campuzano's 2016 absences included absences due to illness and properly reported to the employer on January 26, February 27, March 11, April 1 and August 2. The 2016 absences also included a late arrival for personal reasons on March 24, an absence for personal reasons on June 4, a late clock in on June 30 and an absence for personal reasons on October 4. On October 4, Mr. Campuzano notified the employer he would be late. Mr. Campuzano then did not appear for any part of the shift or provide notice that he would not appear for any part of the shift.

In making the decision to discharge Mr. Campuzano from the employment, the employer considered prior warnings the employer had issued to Mr. Campuzano for attendance. In 2017, the employer issued written warnings to Mr. Campuzano on January 13, on or about April 12, and on July 6. In each instance, the employer warned Mr. Campuzano that he was at 1.5 points and would be subject to discharge if his attendance points reached zero. In between these warnings, Mr. Campuzano had regained points through perfect attendance during 30-day periods.

#### **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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

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 weight of the evidence in the record establishes a discharge for misconduct in connection with the employment due to excessive unexcused absences. The evidence in the record establishes a final absence on November 10 that was attributable to Mr. Campuzano oversleeping and that included late notice to the employer. The absence was an unexcused absence under the applicable law. The weight of the evidence establishes neither a bona fide mental illness that would necessitate Mr. Campuzano being late for work on that day or that would excuse the late notice to the employer. The weight of the evidence establishes three additional unexcused absences in October 2017. These included late notice to the employer on October 6 of a need to be absent to care for an upset child and the late arrivals on October 14 and 25, due to the need to look after the minor children. This series of four unexcused absences over the course of five weeks occurred in the context of repeated warnings for attendance and were sufficient to establish excessive unexcused absences indicating intentional and substantial disregard of the employer's interests.

Because Mr. Campuzano was discharged for misconduct in connection with the employment, Mr. Campuzano 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. Campuzano must meet all other eligibility requirements. The employer's account shall not be charged.

**DECISION:**

The December 1, 2017, reference 01, decision is affirmed. The claimant was discharged for misconduct in connection with the employment based on excessive unexcused absences. The discharge date was November 15, 2017. The claimant is disqualified for 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs