

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JORGE HERNANDEZ**  
Claimant

**APPEAL NO. 13A-UI-09748-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**  
Employer

**OC: 07/07/13**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the August 12, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 27, 2013. Claimant participated. Luis Meza represented the employer. Exhibits One and Two were received into evidence.

**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: Jorge Hernandez was employed by Swift Pork Company, a/ka/ JBS, as a full-time maintenance mechanic from January 2013 until May 10, 2013, when the employer discharged him for attendance. If Mr. Hernandez needed to be absent from work, the employer's written policy required that he call a designated telephone number at least 30 minutes prior to his shift and leave a message on the automated system. The final absence that triggered the discharge occurred on April 24, 2013, when Mr. Hernandez was absent due to illness and properly reported the absence. Mr. Hernandez was also absent due to illness and properly reported the absence on February 14, 15, and 16, March 2 and 30, and April 14, 15, 18, and 23, 2013. On April 13, 2013, Mr. Hernandez notified a supervisor two hours prior to his shift that he was not feeling well and asked for permission to be absent. The supervisor told Mr. Hernandez that the company did not provide days off and directed Mr. Hernandez to speak to the maintenance manager. Mr. Hernandez spoke to the maintenance manager regarding his need for time off and did so two hours prior to his shift. Mr. Hernandez did not contact the automated telephone line until 11:58 p.m. that evening for a shift that started at 6:00 p.m.

On April 19, 2013, Mr. Hernandez was absent due to illness, but did not contact the employer.

During the brief employment, Mr. Hernandez began to suffer from reactive airway disease and chronic bronchitis, which he attributed to working in the cold. Mr. Hernandez made multiple trips to the doctor and provided the employer with one or more medical excuses.

### **REASONING AND CONCLUSIONS OF LAW:**

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.

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.

All but the April 19, 2013 absence were due to illness, were properly reported to the employer, and were excused absences under the applicable law. The April 19 absence was a no-call/no-show and was an unexcused absence. The single unexcused absence was insufficient to establish misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Hernandez was discharged for no disqualifying reason. Accordingly, Mr. Hernandez is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The agency representative's August 12, 2013, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs