

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

CALVIN J MCCOY

Claimant,

and

SWIFT PORK COMPANY

Employer.

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HEARING NUMBER: 12B-UI-14908

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. Those members are not in agreement. John A. Peno would affirm and Monique F. Kuester would reverse the decision of the administrative law judge.

Since there is not agreement, the decision of the administrative law judge is affirmed by operation of law. The Findings of Fact and Reasoning and Conclusions of Law of the administrative law judge are adopted by the Board and that decision is **AFFIRMED** by operation of law. See, 486 IAC 3.3(3).

John A. Peno

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The claimant was in management and well aware of the attendance policy. The record clearly establishes that he had prior attendance issues and was on a last chance agreement. The employer does not dispute the number of hours he worked regarding the final incident, nor does the employer offer any other reason for his discharge other than his attendance. (Tr. 5-6) The employer even stated that the claimant was a very good employee, and was very knowledgeable. However, I would find that the claimant's continued tardiness was indicative of a blatant disregard for the employer's interests. In addition, according to the court in Warrell v. Iowa Department of Job Service, 356 N.W.2d 587 (Iowa App. 1984), persons who are on probation because prior bad acts do not have the same protection as other employees.

Based on the claimant's repeated attendance infractions, and his final warning, I would conclude that the employer satisfied the burden of proof and would deny benefits.

AMG/kk

Monique F. Kuester