

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAKOTA A BARGER

Claimant

APPEAL NO. 17A-UI-08961-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 08/06/17

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 22, 2017, 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 an Agency conclusion that the claimant had been discharged on July 28, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on September 20, 2017. Claimant Dakota Barger participated. Chelsee Cornelius, Human Resources Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 8 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

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: Dakota Barger was employed by Swift Pork Company, a/k/a JBS, as a full-time production worker from August 2016 until July 28, 2017, when Rohelio Bahena, Human Resources Supervisor, discharged him for attendance. If Mr. Barger needed to be absent from work, the employer's written attendance policy required him to call the designated absence reporting telephone line at least 30 minutes before his shift and provide identifying information and the reason for the absence. The policy was reviewed with Mr. Barger at the time of hire and Mr. Barger was aware of the policy. The employer assigns attendance occurrence points to employee absences. An employee who reaches 10 occurrence points is subject to discharge from the employment.

The final absences that factored in the discharge occurred on July 24 and 25, 2017. On each day, Mr. Barger was absent due to illness and properly reported the absence to the employer. Mr. Barger went to the emergency room in connection with his illness and obtained a medical excuse that covered both absence dates. The two-day absence triggered a 10th attendance occurrence point under the employer's attendance policy. When Mr. Barger returned to work on July 26, 2017, he provided the employer with a doctor note that covered both absence dates. Mr. Barger continued to perform work until July 28, 2017, when Mr. Bahena discharged him from the employment. The next most recent absence that factored in the discharge occurred on April 10, 2017. The employer had issued an attendance warning to Mr. Barger in December 2016 and issued another attendance warning to him in March 2017.

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 evidence in the record establishes a discharge for attendance, but not for misconduct in connection with the employment. The final absences that triggered the discharge occurred on July 24 and 25, 2017. Each was due to illness, was properly reported to the employer and, therefore, was an excused absence under the applicable law. Neither absence can serve as a basis for a finding of misconduct in connection with the employment, as a basis for disqualifying Mr. Barger for unemployment insurance benefits, or as a basis for relieving the employer’s account for unemployment insurance benefits. The next most recent absence was in April 2017. The evidence fails to establish a current act of misconduct.

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

DECISION:

The August 22, 2017, reference 01, decision is affirmed. The claimant was discharged on July 28, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs