IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TROY J KENT Claimant **SWIFT PORK COMPANY** Employer	**APPEAL 17A-UI-06468-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/28/17** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Swift Pork Company (employer) filed an appeal from the June 16, 2017, reference 01, unemployment insurance decision that allowed benefits based upon the determination Troy J. Kent (claimant) was not discharged for a current act of misconduct. The parties were properly notified about the hearing. A telephone hearing was held on July 13, 2017. The claimant participated. The employer participated through Human Resources Manager Nicolas Aguirre. Employer's Exhibit 1 was received.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Maintenance Mechanic beginning on May 9, 2012, and was separated from employment on June 1, 2017, when he was discharged. The employer has an attendance policy stating after nine points in a rolling 12-month period an employee may be subject to termination. The employer also has a progressive discipline policy that includes information meetings, a documented meeting, a documented verbal counseling, written warning, suspension, and termination. The claimant's most recent written warning for attendance was in December 2015.

The claimant accrued 11.5 attendance points between June 15, 2016 and May 5, 2017. The claimant did not receive any warnings related to attendance during that time. The claimant's final absence occurred on May 8, 2017 when he reported late to work because he overslept.

On May 4 and May 10, 2017, the claimant's supervisor notified Human Resources Manager Nicolas Aguirre and others that the claimant may be over points and they needed to have a meeting with him. The supervisor did not notify the claimant that he was in danger of being discharged. Aguirre did not respond to the supervisor's emails as he oversees 2,300 employees and was busy training an Assistant Manager. The claimant's supervisor followed up on May 30 and May 31 via email to Aguirre with another request to meet with the claimant in regards to his attendance. On June 1, 2017, Aguirre and the supervisor were finally able to meet with the claimant and discharged him for being over his attendance points.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,341.00, since filing a claim with an effective date of May 28, 2017, for the three week-period ending July 8, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. Iowa Administrative Code rule 871-24.32(1)a provides:

> "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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal*

Bd., 616 N.W.2d 661 (Iowa 2000). Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer. Iowa Admin. Code r. 871-24.32(7); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law." However, an employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits.

The act of misconduct for which an employee is discharged must also be a current act. Iowa Admin. Code r.871-24.32(8). A lapse of 11 days from the final act until discharge when the claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

In this case, the employer did not notify the claimant until over three weeks after the final act of misconduct that he was being discharged. The employer made a business decision to wait to address the claimant's attendance. The employer's decision to wait does not make the claimant's final act of misconduct a current act for purposes of unemployment insurance. The employer did not discharge the claimant for a current act of misconduct. Accordingly, benefits are allowed.

In the alternative, even if the claimant's final act of misconduct was current, benefits would still be allowed. As the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

DECISION:

The June 16, 2017, reference 01, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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