

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LIZ M VARGAS

Claimant

APPEAL NO. 12A-UI-08851-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 06/24/12

Claimant: Respondent (1-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 17, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 16, 2012. Claimant Liz Vargas participated. Aureliano Diaz, Human Resources Manager, represented the employer. Exhibits One through Five 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: Liz Vargas was employed by Swift Pork Company, a/k/a JBS, as a full-time production worker from 2006 and last performed work for the employer on June 1, 2012. Ms. Vargas' immediate supervisor was Melissa Edwards. Ms. Vargas' work hours were 6:30 to 3:00 p.m., Monday through Friday. After June 1, Ms. Vargas was off work due to illness from June 4, 2012 through June 22, 2012. Ms. Vargas provided the employer with a doctor's note, dated June 6, 2012, that excused her from work from June 4 through June 17 due to pregnancy-related issues and depression. Ms. Vargas provided the employer with a doctor's note, dated June 18, 2012, that excused her from work from June 18, 2012 through June 19, 2012 due to pregnancy-related issues, tension headache and depression. Ms. Vargas provided the employer with a doctor's note, dated June 20, 2012, that excused her from work from June 20, 2012 through June 24, 2012 due to smoke inhalation, wheezing, and depression with anxiety.

When Ms. Vargas attempted to return to work on June 25, 2012, the employer notified her that she was discharged because on June 12, 2012 she had reported her daily absence at 6:44 a.m., after the scheduled start of her shift. The employer's policy required that Ms. Vargas telephone a designated absence reporting line no later than 30 minutes prior to the scheduled start of her shift if she needed to be absent. Ms. Vargas called in each day she was absent, but was late calling in June 12, 2012. Ms. Vargas had made proper absence reports from June 4 through June 11 and from June 13 through June 22. Ms. Vargas' absences from prior to

June 4, 2012 has been for illness properly reported to the employer. Ms. Vargas had used Family and Medical Leave Act (FMLA) in connection with earlier absences, but had exhausted the FMLA benefit at the time she started to be absent again on June 4, 2012.

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.

While a disqualifying discharge for attendance usually requires *excessive unexcused* absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). In Sallis, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence.

The evidence in the record establishes a discharge that was based on a single unexcused absence that occurred in the middle of a long series of properly reported absences due to illness. The absence on June 12 was unexcused only because it was reported too late to the employer. The single unexcused absence did not constitute misconduct in connection with the employment. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Vargas was discharged for no disqualifying reason. Accordingly, Ms. Vargas is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's July 17, 2012, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Claims Division for determination of whether the claimant has been able to work and available for work since she established her claim for benefits. That determination should include consideration of medication documentation.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs