

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**KEVIN A CASTILLO**

Claimant

**APPEAL NO. 18A-UI-12030-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**

Employer

**OC: 01/14/18**

**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 December 4, 2018, reference 03, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and that the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on November 15, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on January 3, 2019. Claimant Kevin Castillo participated. Sergio Lopez, Assistant Human Resources Manager, represented the employer. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant (DBRO). Exhibits 1, 2 and 3 and Department Exhibits D-1 through D-12 were received into evidence.

**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: Kevin Castillo was employed by Swift Pork Company, a/k/a JBS, from January 2018 until November 15, 2018, when Victoria Cervantes, Human Resources Manager, discharged from the employment for attendance. Mr. Castillo's work hours were 7:00 a.m. to 3:00 p.m., Monday through Saturday. Mr. Castillo was also required to work on Sundays as needed. Mathew Probasco, Shipping Supervisor, was Mr. Castillo's immediate supervisor.

The final absence that triggered the discharge occurred on November 14, 2018, when Mr. Castillo was absent due to work-related illness and/or injury. On November 13, Mr. Castillo notified Mr. Probasco that he was suffering from work-related muscle strain that prevented him from being able to perform his duties. Mr. Probasco requested to leave his shift early. Mr. Probasco referred Mr. Castillo to the nurses' station. The nurse referred Mr. Castillo to the human resources department. The human resources personnel referred Mr. Castillo back to

Mr. Probasco, who denied Mr. Castillo's request to leave work early. Mr. Castillo completed his shift and then sought medical evaluation of his condition. The medical provider prescribed a pain medication and a muscle relaxing medication. The medical provider took Mr. Castillo off work for November 14 so that he could recover from the muscle strain. On November 14, Mr. Castillo properly reported the absence to the employer by calling the designated absence reporting telephone number at least 30 minutes prior to the start of his shift. When Mr. Castillo reported the absence, he reported that he was sick and that he had a medical note. Mr. Castillo returned to work on November 15, 2018 and was discharged by Ms. Cervantes.

The next most recent absence that factored in the discharge was on October 3, 2018, when Mr. Castillo was absent due to a lack of child care. On October 5, 2018, the employer placed Mr. Castillo on a last chance agreement for attendance. At that time, the employer notified Mr. Castillo that he could not miss work for six months unless he completed a time-off request in advance and unless the employer approved the absence in advance.

### **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).

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 no disqualifying reason. The final absence that triggered the discharge was due to illness and/or injury and was properly reported to the employer under the employer's absence reporting policy. The absence was an excused absence under the applicable law and, therefore, cannot serve as a basis for disqualifying Mr. Castillo for unemployment insurance benefits. The last chance agreement does not convert what would otherwise be an excused absence under the applicable law into an unexcused absence under the applicable law. Because the final absence was an excused absence under the applicable law, and because the next most recent absence occurred several weeks prior to the discharge, the evidence fails to establish a current act of misconduct. In the absence of a current act of misconduct, the administrative law judge need not further consider the earlier attendance history or whether those earlier absences were excused or unexcused absences under the applicable law. Mr. Castillo is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

**DECISION:**

The December 4, 2018, reference 03, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements. 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/rvs