

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSE A ORDAZ

Claimant

APPEAL NO. 13A-UI-04337-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 02/24/13

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 March 29, 2013, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 13, 2013. Claimant Jose Ordaz was not available at the number he provided for the hearing and did not participate. Luis Meza, Human Resources Supervisor, represented the employer. Exhibits One, Two and Three were received into evidence.

ISSUE:

Whether Mr. Ordaz was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jose Ordaz was employed by Swift Pork Company, a/k/a JBS as a full-time production worker from August 2012 until March 15, 2013, when Luis Meza, Human Resources Supervisor, discharged him for attendance. Mr. Ordaz's work hours were 11:00 p.m. to 6:30 a.m. Mr. Ordaz would start his work week on Monday evening. If Mr. Ordaz needed to be absent from work, the employer's attendance policy required that he telephone the designated number at least 30 minutes prior to the scheduled start of his shift and leave a message with his name, ID number and department. Mr. Ordaz was made aware of the absence reporting policy at the start of his employment through the orientation process.

The final absence that triggered the discharge concerned the overnight shift that started on February 13, 2013. Mr. Ordaz waited until 12:49 a.m. on February 14 to notify the employer of his need to be absent.

The next most recent absence concerned the shift that started on the evening of February 11. Mr. Ordaz left work early that day. The employer witness does not know why Mr. Ordaz left early, does not know whether it was due to illness, but assumes Mr. Ordaz spoke to his supervisor, Distribution Center Production Supervisor Mike Coop.

In making the decision to discharge Mr. Ordaz from the employer, the employer considered additional absences. On September 14, October 19, December 5, January 18 and February 9, Mr. Ordaz was absent due to illness and properly reported the absences to the employer. On November 24, Mr. Ordaz was late notifying the employer of his need to be absent. On December 12, Mr. Ordaz was tardy for work.

The employer issued a written warning for attendance to Mr. Ordaz on December 18, 2012, to let him know he had accrued five attendance points. Ten attendance points would subject Mr. Ordaz to discharge from the employment.

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.

The evidence in the record establishes unexcused absences on November 24, December 12 and February 13. Two of these absences involved late notice to the employer of the need to be absent. The remaining absence involved tardiness. The evidence establishes excused absences on September 14, October 19, December 5, January 18, and February 9. Each of these absences was for illness properly reported to the employer and cannot be considered against Mr. Ordaz in determining his unemployment insurance eligibility. The employer has presented insufficient evidence to establish an unexcused absence in connection with the early departure from the shift that started on February 11, 2013. For that absence, the evidence indicates Mr. Ordaz left work early and spoke to a supervisor before he left. The employer did not provide testimony from the supervisor and was unable to provide information concerning why Mr. Ordaz left early.

Thus the evidence establishes but three unexcused absences. The final unexcused absence was on February 13, 2013. The next most recent unexcused absence was on December 12, and the third unexcused absence concerned a late call on November 24. Given the two-month lapse between the final unexcused absence and the next most recent unexcused absence, the administrative law judge concludes that the evidence does not establish excessive unexcused absences. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Ordaz was discharged for no disqualifying reason. Accordingly, Mr. Ordaz is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Ordaz.

DECISION:

The Agency representative's March 29, 2013, reference 02, decision is affirmed. The claimant was discharged 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/pjs