

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LEVI M GALURA**

Claimant

**APPEAL NO. 16A-UI-09997-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**

Employer

**OC: 08/07/16**

**Claimant: Respondent (1)**

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

Iowa Code section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 9, 2016, 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 August 11, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on September 28, 2016. Union representative Brian Ulin represented Mr. Galura. Mr. Galura and Mr. Ulin both testified. Rogelio Bahena represented the employer. Filipino-English interpreter Chrissy Butilgan assisted with the hearing. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One and Two 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: Levi Galura was employed by Swift Pork Company, d/b/a JBS, as a full-time meat production line worker from 2013 until August 11, 2016, when the employer discharged him for allegedly taking unauthorized breaks. Mr. Galura's core work hours were 2:30 p.m., to 11:00 or 11:30 p.m., Monday through Friday. Mr. Galura's shift sometimes ended at 1:00 a.m. Toward the end of the employment, the work hours included shifts on almost all Saturdays. Mr. Galura's immediate supervisor was Production Supervisor Israel Baeza. During the shifts, Mr. Galura would receive a 15-minute break at about 5:20 p.m. and a 30-minute break at about 7:50 p.m. Under the employer's policy and/or collective bargaining agreement with the union, employees

are allowed to take emergency restroom breaks as needed. The employer has an established protocol for taking such emergency breaks. Under the protocol, the production worker is required to ask the supervisor for the break before leaving the line. If a supervisor is not available, the production worker is required to ask a "utility person." If neither the supervisor nor a utility person is available, the employee may leave the production line, but must wait for a substitute worker to take the employee's place at the line. As a last resort, the employee may stop the production line to go on the emergency break. Mr. Galura was familiar with the break protocol. Mr. Galura suffers from diabetes and, as a result, frequently had a need for one emergency restroom break during a shift. Mr. Galura is from the Philippines and has limited English skills. Mr. Galura's wife also worked for the employer and has better English skills.

The final incident that triggered the discharge occurred during Mr. Galura's shift on August 10, 2016. Mr. Galura took his first scheduled break at the usual time and used the restroom during that break. At about 7:00 p.m., Mr. Galura needed an emergency restroom break so that he could urinate. Mr. Galura asked Production Supervisor Kacey Johnson for a break. Ms. Johnson indicated approval of the request, but no one came to replace Mr. Galura and Mr. Galura remained at his work station. About 15 minutes after the first request, Mr. Galura asked another supervisor, Robert, for a break. Robert approved the request for the break, but again no substitute worker appeared to take Mr. Galura's place. Mr. Galura remained at his work station. Mr. Galura's asked his wife to ask another employee to take Mr. Galura's place so that Mr. Galura could take his emergency restroom break. The other employee declined and cited his lack of a protective mesh glove. About 45 minutes after Mr. Galura made his first request for an emergency restroom break, Mr. Galura spotted Mr. Baeza. Mr. Galura told Mr. Baeza that he really needed to use the restroom, that he had asked two supervisors, and that no one had come to replace him. Mr. Baeza told Mr. Galura to wait until another employee came to replace him on the line. When no-one arrived immediately, Mr. Galura stepped away from the line and another production line worker stopped the line momentarily. Shortly after Mr. Galura stepped away, another worker stepped into his spot and the production line restarted. Mr. Galura went directly to the restroom and returned to the line within two to three minutes. The employer later alleged that coworkers had said Mr. Galura had paused on his way to the restroom to wash his mesh glove. Mr. Galura had not stopped. Mr. Galura had placed his mesh glove in his apron.

In making the decision to discharge Mr. Galura from the employment, the employer considered Mr. Galura's previous need for emergency restroom breaks.

## **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code § 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.

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).

The evidence in the record fails to establish misconduct in connection with the employment. The evidence establishes that on August 10, 2016, Mr. Galura had a bonafide need for an emergency restroom break, followed the employer's protocol, and that employer failed to provide the break over a period of about 45 minutes. Given the employer's lack of timely and reasonable response to Mr. Galura's need for a break, and Mr. Galura's prolonged effort to comply with the protocol, Mr. Galura acted reasonably when he stepped away from the production line to use the restroom. The evidence fails to support the employer's allegation that Mr. Galura paused to rinse his mesh glove on his way to the restroom. The employer had the ability to present testimony from persons alleging to have witnessed that alleged conduct, but

failed to present such testimony. Neither the final incident nor any prior similar need for an emergency restroom break involved misconduct on the part of Mr. Galura.

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

**DECISION:**

The September 9, 2016, reference 01, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs