

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**THON J MAKER**  
Claimant

**APPEAL NO. 15A-UI-03467-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**  
Employer

**OC: 02/22/15**  
**Claimant: Appellant (2/R)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

Thon Maker filed a timely appeal from the March 12, 2015, reference 01, decision that that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that he had been discharged on February 5, 2015 for excessive unexcused absences. After due notice was issued, a hearing was held on April 14, 2015. Mr. Maker participated. The employer representative, Stacey Santillan, was not available at the number the employer had provided for the hearing and did not participate.

**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: Thon Maker was employed by Swift Pork Company, also known as JBS, on a full-time basis from 2012 until February 4, 2015, when the employer discharged him for attendance. Mr. Maker's usual work hours were 6:00 p.m. to 5:00 a.m., Monday through Friday. If Mr. Maker needed to be absent from work, the employer's attendance policy required that Mr. Maker notify the employer at least 30 minutes prior to the scheduled start of his shift. Mr. Maker had ongoing medical issues. The final absence that triggered the discharge was a late arrival that occurred a week or two before the discharge. On that date, Mr. Maker was late due to a medical appointment in Ames and properly notified the employer of his need to be late. The employer instructed Mr. Maker to obtain a note from his doctor to cover the absence and Mr. Maker complied. The employer moved forward with discharging Mr. Maker nonetheless.

**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.

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).

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 employer did not make itself available for the hearing and presented no evidence to support the allegation that the claimant was discharged for excessive unexcused absences or any other form of misconduct. The evidence in the record is insufficient to establish a current act of misconduct. The evidence in the record establishes a final incident of tardiness that was due to illness and that was properly reported to the employer. The absence was an excused absence under the applicable law and cannot serve as a basis for a finding of misconduct or disqualifying the claimant for unemployment insurance benefits.

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

Mr. Maker testified during the hearing with regard to a letter from his doctor that indicated a need for Mr. Maker to work part-time, reduced hours due to an ongoing medical condition. In light of that testimony, this matter will be remanded to the Benefits Bureau for a determination of whether Mr. Maker has met the work ability and availability requirements since he established his claim for benefits.

#### **DECISION:**

The March 12, 2015, reference 01, decision is reversed. The claimant was discharged on February 5, 2015 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Benefits Bureau for a determination of whether the claimant has met the work ability and availability requirements since he established his claim for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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