

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATHYANG M KORTHEK
Claimant

APPEAL NO. 17A-UI-03133-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 08/14/16
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 March 9, 2017, reference 02, 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 the claims deputy's conclusion that the claimant was discharged on February 20, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on April 13, 2017. The administrative law judge secured a Sudanese/Arabic interpreter to assist with the hearing after learning that a Dinka interpreter was unavailable. Nicolas Aguirre, Human Resources Manager, represented the employer. Claimant Mathyang Korthek registered a telephone number for the hearing, but was not available at that number at the time of the hearing and did not participate in the hearing. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant in connection with the claim. Exhibits 1, 2 and 3 were received into evidence.

With the assistance of the interpreter, the administrative law judge made two attempts to reach Mr. Korthek for the hearing. Those attempts were at 2:15 p.m. and 2:18 p.m. for the hearing set for 2:00 p.m. The delay in contacting Mr. Korthek was attributable to the delay associated with obtaining an interpreter for the hearing. Mr. Korthek did not answer either call. With the assistance of the interpreter, the administrative law judge left two voice mail messages for Mr. Korthek. Mr. Korthek did not contact the Appeals Bureau prior to the hearing record being closed. At 3:02 p.m., after the hearing record had closed and the employer had been dismissed from the hearing, Mr. Korthek's bilingual nephew telephoned the Appeals Bureau on Mr. Korthek's behalf regarding the hearing Mr. Korthek had missed. Mr. Korthek's nephew explained that the ringer had been muted on Mr. Korthek's cell phone until the nephew noted the issue and turned the ringer volume back up. The administrative law judge concludes that Mr. Korthek's act of silencing his cell phone and, thereby making himself unavailable to receive the administrative law judge's calls, does not constitute good cause to reopen the closed hearing record.

ISSUES:

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

Whether the employer's account may be charged for benefits paid to Mr. Korthek.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mathyang Korthek was employed by Swift Pork Company, a/k/a JBS, as a full-time production worker from October 2016 until February 20, 2017, when the employer discharged him for attendance. The final absence that triggered the discharge occurred on February 14, 2017. On that day, Mr. Korthek was absent due to illness and properly reported the absence to the employer by calling the designated absence reporting number at least 30 mins prior to the scheduled start of his shift. The employer considered earlier absences when making the decision to discharge Mr. Korthek from the employment.

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).

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 on February 20, 2017 for no disqualifying reasons. The February 14, 2017 final absence that triggered the discharge was an absence due to personal illness and was properly reported to the employer. Accordingly, the absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Mr. Korthek for benefits. Because the final absence was an excused absence under the applicable law, the evidence establishes a discharge that was not based on a current act of misconduct. Because the final absence was an excused absence under the applicable law, the administrative law judge need not further consider the earlier absences. Mr. Korthek is eligible for benefits, provided he meets all other eligibility requirements. The employer’s account may be charged for benefits.

The administrative law judge notes that Swift/JBS is not a base period employer for purposes of the claim year that began for Mr. Korthek on August 14, 2016 and that will end for Mr. Korthek on August 12, 2017. That means that Swift/JBS has not been charged for benefits and will not be charged for benefits paid to Mr. Korthek in connection with the current claim year. The

employer's account will only be subject to being charged in the event that Mr. Korthek establishes a new claim for benefits on or after August 13, 2017, is deemed eligible for benefits, and if JBS/Swift is at that point deemed a base period employer.

The administrative law judge is including a remand order in this decision so that the Benefits Bureau can adjudicate an issue unrelated to the present appeal matter. This matter will be remanded to the Benefits Bureau for a single-party adjudication of whether the claimant requalified for benefits subsequent to his July 27, 2016 separation from Iowa Premium, L.L.C. and prior to establishing the additional claim for benefits that was effective February 19, 2017.

DECISION:

The March 9, 2017, reference 02, decision is affirmed. The claimant was discharged on February 20, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible for benefits. The employer's account may be charged as outlined above.

This matter is remanded to the Benefits Bureau for a single-party adjudication of whether the claimant requalified for benefits subsequent to his July 27, 2016 separation from Iowa Premium, L.L.C. and prior to establishing the additional claim for benefits that was effective February 19, 2017.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs