IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRYANT D BERGOM
Claimant

SWIFT PORK COMPANY
Employer

APPEAL NO. 17A-UI-09734-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/27/17
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the September 13, 2017, 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 the claims deputy's conclusion that the claimant was discharged on August 29, 2017 for attendance but for no disqualifying reason. After due notice was issued, a hearing was held on October 10, 2017. Claimant Bryant Bergom did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Nicolas Aguirre, Human Resources Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 2 through 7 into evidence. The administrative law judge took official notice of the fact-finding materials.

ISSUE:

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: Bryant Bergom was employed by Swift Pork Company, a/k/a JBS, as a full-time "tattooer" in the procurement barns area of the Marshalltown plant from February 27, 2017 until August 29, 2017, when Nicolas Aguirre, Human Resources Manager, discharged him for attendance. Mr. Bergom's work hours were typically from 5:00 a.m. to early or mid-afternoon, Monday through Friday, and Saturdays as needed. Production Supervisor Randy Coppock was Mr. Bergom's immediate supervisor. If Mr. Bergom needed to be absent from work, the employer's attendance policy required that he call the designated absence reporting line at least 30 minutes prior to the scheduled start of his shift. The number for the absence reporting line

was on the back of Mr. Bergom's employee ID. The employer reviewed the absence reporting requirement with Mr. Bergom at the start of his employment.

The final absences that triggered the discharge occurred on August 25, 26 and 28, 2017. Each absence was due to illness and was properly reported to the employer. When Mr. Bergom returned to work on August 29, 2017, he provided the employer with a medical note that supported his need to be absent on each of the three days. The employer nonetheless discharged Mr. Bergom on August 29, 2017 because he had substantially exceeded the allowed number of absences. The next prior absences that factored in the discharge occurred on August 1, 2 and 3, 2017. On those days, Mr. Bergom was again absent due to illness, properly reported the absences, and provided the employer with a medical note upon return that supported his need to be absent those days. The employer considered earlier absences when making the decision to discharge Mr. Bergom from the employment. The employer also considered a reprimand for attendance that the employer had issued to Mr. Bergom in June 2017.

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). 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 for no disqualifying reason. The absences on August 25, 26 and 28, 2017 were each due to illness, were each properly reported to the employer, and were each excused absences under the applicable law, regardless of how the employer characterized the absences. The next most recent absences were August 1, 2, and 3, 2017. Those also were each due to illness, were each properly reported to the employer, and were each excused absences under the applicable law. The evidence fails to establish a current act of misconduct in connection with the employment. Accordingly, the discharge does not disqualify Mr. Bergom for unemployment insurance benefits. Mr. Bergom is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The September 13, 2017, reference 01, decision is affirmed. The claimant was discharged on August 29, 2017 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/rvs