

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICKIE M PERKINS

Claimant

APPEAL NO. 17A-UI-11361-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON PET PRODUCTS INC

Employer

OC: 10/15/17

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Rickie Perkins filed a timely appeal from the November 3, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Perkins was discharged on October 20, 2017 for excessive unexcused absences. After due notice was issued, a hearing was held on November 28, 2017. Mr. Perkins participated. Dakota Cunningham, Human Resources Administrator and Benefits Counselor, represented the employer. Exhibits A and B were received into evidence.

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: Rickie Perkins was employed by Tyson Pet Products, Inc. as a full-time production worker from February 2017 until October 19, 2017, when Brook Salger, Human Resources Manager, and Sandy Brustkern, Production Supervisor, discharged him from the employment for attendance. Ms. Brustkern was Mr. Perkins' immediate supervisor toward the end of the employment. Mr. Perkins' work hours were 2:00 p.m. to 10:30 p.m., Monday through Saturday. If Mr. Perkins needed to be absent from or late to work, the employer's policy required that he call the designated absence reporting line at least 30 minutes prior to the scheduled start of his shift and respond to automated prompts that asked for his personnel number, whether the absence would be a late arrival or full-day absence, and whether the absence was due to sickness, personal business or transportation issues. The absence reporting policy was reviewed with Mr. Perkins at the start of the employment. If Mr. Perkins needed to leave work early, the policy required that he speak with his supervisor or the nurse before he left. Mr. Perkins was aware of the absence reporting requirements.

The final absence that triggered the discharge began on October 13, 2017 and ended on October 18, 2017. On October 13, Mr. Perkins was assigned to perform a physically taxing task of pulling items from an oven. On October 13, Mr. Perkins injured his groin area in the course of

performing the work. Mr. Perkins went to the company nurse and the company nurse sent him home early with instructions to go to the doctor. Mr. Perkins saw a doctor that same day. The doctor took Mr. Perkins off work through October 19 and released Mr. Perkins to return to work on October 20. The medical provider provided Mr. Perkins with a medical excuse so that he could present it to the employer. The medical excuse indicated that Mr. Perkins had been seen on October 13, was to remain off work for medical reasons through October 19, and could return to work on October 20. On October 14, 16, 17 and 18, Mr. Perkins provided daily, proper notice to the employer of his need to be absent due to illness. Mr. Perkins was not scheduled to work on October 15. Even though the medical excuse took Mr. Perkins off work through October 19, Mr. Perkins elected to return to work on October 19. When Mr. Perkins returned to work, he took the medical excuse with him and presented it to the employer at the start of his shift. At that time, the employer notified Mr. Perkins that he was being discharged from the employment because he had exceeded the allowable number of attendance points.

The employer also considered earlier absences when making the decision to discharge Mr. Perkins from the employment. On June 10, June 30, July 8, July 28, July 29, and August 17, Mr. Perkins was absent due to illness or injury and properly notified the employer of his need to be absent. On July 7, August 16 and September 21, the nurse sent Mr. Perkins home early due to back pain. These early departure days were days when Mr. Perkins was assigned especially physically taxing work and was not rotated to other duties pursuant to the established production floor protocol. On June 27, Mr. Perkins was absent for personal reasons, but the absence had been approved in advance. On October 12, Mr. Perkins was absent so that he could appear for a 3:30 p.m. court proceeding and to meet with his attorney. Mr. Perkins had requested the day off a week in advance and Ms. Brustkern had approved the request a week in advance. When Mr. Perkins checked back with Ms. Brustkern closer to the planned day off, Ms. Brustkern had lost the request and approval form. Mr. Perkins completed a new request form and indicated on the request form that he planned to report for work at 6:00 p.m. Ms. Brustkern approved the new request form. On October 12, Mr. Perkins did not appear for any part of the shift. Mr. Perkins left the courthouse at 4:30 p.m. and was done meeting with his attorney at 5:30 p.m. It was a 30-minute drive from the courthouse in Waterloo to the workplace in Independence. Mr. Perkins decided not to appear for the remainder of the shift and based his decision on the shortened work period and the gas expense. Before the employer discharged Mr. Perkins from the employment, the employer issued warnings to Mr. Perkins regarding his accrual of attendance points.

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 final absences from October 13 through October 18 that were due to illness, were properly reported to the employer, and therefore were excused absences under the applicable law. Those absences cannot serve as a basis for discharging Mr. Perkins for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Perkins was discharged for no disqualifying reason. Accordingly, Mr. Perkins is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The November 3, 2017, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge date was October 19, 2017. 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/scn