

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DUSTIN O'TOOLE**  
Claimant

**TYSON FRESH MEATS INC**  
Employer

**APPEAL NO. 15A-UI-01536-JTT**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 01/18/15**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Dustin O'Toole filed a timely appeal from the February 2, 2015, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits; based on an Agency conclusion that Mr. O'Toole had been discharged for excessive unexcused absences. After due notice was issued, a hearing was held on March 3, 2015. Mr. O'Toole participated. Will Sager represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two, and Three 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: Dustin O'Toole was employed by Tyson Fresh Meats, Inc. as a full-time maintenance employee from January 2014 until January 14, 2015 when the employer discharged him for attendance. If Mr. O'Toole needed to be absent from work, the employer's attendance policy required Mr. O'Toole to call a designated telephone number at least 30 minutes prior to his shift and leave a message for the employer. The employer had reviewed the attendance policy with Mr. O'Toole at the start of his employment and Mr. O'Toole was aware of the policy. Under the employer's attendance point system, an employee who incurred ten points could be discharged from the employment. The employer assigned points to almost all absences, including absences due to illness that were properly reported to the employer.

The final absence that triggered the discharge occurred on January 5, 2015 when Mr. O'Toole was absent due to illness but failed to notify the employer. Mr. O'Toole had allowed his phone service to terminate for a week due to lack of payment. Mr. O'Toole's hourly wage was \$13.65. He regularly worked from 40 to 60 hours per week. He got paid weekly. Mr. O'Toole returned to work the next day. Mr. O'Toole was absent on January 12, 2015 due to illness and properly reported that absence to the employer.

Most of Mr. O'Toole's absences were due to chronic illness and were properly reported to the employer. However, Mr. O'Toole was tardy on April 13 and July 20, 2014 because he overslept.

The employer issued multiple warnings to Mr. O'Toole for attendance. On May 13, 2014 the employer warned Mr. O'Toole that he had incurred three attendance points. On July 20, 2014 the employer warned Mr. O'Toole that he had incurred six attendance points. On December 2, 2014 the employer warned Mr. O'Toole that he had incurred eight and one-half attendance points. The January 5, 2015 no-call/no-show absence put Mr. O'Toole at 11 and one-half points.

#### **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 establishes unexcused absences on April 13 and July 20, 2014, as well as on January 5, 2015. The first two involved tardiness. The last was due to illness but was not properly reported to the employer. In connection with the final absence, the evidence indicates that Mr. O'Toole failed to take reasonable steps to keep his phone service current and failed to otherwise take reasonable steps to maintain access to a telephone so that he could maintain appropriate contact with the employer in the context of frequent absences. The weight of the evidence indicates that Mr. O'Toole had sufficient income during the employment to maintain basic phone service.

All of the other absences that the employer considered when issuing attendance points, issuing warnings, and making the decision to terminate the employment were for illness and were properly reported to the employer. Accordingly, each was an excused absence under the applicable unemployment insurance law and cannot be used as a basis for a finding of excessive unexcused absences, a finding of misconduct, or disqualification for benefits.

The three unexcused absences were insufficient to establish excessive unexcused absences or misconduct in connection with the employment. There was a five and one-half month space between the final unexcused absence, a no-call/no-show, and the next most recent unexcused absence, an incident of tardiness. There was a three-month space between the first and second incidents of tardiness.

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

**DECISION:**

The February 2, 2015, reference 01, decision is reversed. 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

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