

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**FERRELL A BURSEY**  
Claimant

**APPEAL NO. 18A-UI-03847-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**  
Employer

**OC: 02/25/18**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Ferrell Bursey filed a timely appeal from the March 19, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Bursey was discharged on January 31, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on April 19, 2018. Mr. Bursey did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Katherine Schoepske represented the employer.

**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: Ferrell Bursey was employed by Tyson Fresh Meats, Inc. as a full-time production laborer from April 2016 until January 31, 2018, when Jim Hook, Hiring Manager, discharged him from the employment for exceeding the allowable number of attendance points. Mr. Bursey's work schedule was Monday through Friday from 7:00 a.m. until hog production concluded for the day. If Mr. Bursey needed to be absent from work, the employer's attendance policy required him to either seek pre-approval from his supervisor or to call the designated absence reporting telephone number at least 30 minutes prior to the scheduled start of his shift. The attendance policy was set forth in the handbook the employer provided to Mr. Bursey at the start of the employment. The employer reviewed the attendance policy with Mr. Bursey at the start of the employment.

The final absence that triggered the discharge occurred on January 27, 2018, when Mr. Bursey was absent due to illness and properly reported the absence to the employer. Mr. Bursey had also been absent due to illness on January 25 and 26 and had properly reported those absences to the employer. On January 24, 2018 Mr. Bursey was absent with prior approval of

his supervisor. On January 23, 2018, Mr. Bursey left work early after notifying his supervisor. It is unclear whether the early departure was due to illness or another reason. On January 22, 2018, Mr. Bursey was absent due to a Family and Medical Leave Act (FMLA) related issue and with prior approval of his supervisor. Mr. Bursey's next most recent absence was a no-call/no-show absence on December 8, 2017. Mr. Bursey's most recent warnings for attendance points had been issued on November 28, 2017 and January 23, 2018.

#### **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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 evidence fails to establish a discharge based on a current act of misconduct. The evidence establishes that the final absence was for illness, was properly reported to the employer, and was therefore an excused absence under the applicable law. The evidence establishes similar excused absences on January 25 and 26. The absence on January 24 was with prior approval of the supervisor and therefore would be an excused absence under the applicable law. The January 23 early departure was properly reported to the supervisor. It is unclear whether that early departure was based on illness or some other matter. Accordingly, the employer has failed to present sufficient evidence to establish an unexcused absence on that date. On January 22, Mr. Bursey was absent due an FMLA-related matter with his supervisor's prior approval. Accordingly, that absence would be an excused absence under the applicable law. The next prior absence was a no-call/no-show, unexcused absence on December 8, 2017. That absence was not a current act at the time of the discharge.

Because the evidence in the record establishes a discharge for no disqualifying reason, Mr. Bursey is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

**DECISION:**

The March 19, 2018, reference 01, decision is reversed. The claimant was discharged on January 31, 2018 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

jet/rvs