

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANGELITA L GUTIERREZ
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 20A-UI-00609-S1-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/29/19
Claimant: Appellant (2)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Angelita Gutierrez (claimant) appealed a representative's January 16, 2020, decision (reference 01) that concluded ineligibility to receive unemployment insurance benefits after a separation from work with Tyson Fresh Meats (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 6, 2020. The claimant participated personally. Former co-workers Karmilla Smith and Jazlyn Mabry participated on behalf of the claimant. The employer participated by Katherine Schoepske, Human Resources Administrative Associate.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on November 27, 2017, as a full-time pump room worker. She signed for receipt of the employer's handbook during the week of November 27, 2017. The employer's attendance policy stated that employees who accumulate ten attendance points will be terminated.

The claimant properly reported her absence due to illness on February 12, April 17, 20, May 19, and July 1, 2019. She properly reported her absence to care for her sick mother on March 21, 2019. The employer issued her a written warning for having accumulated six attendance points. The employer notified the claimant that further infractions could result in termination from employment.

On July 19, October 18, and 28, 2019, the claimant was tardy in reporting to work. She properly reported her absences and was issued 0.5 points for each occurrence. On July 12, 24, and November 1, 2019, the claimant properly reported her absences due to illness. She provided a doctor's note for her absences on July 24 and November 1, 2019. The employer prepared a termination notice to give to the claimant for having accumulated 10.5 points. Instead, the

employer removed the November 1, 2019, absence from her history for an unknown reason. This left the claimant with 9.5 points.

On November 13, 2019, the claimant's supervisor told the claimant she could leave early to see a doctor. The supervisor said she did not need to obtain a doctor's note. The employer prepared a termination notice to give to the claimant for having accumulated 10 points. Instead, the employer removed the November 13, 2019, absence from her history for an unknown reason. This left the claimant with 9.5 points.

The claimant properly reported her absence due to illness on November 15, 2019. She provided the employer with a doctor's note. The employer prepared a termination notice to give to the claimant for having accumulated 10.5 points. Instead, the employer removed the November 15, 2019, absence from her history for an unknown reason. This left the claimant with 9.5 points.

The claimant properly reported her absence due to illness on November 16, 2019. She provided the employer with a doctor's note. The employer prepared a termination notice to give to the claimant for having accumulated 10.5 points. Instead, the employer removed the November 16, 2019, absence from her history for an unknown reason. This left the claimant with 9.5 points.

On December 26, 2019, the claimant clocked in for work at 6:26 a.m. for her 6:30 a.m. shift. Two co-workers clocked in at the same time as the claimant. On December 30, 2019, the employer terminated the claimant for accumulating 10 attendance points. The employer said the claimant clocked in tardy for work on December 30, 2019. The claimant conferred with the human resources department and it confirmed the claimant had punched in for work at 6:26 a.m. on December 26, 2019. Human resources did not consider the claimant tardy on December 26, 2019. The two workers did not receive attendance points for being tardy on December 26, 2019.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident the employer provided was a tardy on December 26, 2019. The employer did not provide any witnesses or documentation of the tardy. No report was offered by the employer. The claimant provided two witnesses to support her claim that she was at work on time on December 26, 2019.

Therefore, the last incident of absence which precipitated the discharge occurred on October 28, 2019. The claimant was not discharged until December 30, 2019. The occurrence and the discharge are too remote. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's January 16, 2020, decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs