

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROBERT A HERBERT**  
Claimant

**APPEAL NO. 06A-UI-09524-DWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**  
Employer

**OC: 08/06/06 R: 01  
Claimant: Appellant (2)**

Section 96.5-2-a - Discharge

**STATEMENT OF THE CASE:**

Robert A. Herbert (claimant) appealed a representative's September 25, 2006 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits, and the account of Tyson Fresh Meats, Inc. (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled on October 10, 2006. Neither party responded to the hearing notice or participated in the scheduled hearing. Based on the administrative record and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Did the employer discharge the claimant for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on April 11, 1990. The claimant worked as a full-time employee. The employer's attendance policy informs employees they can be discharged if they accumulate 14 attendance points.

As of July 31, 2006, the claimant had accumulated 14 attendance points. The claimant received one point for each of the following excused absences for non-work illnesses: September 1, December 20, 29, 2005, February 21, March 17, May 16 and July 24, 2006. The claimant received three points on November 25, 2005, for failing to report to work and notifying the employer he would not be at work. On May 23, the employer assessed the claimant one point for reporting to work late when he overslept. On July 26, the employer gave the claimant three points for notifying the employer late that he was unable to work as scheduled.

The claimant worked as scheduled on July 31 and August 1. The claimant notified the employer he was unable to work on August 2. There was no work for the claimant on August 3. On August 4 and 5, the claimant contacted the employer to report he was unable to work as scheduled. The claimant had a doctor's note verifying he was unable to work these two days. As of August 4, the claimant had accumulated 15 points because he had an unexcused

absence on July 26 when he called in late. The employer's records indicate the claimant was absent for personal business. On August 8, 2006, the employer suspended the claimant for excessive absenteeism. As of August 24, the employer discharged the claimant for violating the employer's excessive absenteeism policy.

#### **REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7). 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. 871 IAC 24.32(8).

The employer established compelling business reasons for discharging the claimant. Based on the employer's no-fault attendance policy, the claimant was excessively absent from work. The record shows the claimant's recent absences occurred because he was unable to work as scheduled, which was verified by a doctor's note and the claimant contacted the employer about his inability to work. The record does not establish that the claimant intentionally or even substantially disregarded the employer's interests. The claimant did not commit work-connected misconduct. Therefore, as of August 6, 2006, the claimant is qualified to receive unemployment insurance benefits.

**DECISION:**

The representative's September 25, 2006 decision (reference 01) is reversed. The employer discharged the claimant for compelling business reasons that do not constitute work-connected misconduct. As of August 6, 2006, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

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Debra L. Wise  
Administrative Law Judge

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Decision Dated and Mailed

dlw/pjs