IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MAX A GIBSON
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 15A-UI-02246-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/01/15
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

Max Gibson filed a timely appeal from the February 16, 2015, reference 01, decision that disqualified the claimant for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that the claimant had been discharged on January 26, 2015 for excessive unexcused absences. After due notice was issued, a hearing was held on March 23, 2015. Claimant participated. Alberto Olguin, Human Resources Manager, 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: Max Gibson was employed by Tyson Fresh Meats, Inc., as a full-time kill floor supervisor at the employer's Perry plant from 2008 until January 26, 2015, when the employer discharged him for attendance. Mr. Gibson's usual start time was 5:00 a.m. The usual work days were Monday through Friday. Mr. Gibson would usually work a shift that lasted at least 10 hours. Mr. Gibson's immediate supervisor was Brian Jackson, Kill Floor General Foreman. If Mr. Gibson needed to be absent from the employment, the employer's work rules required that Mr. Gibson contact Mr. Jackson at least 30 minutes prior to the scheduled start of the shift. Mr. Gibson was aware of the attendance policy, including the absence notification requirement.

Mr. Gibson's discharge from the employment occurred at a time when Mr. Gibson was in the process of seeking medical attention for a hand injury that was likely caused or aggravated by the employment. On or about December 24, 2014, Mr. Gibson began to experience increased pain in his left hand. The pain arose after Mr. Gibson had to perform work involving pulling internal layers of fat from inside an animal carcass. Though the task was ordinarily performed with the aid of a machine, the machine was out of order of and the work had to be performed by hand. Thereafter, Mr. Gibson experienced shooting pain in his left hand. Mr. Gibson did not

want to report the injury to the employer as a work-related injury because he did not want to be perceived as disloyal to the employer. Mr. Gibson intended instead to use his employer-sponsored health insurance and available vacation time to address the hand injury.

On and after December 29, Mr. Gibson began to miss work due to his hand injury. On December 29 and 30, 2014, Mr. Gibson was absent due to illness and properly reported the absence to the employer. On December 31, 2014, Mr. Gibson was absent due to a medical appointment. Mr. Gibson had requested the time off in advance and Mr. Jackson had approved the request. The employer's human resource department later erroneously documented Mr. Gibson as being a no-call, no-show on December 31. The employer had scheduled Mr. Gibson to participate in out-of-state training on January 6-8, 2015. On January 2, Mr. Gibson requested and was approved to have January 5 and 9 off. On January 3, 2015, Mr. Gibson's primary doctor took him off work until January 12, 2015 in connection with the hand injury. The employer received a note from the doctor. Mr. Gibson intended nonetheless to participate in the out-of-state training, since the training, unlike meat production, would not require repetitive use of his left hand. On January 5, the employer notified Mr. Gibson that the employer was cancelling Mr. Gibson's participation in the out-of-state training after concluding that it was not a good time for Mr. Gibson to participate in the training in light of his hand issue and his need to go off work in connection with the hand issue. Mr. Gibson remained off work. The employer's human resources staff later erroneously documented Mr. Gibson as being a no-call, no-show for work on January 6-8. On January 12, Mr. Gibson saw an orthopedist who took Mr. Gibson off work until January 19. On January 12, Mr. Gibson presented the employer with a doctor's note that took him off work until January 19, 2015.

On January 19, Alberto Olguin, Human Resources Manager for the Perry plant, met with Mr. Gibson to discuss concerns that he had about how Mr. Gibson had been reporting his absences. Mr. Gibson had directed his medical documentation regarding his need to the employer's nursing department pursuant to his understanding of required protocol pertaining to absences due to medical issues. Mr. Olguin told Mr. Gibson that he not been properly reporting his absences, that he could be discharged from the employment, but that in light of his long employment and prior good attendance, the employer was going to continue the employment pursuant to a last chance agreement. The employer told Mr. Gibson that he needed to speak directly with Jamie Fry, Production Superintendent, or his direct supervisor, Brian Jackson, to report his absences.

On January 21, 2015, Mr. Gibson got to work on time, but left early, with Mr. Jackson's permission, so that he could see a doctor regarding a respiratory issue.

On January 22, 2015, Mr. Gibson reported for work on time. Mr. Gibson stopped at the plant safety coordinator's office to discuss his hand injury. Mr. Gibson shared that his wife wanted him to report the hand injury to be addressed as a worker's compensation matter. At that point, Mr. Gibson had a surgical procedure scheduled for January 28, 2015 and had provided the employer notice of the impending procedure. Mr. Gibson's wife had tried to cancel the procedure so that the matter could first be recharacterized as a work-related injury covered by worker's compensation. The safety coordinator referred Mr. Gibson to Mr. Jackson. Mr. Jackson told Mr. Gibson to report to the health services department. Mr. Gibson told the nursing staff that he had been unable to sleep due to shooting pain in his hand and that he needed to go see a doctor. Mr. Olguin, Human Resources Manager, was at the nursing station at the same time Mr. Gibson was there. The employer's nursing supervisor had recently separated from the employer and Mr. Olguin was functioning as the de facto nursing department supervisor. The nurse sent Mr. Gibson home for the day. Later that day, Mr. Gibson spoke with a nurse in the orthopedist's office about getting a note that would take him off work pending his

surgery. The orthopedist's office faxed a note to the employer's health services department indicating that Mr. Gibson was being taken off work from January 23, 2015 through March 5, 2015. Mr. Gibson believed he had properly directed the note to the health services department in light of Mr. Jackson's decision to refer him to health services. Mr. Gibson notified the company nurse that the note from his doctor would be faxed to the employer no later than January 23.

On or about January 22, 2015, Mr. Olguin had notified Mr. Gibson that his absence from work was being treated as an absence under the Family and Medical Leave Act. The employer had given preliminary approval of the leave. The employer had provided Mr. Gibson with FMLA application materials and a deadline by which to return the completed materials, including the medical certification. On the afternoon of January 23, another kill floor supervisor telephoned Mr. Gibson and asked what he was up to. Mr. Gibson reported that he had been on his way to Des Moines to provide the orthopedist with the forms that needed to be completed for the FMLA leave approval and application for short-term disability benefits, but that he would have to delay his trip to Des Moines until Monday, January 26. On January 26 the fellow kill floor supervisor again contacted Mr. Gibson. This time the kill floor supervisor asked Mr. Gibson whether he was still scheduled to undergo surgery on January 28. Mr. Gibson advised that he was about to walk into the orthopedist's office. The nature and content of these contacts from the kill floor supervisor suggest they were prompted by the employer. Later that same day, Mr. Gibson contacted the employer's human resources office regarding questions he had about insurance and benefits. At that time, Mr. Olguin told Mr. Gibson that he had been discharged from the employment as a result of being a no-call, no-show on December 31 and January 23. The discharge occurred despite the fact that the employer had already given preliminary approval of the request for FMLA and the deadline for FMLA application materials had not yet arrived.

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:
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> 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.
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> 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.

This case bears the hallmarks of an employer's bad faith attempt to cut loose an injured worker to minimize or avoid liability in connection with a work-related injury through the pretext of insufficiently reported absences. The weight of the evidence indicates that Mr. Gibson at all

points maintained reasonable and appropriate contact with the employer regarding his need to be absent from work in connection with the work-related injury. The weight of the evidence fails to establish a single absence that would be an unexcused absence under the applicable law. The administrative law judge notes that the employer failed to present testimony from the claimant's immediate supervisor, from the plant superintendent, the safety coordinator, or from the company nurse, all of whom had personal knowledge concerning the claimant contact with the employer regarding his need to be off work for medical reasons. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Gibson was discharged for no disqualifying reason. Accordingly, Mr. Gibson is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 16, 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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