

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DENISE S OBRIEN**

Claimant

**APPEAL NO. 17A-UI-04063-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**

Employer

**OC: 01/15/17**

**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Denise O'Brien filed a timely appeal from the April 7, 2017, reference 02, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. O'Brien was discharged on March 25, 2017 for repeated tardiness in reporting to work. After due notice was issued, a hearing was held on May 4, 2017. Ms. O'Brien participated. Cathleena Mayes, Human Resources Administrative Assistant, 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: Denise O'Brien was employed by Tyson Fresh Meats, Inc. as a full-time Hog Receiving Monitor until March 24, 2017, when Human Resources Managers Teri Rottinghaus and Jim Hook discharged her for attendance. Ms. O'Brien began her employment in 2004. Ms. O'Brien's work hours were 5:30 a.m. to 2:00 p.m., Monday through Friday, and Saturdays as needed. Ms. O'Brien's immediate supervisor during the last several years of the employment was Albert Kneeskern. If Ms. O'Brien needed to be absent from or late for a shift, the employer's absence reporting policy required that Ms. O'Brien telephone the scale house and speak to a supervisor or leave a message at least 30 minutes prior to the scheduled start of her shift. Ms. O'Brien was familiar with the absence reporting policy.

The final absence that triggered the discharge occurred on March 17, 2017, when Ms. O'Brien was absent due to illness. Ms. O'Brien awoke at 4:00 a.m. and called the scale house at that time to report her need to be absent from her shift, but no one answered at the scale house at that time. The scale person who would answer the scale house phone also had to work in the plant's barn and was not always available to answer the phone. Ms. O'Brien called again at 4:30 a.m. and 5:00 a.m., but no one answered the scale house phone. At that point, Ms. O'Brien went back to sleep. Ms. O'Brien went to the doctor that morning and was

diagnosed with a lung infection. The doctor took Ms. O'Brien off work through March 27, 2017 with an anticipated return to work date of March 28, 2017. On the morning of March 17, Ms. O'Brien reported the Tyson plant and provided her medical documentation to the health services personnel per policy. Ms. O'Brien was thereafter on an approved leave of absence until she returned to the employment and was discharged.

On March 23, 2017, Ms. O'Brien returned to the doctor and was released to return to work on March 24, 2017. Ms. O'Brien was anxious to return to work because she needed the wages. On the morning of March 24, 2017, Ms. O'Brien returned to work, delivered her medical release to the health services personnel, and was cleared to return to work. When Ms. O'Brien reported to her work station, her supervisor told her that she would have to leave the plant and return later that morning to speak with human resources, based on her attendance points. Under the employer's attendance policy, an employee was subject to being discharged if the employee accrued 10 attendance points. The employer deemed Ms. O'Brien to have provided late notice of her need to be absent on March 17, 2017. As a result, the employer deemed Ms. O'Brien to have 12 attendance points. When Ms. O'Brien returned to speak to human resources personnel later that morning, Teri Rottinghaus and Yard Supervisor Jeff Johnson notified Ms. O'Brien that she was discharged for attendance.

In making the decision to discharge Ms. O'Brien from the employment, the employer considered absences dating back to June 15, 2016 and attendance points warnings issued in November and December 2016. Prior to the final absence on March 17, 2017, the next most recent absence that factored in the discharge occurred on January 11, 2017, when Ms. O'Brien was absent due to illness and properly reported the absence.

#### **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 in the record fails to establish a "current act" of misconduct. The weight of the evidence establishes that the March 17, 2017 was an excused absence under the applicable law. Ms. O'Brien took reasonable and timely steps to report the absence to the employer by calling the scale house at 4:00, 4:30 and 5:00 a.m., but no one answered that the scale house.

Ms. O'Brien cannot be faulted for the employer's failure to answer the phone at the number Ms. O'Brien was directed to use to report her absences. Ms. O'Brien continued to act in good faith that morning by promptly securing a medical appointment and by reporting the plant following the medical appointment to deliver documentation that supported her need to be absent due to illness. One has to go more than two months back in time to reach the next most reach absence on January 11, 2017. That absence was also due to illness, was properly reported to the employer and was an excused absence under the applicable law. The absences that occurred earlier in the employment were too remote in time to constitute "current acts" at the time of the discharged. Because the final absence that triggered the discharge was an excused absence under the applicable law and because the evidence fails to establish a 'current act' of misconduct, the administrative law judge need not further consider the earlier absences that factored in the discharge decision.

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

**DECISION:**

The April 7, 2017, reference 02, decision is reversed. The discharge occurred in the absence of a current act of misconduct. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she 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