

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOHN C REICH**  
Claimant

**APPEAL NO. 13A-UI-12705-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON PET PRODUCTS INC**  
Employer

**OC: 10/20/13**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

John Reich filed a timely appeal from the November 8, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 5, 2013. Mr. Reich participated. At the time of the hearing, the employer representative, Brook Salger, was not available at the number the employer, or the employer's representative of record, Talx/Equifax, had provided as the number where the employer could be reached for the hearing. Exhibit A was received into evidence.

After the hearing record has closed and after the administrative law judge had released the claimant from the hearing, Ms. Salger left a message with the Appeals Section staff. The message was that Equifax had not let her know that she was to participate in the hearing. The administrative law judge had made two attempts to reach Ms. Salger for the hearing at the number the employer, or the employer's representative had provided on December 4, 2013 as the number where the employer could be reached for the hearing. On the first attempt, the administrative law judge attempted to reach the employer's operator, but no one answered at that extension. On the second attempt, the administrative law judge attempted to reach the human resources department, but no one answered at that extension. The recorded message at the human resources extension identified Ms. Salger as the human resources representative. After Ms. Salger's late call and the message left with the Appeals Section staff, the administrative law judge returned Ms. Salger's call at his earliest convenience, within a couple hours of her message. However, Ms. Salger again did not answer at her extension. Though the hearing was set for 10:00 a.m. and though the administrative law judge left a message for Ms. Salger in the early afternoon, as of the entry of this decision at 6:30 p.m., the administrative law judge has still not heard from Ms. Salger. The employer's representative of record had proper notice of the hearing and the employer has failed to establish good cause for its failure to participate in the hearing.

**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: John Reich was employed by Tyson Pet Products as a full-time oven assistant from February 2013 until October 21, 2013, when the employer discharged him for attendance. Mr. Reich's work hours were 6:00 a.m. to 2:30 p.m., Monday through Saturday. The final absence that triggered the discharge occurred on October 18, 2013, when Mr. Reich was absent because he was incarcerated. Mr. Reich had been arrested the prior evening and had left a message for the employer on the evening of October 17 to let the employer know of his incarceration. Mr. Reich was released from custody on October 18, 2013 and appeared at the workplace just as his shift was getting over. At that time, Mr. Reich spoke to a supervisor, Randy Clausen, who directed Mr. Reich to appear on Monday, October 21, 2013 to speak with Brook Salger in human resources. Mr. Reich appeared as directed and was discharged from the employment.

Mr. Reich has been late getting to work a couple weeks before the final absence, when his car overheated as he was on his way to work. Mr. Reich walked the rest of the way to work, but was an hour late. Mr. Reich had not known prior to leaving for work that his car was having a problem with overheating. Mr. Reich was under the belief that the employer excused the absence.

Mr. Reich has also been absent from work three or four times before due to severe allergies. On those occasions he had reported to work, but had gone home early after speaking with a supervisor.

Mr. Reich has also been absent from work in February 2013, due to inclement weather that prevented him from driving to work.

At the time of the discharge, Mr. Reich was aware that his attendance points were high.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 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.

871 IAC 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.

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 employer did not participate in the hearing and, thereby, did not present any evidence to support the allegation that Mr. Reich was discharged for misconduct in connection with the employment. The evidence in the record establishes a single unexcused absence on

October 18, 2013, when Mr. Reich was absent due to incarceration. The evidence establishes an additional absence, a late arrival, two weeks earlier that was due to Mr. Reich's vehicle overheating without notice while he was on his way to work. The weight of the evidence indicates that the absence was due to an incident beyond Mr. Reich's control, that Mr. Reich took reasonable steps to get to work as soon as he could, and that the employer excused the late arrival. There is insufficient evidence to establish an unexcused absence in connection with the car incident. The evidence establishes additional absences due to illness, which absences were properly reported to the employer, and those absences would be excused absences under the applicable law. Finally, the evidence establishes another absence in February 2013 that was due to inclement weather that prevented Mr. Reich from driving to work. That absence was due to a matter beyond Mr. Reich's control and, therefore, would be an excused absence under the applicable law.

The evidence establishes only one unexcused absence, the absence that triggered the discharge. That single absence is insufficient to establish misconduct in connection with the employment. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Reich was discharged for no disqualifying reason. Accordingly, Mr. Reich is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Reich.

**DECISION:**

The Agency representative's November 8, 2013, 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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