

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALEXANDER J FORSYTHE
Claimant

APPEAL NO. 12A-UI-02480-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL MEAT SOLUTIONS CORP
Employer

OC: 01/22/12
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 2, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 27, 2012. Claimant participated. Kirstie Horton, Human Resources Associate, represented the employer. Exhibits One through 11 were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Alexander Forsythe was employed by Cargill Meat Solutions as a full-time production worker from 2009 until January 26, 2012, when the employer discharged him for attendance. The final absence that triggered the discharge occurred on January 6, 2012, when Mr. Forsythe left work early due to illness and properly reported the need to leave to employer before departing. Under the employer's attendance policy, the absence would count against Mr. Forsythe unless he could qualify for Family and Medical Leave in connection with the absence.

In order to qualify for FMLA in connection with the January 6 absence, Mr. Forsythe thought he had to be absent a minimum of three days. Accordingly, Mr. Forsythe was absent for his shifts on January 7 and 9 and provided proper notice. Mr. Forsythe returned to work on January 10. Mr. Forsythe had gone to the doctor on January 6 and presented a doctor's note to the employer on January 10. The employer directed him to provide more detailed medical records. Mr. Forsythe did that. On January 26, the employer discharged Mr. Forsythe from the employment. Between January 10 and 26, Mr. Forsythe continued to report for work.

In making the decision to end Mr. Forsythe's employment, the employer considered prior absences going back to March 30, 2011. On March 30, April 20 and 25, June 9 and 21, July 6, 19, and 25, August 10 and 24, and September 13 and 17, Mr. Forsythe was absent from work and provided proper notice to the employer. Neither the employer nor Mr. Forsythe recalls the basis for those absences. On May 17, August 2 and 11, and October 3, Mr. Forsythe was late getting to work for personal reasons.

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.

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 § 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's documentation, and the weight of the evidence, indicates that the absence that triggered the discharge was the absence January 6, 2012. That absence was for illness properly reported and could not serve as the basis for disqualifying Mr. Forsythe for benefits. The evidence does establish unexcused absence on January 7 and 9. On those days, Mr. Forsythe was not ill, but decided to be absent in order to try to get the January 6 absence excused under the employer's policy. The employer allowed Mr. Forsythe to work more than two weeks before the employer discharged him from the employment after the final unexcused absence on January 9. The employer's delay in discharging Mr. Forsythe was unreasonable. The evidence fails to establish a current act of misconduct. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Forsythe was discharged for no disqualifying reason. Accordingly, Mr. Forsythe is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Forsythe.

DECISION:

The Agency representative's March 2, 2012, reference 01, decision is affirmed. The discharge was not based on a current act. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs