

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**DANIEL J PALENIK**  
Claimant

**TYSON FRESH MEATS INC**  
Employer

**APPEAL NO. 21A-UI-04449-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/08/20**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant, Daniel Palenik, filed a timely appeal from the January 22, 2021, reference 01, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on October 30, 2020 excessive unexcused absences. After due notice was issued, a hearing was held on April 8, 2021. The claimant participated. The employer did not participate. The employer had registered a number for the hearing and had registered Korina Mellado as the employer's representative. However, at the time of the hearing, the employer representative was not available at the registered number. Exhibit A 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.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by Tyson Fresh Meats, Inc. as a full-time Engine Room Roundsman until October 30, 2020, when the employer discharged the claimant for attendance. The claimant had started with the employer in 2008. The claimant was on the first shift. The claimant's shift started at 6:00 a.m. and ended at 6:30 a.m. Power House supervisors Tony Munoz and Travis Wendt were the claimant's supervisors. The claimant last performed work for the employer on October 25, 2020 and completed his shift that day. The claimant was next scheduled to work on October 29, 2020.

The final absence that triggered the discharge occurred on October 29, 2020. The claimant realized during his walk to work that he did not have his building access badge. The claimant returned home to collect his badge and then reported to the workplace. The claimant arrived at about 6:18 a.m. to 6:20 a.m. Mr. Wendt was waiting for the claimant at the security entrance. Mr. Wendt asked the claimant what had happened. The claimant replied that he was late. Mr. Wendt met with the claimant in a security conference room, requested the claimant's badge, and directed the claimant to leave and return after 10:00 a.m. the following day for a meeting

with human resources personnel. The claimant reported the next day as directed. Though the employer had directed the claimant to report after 10:00 a.m., and though the claimant reported shortly after 10:00 a.m., the employer asserted that the claimant was late for the meeting and had thereby used up his second chance.

Prior to the final absence, the claimant had been absent due to illness on October 19, 20, 21 and 22, 2020. The claimant was during that time experiencing debilitating symptoms consistent with COVID-19. The claimant's symptoms included projectile vomiting and severe diarrhea. The claimant usually lives alone in a house. The claimant's father had recently been staying with the claimant, but the claimant had sent his father elsewhere to avoid exposing his father to the suspected COVID-19. In the midst of his severe illness and delirium, the claimant had set his cell phone on the toilet tank lid while he attempted to clean vomit and feces off the floor in his bathroom. The claimant's phone somehow ended up submerged in the toilet tank water. The claimant discovered his phone the next day and attempted to dry it out, but the phone was inoperable. The claimant was aware that he was required to call the employer's absence reporting line at least 30 minutes prior to his shift to report his absence, but was without a working phone and was too ill to leave his home. The claimant's was still ill with a headache and low-grade fever when he reported for work on October 25, 2020, treated his fever with an over-the-counter NSAID and was able to make it through the employer's infrared camera screening and report for work on that day.

The claimant cannot recall prior absence dates or details and the employer has not provided such information as part of the appeal.

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

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 establishes a discharge for no disqualifying reason. The employer did not participate in the appeal hearing and presented no evidence to prove excessive unexcused absences or other disqualifying misconduct in connection with the employment. The evidence in the record establishes a single unexcused absence occurring October 29, 2020, when the claimant was late before he forgot his building access badge at home. The absences on October 19 through 22 were excused absences under the applicable law. The absences

were based on illness. The claimant was physically incapacitated, without a working phone, and unable to comply with the employer's absence reporting policy on those days. The employer failed to present any evidence to rebut the claimant's candid and detailed testimony regarding the circumstances of his illness that prevented him from reporting those absences to the employer. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The January 22, 2021, reference 01, decision is reversed. The claimant was discharged on October 30, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.



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James E. Timberland  
Administrative Law Judge

April 12, 2021  
Decision Dated and Mailed

jet/lj