

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREW A BISHOP
Claimant

APPEAL NO. 07A-UI-05037-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CARGILL MEAT SOLUTIONS
CORPORATION**
Employer

OC: 04/08/07 R: 03
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Cargill Meat Solutions filed a timely appeal from the May 7, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 4, 2007. Claimant Andrew Bishop did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Judy Dorman, Worker's Compensation Coordinator, represented the employer. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received Exhibits One through Seven into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Andrew Bishop was employed by Cargill Meat Solutions as a full-time production worker from September 14, 2006 until April 9, 2007, when the employer's human resources department discharged him for attendance. The employer's written attendance policy required Mr. Bishop to notify the employer at least 30 minutes before the scheduled start of his shift if he needed to be absent. The employer provided Mr. Bishop with a telephone number at which he could leave a message. The employer required Mr. Bishop to provide the reason for the absence when he reported the absence. The employer's human resources clerk was charged with reviewing the phone messages and documenting the time of the call and the reason given for the absence. The employer witness testified to several absences, but lacked information regarding the reason for all but a handful of the absences, which the employer had documented as being based on illness. The employer witness assumes the absences were for illness. The employer witness testified that Mr. Bishop notified the employer of the absences, but employer witness lacked information regarding when Mr. Bishop notified the employer. The final absence that prompted the discharge occurred on March 30, 2007 when Mr. Bishop reached ten attendance points under the employer's attendance policy. On April 9, the employer notified Mr. Bishop that he

was being discharged effective March 30, 2007. Mr. Bishop had been absent on April 2-6, which prevented the employer from meeting with Mr. Bishop earlier than April 9.

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).

The employer has failed to produce sufficient evidence to prove, by a preponderance of the evidence, that any of Mr. Bishop's absences would be unexcused absences under the applicable law. The employer witness testified that she assumes the absences were related to illness and that Mr. Bishop had reported the absences. The employer had the ability to present more direct and satisfactory evidence to support the allegation of unexcused absences, but failed to produce that evidence for the hearing. See 871 IAC 24.32(4) and Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976). Accordingly, the evidence fails to establish a "current act." See 871 IAC 24.32(8). Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Bishop was discharged for no disqualifying reason. Accordingly, Mr. Bishop is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Bishop.

DECISION:

The claims representative's May 7, 2007, reference 01, decision is affirmed. 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/css