

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**SALVADOR LOPEZ GONZALEZ**  
Claimant

**APPEAL NO. 19A-UI-00938-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**  
Employer

**OC: 01/06/19**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Salvador Lopez Gonzalez filed a timely appeal from the January 24, 2019, reference 01, decision that held he was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Mr. Lopez Gonzalez was discharged on December 10, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on February 15, 2019. Mr. Lopez Gonzalez did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Jeaneth Ibarra 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: Salvador Lopez Gonzalez was employed by Tyson Fresh Meats, Inc. as a full-time maintenance technician from 2016 until December 10, 2018, when Human Resources Manager Will Sager discharged him for attendance. Mr. Lopez Gonzalez's work hours were 4:00 a.m. to 4:00 p.m. Sunday through Wednesday. The employer suspended Mr. Lopez Gonzalez on Friday, December 7, 2018 and notified him the following Monday that he was discharged from the employment. If Mr. Lopez Gonzalez needed to be absent from work, the employer's attendance policy required that he call the automated absence reporting line at least 30 minutes prior to the scheduled start of his shift and leave a message in response to the prompts. Mr. Lopez Gonzalez was at all relevant times aware of the absence reporting requirement. Under the attendance policy, Mr. Lopez Gonzalez would be subject to discharge from the employment if he accrued 10 attendance points.

The final absence that triggered the discharge occurred on December 1, 2018, when Mr. Lopez Gonzalez provided late notice of his need to be absent for personal business. Mr. Lopez Gonzalez reported the absence 19 minutes after the scheduled start of his shift. The next most recent absence that factored in the discharge occurred on March 11, 2018, when Mr. Lopez Gonzalez was absent due to illness and properly notified the employer. Mr. Lopez Gonzalez was absent without notifying the employer on March 9, 2018. The

employer issued a written warning on April 26, 2018 to let Mr. Lopez Gonzalez know he had accrued seven attendance points. On February 25, 2018, Mr. Lopez Gonzalez was absent for personal business. The earliest absence that factored in the discharge occurred on January 7, 2018, when Mr. Lopez Gonzalez was absent due to illness and properly notified the employer.

### **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 evidence in the record establishes a final absence on December 1, 2018 that was for personal business and that was reported late. Either factor would make the absence unexcused under the applicable law. Prior to that final unexcused absence, one has to go all the way back to March 9, 2018 to find the next most recent absence that would be unexcused under the applicable law. That was a no-call/no-show absence. The February 25, 2018 absence was for personal business and therefore was an unexcused absence under the applicable law. The January 7 and March 11, 2018 absences were due to illness, were properly reported to the employer, and were excused absences under the applicable law. Given the almost nine-month space between the final unexcused absence and the next most recent unexcused absence, the evidence does not establish excessive unexcused absences. Mr. Lopez Gonzalez is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

#### **DECISION:**

The January 24, 2019, reference 01, decision is reversed. The claimant was discharged on December 10, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements. 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