

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KEVIN S BARBEE**

Claimant

**APPEAL NO. 13A-UI-05989-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**INTERBAKE FOODS**

Employer

**OC: 03/31/13**

**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Kevin Barbee filed a timely appeal from the May 14, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 8, 2013. Mr. Barbee participated. Vanessa Bremer represented the employer. Exhibits One through 20 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: Kevin Barbee was employed by Interbake Foods on a full-time basis from March 2012 until March 22, 2013, when the employer discharged him for attendance. The employer's attendance policy required that Mr. Barbee telephone the employer at least one hour prior to the scheduled start of his shift if he needed to be absent. Mr. Barbee was aware of the policy. The final absences occurred on March 15, 16, 20, and 21, 2013. On March 15, Mr. Barbee notified the employer at 10:42 a.m. that he would be absent for personal reasons from a shift that was to start at 11:00 a.m. Mr. Barbee said nothing to the employer on that day about needing to be absent due to illness. On March 16, Mr. Barbee left a message for the employer at 11:54 a.m. indicating that needed to be absent from the shift was to start at 3:00 p.m. The message was otherwise indecipherable. On March 20 and 21, Mr. Barbee was absent without notifying the employer of his need to be absent. Mr. Barbee did not contact the employer on March 20 or 21 because he assumed he was discharged from the employment for accruing too many attendance points. On March 22, 2013, the employer notified Mr. Barbee that he was discharged.

In making the decision to discharge Mr. Barbee from the employment, the employer considered additional absences. On February 1, 2013, Mr. Barbee was absent from work due to a lack of transportation. Mr. Barbee discovered shortly before 2:00 a.m. that his car would not start. Mr. Barbee was scheduled to work at 3:00 a.m. and the commute was several miles.

Mr. Barbee lacked money for a cab and did not make any other arrangements to get to work. On June 16 and July 17, 2012, Mr. Barbee missed mandatory overtime. The overtime notice had been posted, but Mr. Barbee had not reviewed to see whether he was included on the list. The employer had provided training to Mr. Barbee at the start of the employment so that he would understand the overtime protocol. On July 5, 2012, Mr. Barbee was late to work because he overslept.

The employer issued multiple reprimands to Mr. Barbee for attendance and regularly informed him of the attendance points he had accrued. Prior to the absences that started on March 15, 2013, Mr. Barbee knew the employment was in jeopardy.

Mr. Barbee had undergone sinus surgery in December 2012 and the employer had approved a leave of absence. Mr. Barbee returned to work in January 2013.

### **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).

Mr. Barbee provided somewhat half-hearted, unpersuasive testimony to suggest that his absences on March 15 and 16 were due to the sinus surgery he had in December. The administrative law judge noted that Mr. Barbee seemed to hem and haw before offering up the sinus issue as an excuse for the March 15 absence. Along with that, Mr. Barbee testified unpersuasively that he had not mentioned illness when he called in on March 15 because he was uncomfortable doing so. The weight of the evidence indicates there was no prior such discomfort in connection with the extended absence in December and January.

The evidence in the record establishes unexcused absences on March 15, 20 and 21. On each of those days, Mr. Barbee failed to give the employer proper notice of his need to be absent. On March 20 and 21, Mr. Barbee made no effort to contact the employer. The evidence is insufficient to establish an unexcused absence connection with the March 16 absence, since the notice was time and the content of the message was garbled. The evidence establishes additional unexcused absences on February 1, 2013. Though Mr. Barbee’s car would not start, Mr. Barbee knew that more than an hour before he was scheduled to be at work and made no effort to find an alternative means to get to work. The evidence establishes additional unexcused absences on June 16 and July 17, 2012, when Mr. Barbee missed mandatory overtime because he did not follow the established protocol to learn whether he was scheduled to work overtime. The evidence establishes an unexcused absence on July 5, 2012, when Mr. Barbee overslept. Mr. Barbee’s unexcused absences were excessive and constituted misconduct in connection with the employment. Mr. Barbee is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit

amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

**DECISION:**

The agency representative's May 14, 2013, reference 01, decision is affirmed. The claimant as discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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