

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

KENNETH D WILEY
Claimant

APPEAL NO. 18A-UI-07101-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 06/03/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Kenneth Wiley filed a timely appeal from the June 25, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Wiley was discharged on May 5, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on July 18, 2018. Mr. Wiley participated. Jeaneth Ibarra represented the employer. Exhibits A and B 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: Kenneth Wiley was employed by Tyson Fresh Meats, Inc., as a full-time building maintenance team member from November 2017 until May 23, 2018, when the employer discharged him for attendance. Until a couple weeks before the discharge, Mr. Wiley's usual work hours were 4:00 a.m. to 12:30 p.m., Sunday through Thursday. A couple weeks before the discharge, the employer changed Mr. Wiley's work hours to 4:00 a.m. to 4:30 p.m., Sunday through Wednesday. John Abbas, Maintenance Supervisor, was Mr. Wiley's immediate supervisor.

The final absence that triggered the discharge occurred on May 16, 2018. On that day, Mr. Wiley was absent from the entire shift and failed to notify the employer in a timely manner. Under the employer's attendance policy, Mr. Wiley was required to call the designated absence reporting number at least 30 minutes prior to the scheduled start of his shift if he needed to be absent. Mr. Wiley was at all relevant times aware of the absence reporting requirement. On May 16, Mr. Wiley reported his need to be absent at 5:51 a.m., almost two hours after the scheduled start of his shift. On May 22, 2018, the employer suspended Mr. Wiley pending review of his attendance history and a decision regarding whether he would be allowed to continue in the employment. The discharge followed the next day, after the employer concluded that Mr. Wiley had 11 attendance points, which exceeded the allowable 10 attendance points.

As Mr. Wiley would accrue attendance points in connection with absence, his supervisor would tell him the number of attendance points he had accrued.

The employer considered additional absences dating back to February 20, 2018 when making the decision to discharge Mr. Wiley from the employment. On February 20, 2018, Mr. Wiley was absent due to illness and properly reported the absence to the employer. On March 17, 2018, Mr. Wiley was absent due to transportation issues and properly notified the employer of his need to be absent. On April 5, 2018, Mr. Wiley was absent due to illness and properly notified the employer. On April 18, 2018, Mr. Wiley was absent and failed to notify the employer. On April 19, 2018, Mr. Wiley clocked in four minutes late. Mr. Wiley was aware that the employer's policy required that he be clocked in and in the building supervisor's office at his scheduled start time. Mr. Wiley made a trip to the restroom upon his arrival at the workplace and this led to him clocking in late and arriving at the supervisor's office late.

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 misconduct in connection with the employment based on excessive unexcused absence. The evidence in the record establishes unexcused absences on March 17, April 18, April 19, and May 22, 2018. The March 17 absence was due to transportation, a matter of personal responsibility. The April 18 absence was a no-call/no-show. The April 19 absence was a late clock-in and late appearance in the maintenance supervisor's office due to an ill-timed restroom break. The May 22 absence involved untimely notice to the employer. These four unexcused absences within a roughly two-month period were excessive and occurred in the context of employer warnings regarding the accrual of attendance points. The absences on February 20 and April 5 were due to illness, were properly reported to the employer, and therefore were excused absences under the applicable law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Wiley was discharged for misconduct in connection with the employment. Accordingly, Mr. Wiley is disqualified for benefits until he has worked in and been

paid wages for insured work equal to ten times his weekly benefit amount. Mr. Wiley must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The June 25, 2018, reference 01, decision is affirmed. The claimant was discharged on May 23, 2018 for misconduct in connection with the employment based on excessive unexcused absences. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs