

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRUCE E ORR
Claimant

APPEAL NO. 10A-UI-03378-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**Original Claim: 01/17/10
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Bruce Orr filed a timely appeal from the February 23, 2010, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on April 20, 2010. Mr. Orr participated. Eloisa Baumgartner, Employment Manager, 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: Bruce Orr was employed by Tyson Fresh Meats, Inc., as a full-time building maintenance worker from October 2007 until January 14, 2010, when Dan Wilks, Building Maintenance Supervisor, discharged him for exceeding the allowable number of attendance points. Mr. Wilks was Mr. Orr's immediate supervisor.

The final two absences that triggered the discharge occurred on January 8 and 9, 2010. The employer documented no-call, no-show absences for each day. Two weeks prior, Mr. Orr had submitted a formal request to use both days as vacation days. A week prior, Mr. Wilks verbally notified Mr. Orr that the time off request was approved. Mr. Orr would ordinarily receive written confirmation of the approved time off, but did not receive any. Mr. Orr assumed, based on Mr. Wilks' statement, that he had proper approval to take the days off. On January 14, Mr. Wilks notified Mr. Orr that he was being discharged for attendance points. Mr. Orr took the opportunity to remind Mr. Wilks that Mr. Wilks had told Mr. Orr that his absences on January 8 and 9 were approved beforehand. Mr. Wilks gave some indication that at least one of the absences would not be held against Mr. Orr. The balance of Mr. Orr's many absences were for illness properly reported to the employer.

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 weight of the evidence in the record fails to establish any absences that would be unexcused absences under the applicable law. With regard to the final two absences, the employer failed to present any testimony from Mr. Wilks, or others with firsthand knowledge, to rebut Mr. Orr's testimony that the final absences had been approved in advance. The employer had the ability to present such testimony. The balance of Mr. Orr's absences were for illness properly reported to the employer, were excused absences under the applicable law, and cannot be used as a basis for denying benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Orr was discharged for no disqualifying reason. Accordingly, Mr. Orr is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Orr.

DECISION:

The Agency representative's February 23, 2010, reference 02, decision is reversed. 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/kjw