

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ABDIWAHID D AWIL**  
Claimant

**APPEAL NO. 12A-UI-05319-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AGRI STAR MEAT & POULTRY LLC**  
Employer

**OC: 10/30/11  
Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the May 2, 2012, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on June 25, 2012. Claimant participated. Laura Roney, payroll/human resources assistant, represented the employer. Exhibits One through Seven were received into evidence.

**ISSUE:**

Whether the claimant separated from the employment for a reason that disqualified him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Abdiwahid Awil is an immigrant from Somalia and does not speak English. Mr. Awil was employed by Agri Star Meat & Poultry, L.L.C., on a full-time basis from 2010 and last performed work for the employer on April 4, 2012. Mr. Awil's usual work hours were 7:00 p.m. to 3:30 a.m., Sunday night through Friday morning. The employer would occasionally have Mr. Awil work on a Friday afternoon.

On April 4, Mr. Awil worked his entire shift. On that day, Mr. Awil went to the human resources office and requested time off. Mr. Awil was experiencing neck pain that prevented him from turning his neck. Mr. Awil wanted time off so that he could seek medical attention and recover. The human resources representative declined to pre-authorize the time off, but instructed Mr. Awil that he could use the employer's call-in line to report his absences each day and bring a doctor's note when he returned to work.

Mr. Awil was then absent from shifts on April 5, 6, 8, and 9. Mr. Awil knew about the shifts on April 5, 8, and 9. Mr. Awil did not know about the Friday shift on April 6, because that was announced during the April 5 shift. On April 5, 8, and 9, Mr. Awil used the employer's call in line to report his absences due to illness. The employer's policy required that Mr. Awil call the employer at least an hour prior to the shift if he needed to be absent. Mr. Awil followed the

policy, but left messages that were unintelligible due to the language barrier. The employer erroneously documented no-call, no-show absences for each day.

Mr. Awil returned to the workplace on April 10. Mr. Awil attempted to enter the production facility at 6:53 p.m., but could not enter because the employer had deactivated the ID badge he needed to swipe to gain entry. The employer had already documented a voluntary quit. Mr. Awil returned during the early afternoon of April 11 and spoke to a human resources representative. Mr. Awil provided a doctor's note that indicated he had been seen that day. The note excused Mr. Awil for April 10 through 13, but said nothing about April 5 through 9. The human resources representative told Mr. Awil that his employment had been terminated. Mr. Awil requested to speak with a human resources supervisor, but his request was denied.

### **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). 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 attendance. The weight of the evidence establishes that Mr. Awil did not know about the April 6, 2012, Friday afternoon shift. Accordingly, Mr. Awil cannot be faulted for not appearing for that shift. The weight of the evidence establishes that Mr. Awil properly notified the employer about his need to be absent due to illness on April 5, 8, and 9, but that the employer could not understand his telephone calls due to the language issues. The absences were excused absences under the applicable law and cannot serve as a basis for disqualifying Mr. Awil for unemployment insurance benefits.

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

**DECISION:**

The Agency representative's May 2, 2012, reference 03, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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