

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**TROY S UTECH**  
Claimant

**APPEAL NO. 19A-UI-01468-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SEABOARD TRIUMPH FOODS LLC**  
Employer

**OC: 01/20/19**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Troy Utech filed a timely appeal from the February 12, 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 the claimant was discharged on January 23, 2019 for misconduct in connection with the employment. After due notice was issued, a hearing was held on March 5, 2019. Mr. Utech participated. Christine Scott represented the employer. Exhibits 2, 3, 4, and A through E 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: Troy Utech was employed by Seaboard Triumph Foods, L.L.C. as a full-time maintenance worker from April 2018 until January 23, 2019, when Deb Garnand, Human Resources Manager, discharged him for attendance. If Mr. Utech needed to be absent from work the employer's written attendance policy required that Mr. Utech call the designated absence reporting number and leave an appropriate message at least 30 minutes prior to the scheduled start of his shift. The employer reviewed the absence reporting requirement with Mr. Utech during orientation. Mr. Utech was at all relevant times aware of the absence reporting requirement. Effective July 30, 2019, the employer implemented a new attendance point system. The employer's decision to discharge Mr. Utech from the employment was based on Mr. Utech exceeding the allowable number of attendance points.

The final two absences that factored in the discharge occurred January 20 and 21, 2019. On both days, Mr. Utech was absent due to illness and properly reported the absences. The next most recent absence that factored in the discharge occurred on January 6, 2019. That absence

and additional absences on August 5, August 6, August 28, September 10-12, October 14 and December 15, 2018 were based on painful swelling in Mr. Utech's leg. Mr. Utech properly reported each of the absences. In September 2018, Mr. Utech was diagnosed with blood clots in his lungs and with a blood clot in his leg. Mr. Utech's doctor took Mr. Utech off work for about a week, treated Mr. Utech's condition with a blood thinning medication, and subsequently released Mr. Utech to return to work as tolerated. Mr. Utech at times experienced painful swelling in his leg in connection with the blood clot. On those occasions, Mr. Utech followed his doctor's instructions and elevated his leg for extended periods. On July 30, 2018, the employer documented Mr. Utech as two hours tardy for personal reasons. Mr. Utech had requested time off in advance so that he could attend his child's school function and the supervisor had approved the late arrival in advance of the absence. On August 8, Mr. Utech was late for personal reasons because he left a diaper bag in his car when he dropped his child at daycare and had to take the bag to the daycare before he reported for work. On September 20, 2018, the employer issued a written warning to Mr. Utech based on his accumulation of attendance points

### **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 establishes that almost all of the absences that factored in the discharge were absences based on illness. These illness-based absences were properly reported to the employer. Each of the illness-based absences was an excused absence under the applicable law and cannot serve as the basis for a finding of misconduct in connection with the employment or disqualification for unemployment insurance benefits. These excused absences included all of the absences between September 10, 2018 and January 21, 2019. Accordingly, the evidence in the record fails to establish a current act of misconduct in connection with the employment. Mr. Utech is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

**DECISION:**

The February 12, 2019, reference 01, decision is reversed. The claimant was discharged on January 23, 2019 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