

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**HUGO F AGUILAR**

Claimant

**APPEAL NO. 19A-UI-07284-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**COMES INVESTMENTS INC**

Employer

**OC: 08/11/19**

**Claimant: Respondent (1)**

---

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 10, 2019, reference 03, decision that allowed benefits to the claimant provided he met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on August 7, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on October 7, 2019. Claimant Hugo Aguilar did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Jill Comes represented the employer and presented additional testimony through Dawn Updike. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the documents submitted for and created in connection with the September 6, 2019 fact-finding materials.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Comes Investments, Inc. owns and operates multiple Pizza Hut restaurants, including one located in Storm Lake. Hugo Aguilar was employed as a part-time prep cook at the Storm Lake restaurant from June 3, 2019 until August 7, 2019, when Dawn Updike, Restaurant General Manager, discharged him from the employment. Ms. Updike was Mr. Aguilar's immediate supervisor throughout the employment.

The final events that triggered the discharge occurred over the two-day period of August 5 and 6, 2019. On August 5, 2019, Mr. Aguilar was absent due to illness pertaining to his ear. Mr. Aguilar initially thought that he had a burst ear drum, but the issue turned out to be an ear infection. Mr. Aguilar notified the employer prior to the start of his August 5 shift that he would

be absent from the employment. Ms. Updike is uncertain how long before the shift Mr. Aguilar provided notice of his need to be absent from the shift. Ms. Updike sometimes tells new employees that she desires notice at least three hours prior to the scheduled start of the shift. Ms. Updike cannot recall whether she told Mr. Aguilar about that specific expectation. When Mr. Aguilar appeared for work on August 6, 2019, he brought with him a medical note and ear drops. During the August 6 shift, Ms. Updike repeatedly instructed Mr. Aguilar to pick up the pace of his work, but Mr. Aguilar acted as if he did not hear her and may not have heard her. Later in the shift, Mr. Aguilar asked to speak with Ms. Updike privately and the pair stepped outside. At that time, Mr. Aguilar told Ms. Updike a tale about working undercover with various law enforcement agencies to assist with recovering a cousin kidnapped in Mexico and about wearing an ear implant that hindered his ability to hear what Ms. Updike was saying. While Ms. Updike concluded that comments did not arise in the context of mental health or cognitive issues, Jill Comes, co-owner and payroll administrator, concluded the behaviors may well be based on mental health and/or cognitive disability issues.

In making the decision to discharge Mr. Aguilar from the employment, Ms. Updike considered prior instances of Mr. Aguilar not performing work duties at the required pace and prior absences. Ms. Updike at other points in the employment observed Mr. Aguilar standing upright and motionless at his workstation. Ms. Updike does not recall dates or details regarding prior absences.

Mr. Aguilar established an original claim for benefits that was effective August 11, 2019. Mr. Aguilar's base period for purposes of the claim consists of the second, third and fourth quarters of 2018 and the first quarter of 2019. Comes Investments, Inc. is not a base period employer for purposes of the claim year that began for Mr. Aguilar on August 11, 2019 and that will end for Mr. Aguilar on August 8, 2020.

#### **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 a discharge 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 weight of evidence in the record establishes a discharge for no disqualifying reason. The final absence that factored in the discharge decision was due to illness. The weight of the evidence indicates that absence was properly reported to the employer. Accordingly, the

absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Mr. Aguilar for unemployment insurance benefits. The evidence establishes no absences that could be deemed unexcused absences within the meaning of the law. Mr. Aguilar's failure to perform to the employer's satisfaction was also a factor in the discharge. However, the performance issues appear to have been based on inability, rather than based on a willful disregard of the employer's interests. Accordingly, the performance issues did not amount to misconduct in connection with the employment. The tale that Mr. Aguilar told Ms. Updike on August 6, 2019 appears also to have been based on mental health issues, rather than based on a dishonest intent and, therefore, did not constitute misconduct in connection with the employment. Mr. Aguilar is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits. However, because the employer is not a base period employer for purposes of the claim year that began for Mr. Aguilar on August 11, 2019 and that will end on August 8, 2020, the employer has not been charged and will not be charged for benefits in connection with the current claim year. This employer's account will only be charged if Mr. Aguilar establishes a new claim year on or after August 9, 2020, is deemed eligible for benefits, and only if the employer is at that time deemed a base period employer for purposes of that future claim year.

**DECISION:**

The September 10, 2019, reference 03, decision is affirmed. The claimant was discharged on August 7, 2019 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged as outlined above.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/rvs