

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EDWARD M KUGEL
Claimant

APPEAL NO. 07A-UI-11113-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 10/28/07 R: 03
Claimant: Appellant (2)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Edward M. Kugel (claimant) appealed a representative's November 20, 2007 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits, and the account of Tyson Fresh Meats, inc. (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known address of record, a telephone hearing was held on December 17, 2007. The claimant participated in the hearing. The employer failed to respond to the hearing notice by contacting the Appeals Section prior to the hearing and providing the phone number at which the employer's witness/representative could be contacted to participate at the hearing. As a result, no one represented the employer. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 7, 1991. Prior to his employment separation, the claimant worked full time in a management position. The claimant understood the employer allowed managers to have only three attendance occurrences during a year.

In March or April 2007, the employer talked to the claimant about his attendance. In July or August, the employer considered the claimant seven minutes late for work when no one saw him right away. The claimant's timecard, however, indicated he had punched in for work on time. The claimant did not know the employer considered him seven minutes late for work until November 1, 2007.

In mid-October the claimant was 30 minutes late for work because transportation problems developed on the way to work. When the claimant knew he would be late for work, he contacted the employer to let the employer know what was happening. When the claimant reported to work about 30 minutes late for work, no one said anything to the claimant until

November 1. On November 2, 2007, the employer discharged the claimant for violating the employer's attendance policy because he was late for work three times in a year.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8). The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

The facts show the employer discharged the claimant in accordance with its attendance policy for managers. The evidence does not establish that the claimant was late for work three times in a year. Also, there is a question of why the employer waited two weeks before discharging the claimant after he had been late for work two weeks earlier because of unexpected car problems. Even if the employer discharged the claimant for a current act, the evidence does not establish that the claimant intentionally or substantially disregarded the employer's interests. Instead, when the claimant realized he would be late for work because of unexpected car problems, he contacted the employer. The claimant did not intentionally fail to report to work on time. After the claimant realized his vehicle had mechanical problems, he took reasonable steps to get to work so he was only about 30 minutes late for work. Based on the evidence presented during the hearing, the claimant did not commit work-connected misconduct. Therefore, as of October 28, 2007, he is qualified to receive unemployment insurance benefits.

DECISION:

The representative's November 20, 2007 decision (reference 02) is reversed. The employer discharged the claimant for reasons that do not constitute work-connected misconduct. As of October 28, 2007, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css