

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LUKE D CHAPMAN**  
Claimant

**APPEAL NO. 07A-UI-04538-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**RED ROBIN INTERNATIONAL INC  
RED ROBIN GOURMET BURGERS**  
Employer

**OC: 03/18/07 R: 04  
Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absences

**STATEMENT OF THE CASE:**

Red Robin International filed a timely appeal from the April 19, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 5, 2007. Claimant Luke Chapman participated. Linda Green of TALX UC eXpress represented the employer and presented additional testimony through Pete Stonskas. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received Exhibits One through Five into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Luke Chapman was employed by Red Robin Gourmet Burgers as a full-time line cook from October 19, 2005 until March 17, 2007, when General Manager Pete Stonskas discharged him for attendance. The final absence that prompted the discharge occurred on March 17, 2007. Mr. Chapman was scheduled to work from 8:00 a.m. to 3:00 p.m. At 10:30 a.m., Mr. Chapman called to notify the employer that he had overslept. At that time, Mr. Stonskas notified Mr. Chapman that he was discharged for tardiness. On March 11, 2007, Mr. Chapman was tardy because he overslept. On March 12, Mr. Stonskas discussed the absence with Mr. Chapman and warned Mr. Chapman that another unexcused absence would result in Mr. Chapman being discharged from the employment. Mr. Chapman's next most recent absence had occurred on July 24, 2006, when Mr. Chapman was tardy for personal reasons. Mr. Chapman has also been tardy on July 16, 2006, when he again overslept. Mr. Stonskas issued reprimands in response to each of the above absences.

## REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Chapman was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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). 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 evidence in the record establishes that the final tardiness on March 17, 2007 was unexcused under the applicable law. The evidence establishes unexcused tardiness on two occasions in July 2006 and on March 11, 2007. However, the evidence indicates a seven-month period between the July 2006 tardiness and the March 2007 tardiness. The evidence in the record does not establish excessive unexcused absences and, therefore, does not establish misconduct in connection with the employment that would disqualify Mr. Chapman for unemployment insurance benefits.

The administrative law judge concludes that the allegation that Mr. Chapman appeared at work under the influence of alcohol and unable to work in July 2006 does not rise above a mere allegation and does not concern a "current act" of misconduct. Accordingly, the allegation need not be considered further. See 871 IAC 24.32(8) and 871 IAC 24.32(4).

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

**DECISION:**

The claims representative's April 19, 2007, reference 01, 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

jet/pjs