

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**JEREMY A MCBURNEY
PO BOX 25
KELLERTON IA 50133-0025**

**OSCEOLA FOODS CORPORATION
C/o JON-JAY ASSOCIATES
PO BOX 182523
COLUMBUS OH 43218**

**Appeal Number: 06A-UI-02710-CT
OC: 02/12/06 R: 03
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Osceola Foods Corporation (OFC) filed an appeal from a representative's decision dated February 27, 2006, reference 01, which held that no disqualification would be imposed regarding Jeremy McBurney's separation from employment. After due notice was issued, a hearing was held by telephone on March 28, 2006. Mr. McBurney did not respond to the notice of hearing. The employer participated by Judy Callahan, Human Resources Manager. Exhibits 1 through 12 were admitted on the employer's behalf.

FINDINGS OF FACT:

Having heard the testimony of the witness and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. McBurney was employed by OFC from

October 15, 2001 until February 14, 2006 as a full-time production worker. He was discharged because he received three warning notices within a one-year period of time.

Mr. McBurney received a written warning regarding attendance on February 3. After two additional occurrences, he received another written warning on February 11. He had an additional incident of tardiness on March 16 and was warned again on March 23. Mr. McBurney was absent on August 22 and, therefore, received another warning on August 31. He was not absent again until November 7 and was again warned on November 23, 2005. Some of Mr. McBurney's absences were for a full day and some were for partial days. Some of the absences were due to illness and some to what were said to be emergencies.

After his absence of November 7, Mr. McBurney did not have another occurrence until February 13, 2006. He left a voice mail message on that date indicating he would not be at work. The employer later learned that he was in jail on February 13. He was notified of his discharge on February 14, 2006.

In making the decision to discharge, the employer also considered the fact that Mr. McBurney had been warned and suspended on December 16, 2005. He was told to recondition a vat of hams. The proper procedure is to take each ham to a wash station to wash it and to trim off the dirt. Rather than follow the correct procedure, Mr. McBurney put water in the vat using a water hose. His conduct could have resulted in contaminated product.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. McBurney was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. McBurney was discharged because of the various warnings he received. He had received warnings about his attendance. The evidence does not identify the specific reasons for all of the absences. Therefore, the administrative law judge cannot determine if the absences prior to February 13 were excused or unexcused. The absence of February 13 is unexcused as it was due to a matter of personal responsibility, his incarceration. The evidence does not establish an excessive number of unexcused absences.

Mr. McBurney deliberately and intentionally violated the employer's standards on December 16, 2005 when he failed to follow the correct procedure for reconditioning hams. He knew the correct procedure but failed to follow it. His conduct could have resulted in contaminated product going to the public. However, this conduct occurred in December. It was not a current act of misconduct in relation to the separation date of February 14, 2006. The law requires that a disqualification be based on a current act. See 871 IAC 24.32(8).

After considering all of the evidence, the administrative law judge concludes that Mr. McBurney was discharged, but disqualifying misconduct has not been established. Excessive unexcused absenteeism has not been established. A current act of misconduct has not been established. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983). Benefits are allowed.

DECISION:

The representative's decision dated February 27, 2006, reference 01, is hereby affirmed. Mr. McBurney was discharged but misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

cfc/kkf