

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JIMMY S LUBARI
Claimant

APPEAL NO. 07A-UI-05835-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 04/29/07 R: 02
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Tyson Fresh Meats filed a timely appeal from the May 29, 2007, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on July 2, 2007. Claimant Lubari provided a telephone number for the hearing, but was not available at that number at the scheduled start of the hearing and did not participate. The Agency secured an Arabic-English interpreter to facilitate the claimant's participation in the hearing. Terry Carmichael, Employment Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant.

ISSUES:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jimmy Lubari was employed by Tyson Fresh Meats as a full-time laborer from March 13, 2006 until April 23, when the employer discharged him from the employment for attendance. The employer has an attendance policy that required Mr. Lubari to notify the employer 30 minutes before the scheduled start of his shift if he needed to be absent. The policy had been reviewed with Mr. Lubari at the time he commenced the employment and Mr. Lubari signed his acknowledgement of the policy on July 16, 2006.

The final absence that prompted the discharge occurred on April 23, 2007, when Mr. Lubari was a "no-call, no-show" for his 6:30 a.m. shift. This absence followed "no-call, no-show" absences on April 16 and 18. On April 17, Mr. Lubari notified the employer after the scheduled start of his shift that he would be absent due to illness. Mr. Lubari had been absent due to illness properly reported on June 26 and October 27, 2006, as well as on January 2, 15, and 17, and March 20, 2007. Mr. Lubari had been tardy for personal reasons on August 7, 14, 2006 and April 13, 2007. Mr. Lubari had been absent for personal reasons on August 8, 2006.

Mr. Lubari established a claim for benefits that was effective April 29, 2007 and has received benefits totaling \$1,855.00.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

The employer has the burden of proof in this matter. See Iowa Code § 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).

Because Mr. Lubari did not make himself available for the hearing, the evidence in the record consists only of the testimony of the employer representative. The evidence in the record establishes that Mr. Lubari's final absence on April 23, 2007, was unexcused under the applicable law. The final unexcused absence immediately followed unexcused absences on April 13, 16, 17, and 18. These unexcused absences were excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Lubari was discharged for misconduct. Accordingly, Mr. Lubari is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Lubari.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Mr. Lubari has received benefits for which he has been deemed ineligible, those benefits constitute an overpayment that Mr. Lubari must repay to Iowa Workforce Development. Mr. Lubari is overpaid \$1,855.00.

DECISION:

The claims representative's May 29, 2007, reference 02, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs