

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DE'ANTHONY CLARK
Claimant

APPEAL NO. 17A-UI-02584-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 02/12/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

De'Anthony Clark filed a timely appeal from the March 1, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits and that relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that Mr. Clark was discharged on February 14, 2017 for excessive unexcused absenteeism and tardiness. After due notice was issued, a hearing was held on March 30, 2017. Mr. Clark participated. The employer did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Exhibit A was received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: De'Anthony Clark was employed by Tyson Fresh Meats, Inc. as a full-time lard puller from January 2016 until February 14, 2017, when Jim Hook, Human Resources Manager, discharged him for attendance. Mr. Clark's work hours were 7:00 a.m. to 3:45 p.m., Monday through Saturday. Mr. Clark had a series of immediate supervisors during the employment. On Monday, February 13, 2017, Mr. Clark returned to work after being absent on February 9 and 10, due to illness. On February 13, 2017, the employer pulled Mr. Clark off the production line, had him wait in an office, and then sent him home with instructions to appear for a meeting the next day at 8:00 a.m. When Mr. Clark returned on February 14, the employer notified him of the discharge for attendance.

On Wednesday, February 8, the company nurse had sent Mr. Clark home early, after she determined that Mr. Clark had a 102 degree fever. Mr. Clark was at that point sick with the flu. Mr. Clark saw a doctor and the doctor determined that he should not work on February 9 and 10. Mr. Clark was sick in bed with the flu on February 9 and 10, Thursday and Friday, and was without access to a telephone to use to report his absences to the employer. The employer's policy required that absences be reported at least 30 minutes prior to the scheduled start of the shift. Mr. Clark's girlfriend was out-of-state with the couple's only functional cell phone. Mr. Clark recently moved to Iowa from Mississippi and did not know his neighbors.

Mr. Clark did not ask to borrow a neighbor's phone to call the employer. Had he done so, he would have exposed his neighbors to the flu.

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.

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 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). 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 employer did not participate in the hearing and did not present any evidence to support the allegation that Mr. Clark was discharged for excessive unexcused absences or any other form of misconduct in connection with the employment. The evidence in the record establishes an early departure on February 8 upon the company nurses directive and due to illness. The evidence establishes absences on February 9 and 10 that were not reported to the employer. However, the failure to report was based on extenuating circumstances that included Mr. Clark being bed-ridden with a highly communicable disease and without access to a telephone. The evidence in the record does not establish excessive unexcused absences or other misconduct in connection with the employment. Mr. Clark was discharged for no disqualifying reason. Accordingly, Mr. Clark is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The March 1, 2017, reference 01, decision is reversed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs