

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JEFFREY TITUS
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 20A-UI-07022-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/31/20
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 18, 2020, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on June 1, 2020 for excessive unexcused absences. After due notice was issued, a hearing was held on July 31, 2020. Claimant participated. The employer did not provide a telephone number for the hearing and did not participate.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jeffrey Titus was employed by Tyson Fresh Meats, Inc. as a full-time maintenance technician until June 1, 2020, when the employer discharged him for attendance. Mr. Titus started his employment in 2013. His work hours were 4:00 a.m. to 4:00 p.m. Mr. Titus usually worked four days in a row followed by three days off. Luis Mendez, General Maintenance Supervisor, was Mr. Titus' supervisor during the last few months of the employment.

On May 20, 2020, Mr. Titus was absent from work so that he could assist his wife could and get his family affairs in order before Mrs. Titus underwent a cholecystectomy, gallbladder removal, on May 21, 2020. Mr. Titus provided late notice to the employer of his need to be absent from work that day by contacting the employer at 5:30 a.m. The employer's policy required that Mr. Titus give notice to his supervisor at least 30 minutes prior to the scheduled start of his shift. Mr. Titus was aware of the notice requirement. Mr. Titus had been up late on the evening of May 19, 2020 and had overslept on May 20.

On May 23, 2020, Mr. Titus was absent from work so that he could assist his wife following her March 21 surgery. In addition, Mr. Titus did not want to leave the couple's four children solely in

his wife's care in light of her recovery from the surgery. Mr. Titus provided timely notice to the employer of his need to be absent.

On May 27, 2020, the employer summoned Mr. Titus to a meeting and told him he was over the allowed number of attendance points. The employer sent Mr. Titus home and directed him to return for a meeting on June 1. At the June meeting, the employer discharged Mr. Titus from the employment. Mr. Titus had received no prior reprimands for attendance.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

In order for a claimant's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 evidence in the record establishes a discharge for no disqualifying reason. The employer did not participate in the appeal hearing and presented no evidence to meet its burden of proving a discharge based on misconduct in connection with the employment. The May 20 absence was an unexcused absence, based at least in part on the lack of timely notice to the employer. The May 23 final absence that triggered the discharge was properly reported to the employer and was based on Mr. Titus' need to assist his wife, who was recovering from the surgery she underwent two days early. The final absence was not based on an ordinary lack of childcare. The May 23 absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Mr. Titus for unemployment insurance benefits. Even if the final absence had been an unexcused absence, the evidence would establish no more than two unexcused absences and would not have established excessive unexcused absences. Mr. Titus is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The June 18, 2020, reference 01, decision is reversed. The claimant was discharged on June 1, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

A handwritten signature in cursive script that reads "James E. Timberland". The signature is written in black ink on a light gray rectangular background.

James E. Timberland
Administrative Law Judge

August 6, 2020
Decision Dated and Mailed

jet/mh