

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TYLER J HIPPEN
Claimant

APPEAL NO. 18A-UI-06172-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON PET PRODUCTS INC
Employer

OC: 05/06/18
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 24, 2018, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on May 9, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on June 20, 2018. Claimant Tyler Hippen did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Dakota Cunningham represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record reflects that no benefits have been disbursed to the claimant in connection with the May 6, 2018 original claim. Exhibits 1, 2 and 3 were received into evidence.

ISSUES:

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

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tyler Hippen was employed by Tyson Pet Products, Inc. as a full-time general laborer from February 21, 2018 until May 9, 2018, when Brooke Salger, Human Resources Manager, discharged him for attendance. Mr. Hippen's work hours were 6:00 a.m. to 3:00 p.m., Monday through Friday. The employer also required that Mr. Hippen work a Saturday shift as needed.

The employer has a written attendance policy that the employer reviewed with Mr. Hippen at the start of the employment. Mr. Hippen signed his acknowledgement of the policy. If Mr. Hippen needed to be absent from or late for work, the attendance policy required that Mr. Hippen call the designated automated absence reporting line at least 30 minutes prior to the scheduled start of his shift and leave an appropriate message.

The final absence that triggered the discharge occurred on May 9, 2018, when Mr. Hippen reported late for work. At 5:41 a.m., Mr. Hippen notified the employer that he would be late. Mr. Hippen reported for work at 6:56 a.m. Mr. Hippen had overslept.

The employer considered prior absences and a prior attendance point warning when making the decision to discharge Mr. Hippen from the employment. On March 15, 2018, Mr. Hippen was absent due to illness and properly reported the absence. On April 4 and 7, Mr. Hippen was absent due to transportation issues and properly notified the employer. On April 16, 2018, Mr. Hippen was late for personal reasons and properly notified the employer that he would be late. On April 24, Mr. Hippen was absent for personal reasons. On May 8, 2018, the employer issued a written attendance point warning to Mr. Hippen to let him know he had accrued 4.5 attendance points. With the late arrival on May 9, 2018, Mr. Hippen incurred an additional attendance point and was subject to discharge from the employment for exceeding the allowable number of attendance points during his 90-day probationary period.

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 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 evidence in the record establishes misconduct in connection with the employment based on excessive unexcused absences. Mr. Hippen was absent or late for personal reasons on April 4, 7, 16 and 24 and on May 9, 2018. Each of these absences was an unexcused absence under the applicable law. The March 15, 2018 absence was due to illness, was properly reported to the employer, and was an excused absence under the applicable law. The pattern of unexcused absences, five within a five-week period, indicated an intentional and substantial disregard of the employer's interests in maintaining appropriate staffing and orderly operations. The administrative law judge notes that the final unexcused absence occurred one day after the employer issued an attendance point warning to Mr. Hippen to let him know his employment was in jeopardy.

Based on the evidence in the record establishes a discharge for misconduct in connection with the employment, Mr. Hippen is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Hippen must meet all other eligibility requirements. The employer's account shall not be charged.

Because Mr. Hippen has received not benefits in connection with his claim, there is not overpayment of benefits to address.

DECISION:

The May 24, 2018, reference 01, decision is reversed. The claimant was discharged on May 9, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs