IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JERRY L ALTMAN
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 12A-UI-13882-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/21/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Jerry Altman filed a timely appeal from the November 14, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 17, 2012. Mr. Altman participated. Will Sager, Complex Human Resources Manager, represented the employer.

ISSUE:

Whether Mr. Altman 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: Jerry Altman was employed by Tyson Fresh Meats, Inc., in Storm Lake from 2010 until October 12, 2012, when the employer discharged him for attendance for fabricating illness to take time off. Mr. Altman was assigned to the second shift and his work day started sometime between 3:30 p.m. and 4:00 p.m.

The incident that triggered the discharge occurred on October 5, 2012. Early that afternoon, Mr. Altman contacted the company nurses' office and spoke to Nurse Manager Renee Kestel. Mr. Altman told Ms. Kestel that he would be absent that day *and the next day* due to increased shoulder pain. Mr. Altman had been on light-duty work since a workplace injury in August 2012. Based on Mr. Altman's assertion that his shoulder prevented him from performing the light-duty work, the nurse manager directed Mr. Altman to report to the workplace so that the company nurses could examine his shoulder to determine whether he needed to be seen by a doctor. The nurse manager also wanted Mr. Altman to appear at the workplace to sign a document indicating he was choosing not to appear for the light-duty assignment. During the period of Mr. Altman's employment, he was civilly committed to a facility for sex offenders. The facility was located in Cherokee. Mr. Altman was in the final phase of the civil commitment program, prior to release back into the community. The workplace was 25 miles away in Storm Lake. Mr. Altman had his own car, but had to have authorization from the Cherokee facility staff to obtain his car keys and to leave the facility. Mr. Altman told the Nurse Manager Kestel that he

could not come and go from the facility as he pleased. The nurse manager asked Mr. Altman, whether he could leave the facility if he needed to meet with a doctor. Mr. Altman acknowledged that yes, he could leave the facility under those circumstances. The call had lasted three to five minutes. During the telephone call, Mr. Altman made no reference to any ailment other than his shoulder.

Shortly after the telephone call to the nurse manager, Mr. Altman left a voice mail message for Will Sager, Complex Human Resources Manager. In the message, Mr. Altman said he would be absent from work *that day and the next* day *because he was suffering from diarrhea*. Mr. Altman made no mention of his shoulder pain.

The employer's absence reporting policy required that Mr. Altman contact the employer at least 30 minutes before the start of his shift if he needed to be absent. Employees are directed to call the designated attendance number. The employer also accepts notice to the human resources manager or to the supervisor. Mr. Altman's contact with the employer on the morning of October 5 was timely.

When Mr. Altman subsequently returned to work, he was interviewed by a couple of supervisors about the basis for his absences on October 5 and 6. On October 11, Will Sager, Complex Human Resources Manager, met with Mr. Altman to discuss the absences. Mr. Sager asked Mr. Altman whether on October 5 he had taken any steps to get authorization from the Cherokee facility staff to come to the workplace to be examined by the nursing staff. Mr. Altman conceded he had not. Mr. Sager spoke to the Cherokee facility staff and learned that the staff would have assisted on October 5 with the transportation issue. Mr. Altman did not have a reasonable explanation for why he had indicated on October 5 that he needed to be gone for *two* days. Mr. Altman asserted to Mr. Sager that the reason he had not spoken to the Nurse Manager about his diarrhea issue was that she had interrupted him during the call. In addition to not mentioning the diarrhea issue to the nurse manager, Mr. Altman had not mentioned that issue to staff at the Cherokee facility.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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 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.

There is sufficient evidence in the record to establish, by a preponderance of the evidence, that Mr. Altman provided the employer with false information on October 5, 2012 at the time he

notified the employer he would be absent that day and the next. Mr. Altman provided two different Tyson representatives, Ms. Kestel and Mr. Sager, with two completely separate reasons for his need to be absent. If the primary reason for Mr. Altman's need to be absent was diarrhea, a reasonable person would expect that to be the first thing, or one of the first things, he would tell the nurse manager when he contacted her. Mr. Altman did not do that. In addition, Mr. Altman made no mention to the Cherokee civil commitment facility staff that he needed to miss work due to diarrhea or even that he was suffering from diarrhea. The weight of the evidence indicates that Mr. Altman provided the employer with one reason for the absence, his shoulder, but then when the employer provided a reasonable response to that issue that would involve Mr. Altman coming to the workplace for further evaluation of the shoulder, Mr. Altman fabricated a diarrhea issue as the basis for the need to be absent when he left his message for Mr. Sager. The conclusion that Mr. Altman provided bogus information to the employer is further supported by the fact that Mr. Altman notified the employer on October 5 that he would be gone for *two* days. Mr. Altman provided the employer with no reasonable explanation of why he made the request for two days. Mr. Altman has likewise provided the administrative law judge with no reasonable explanation for why he told the employer he would be gone for two days. Mr. Altman's attempt to mislead the employer was in willful and wanton disregard of the employer's interests and constituted misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Altman was discharged for misconduct. Accordingly, Mr. Altman 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.

DECISION:

The Agency representative's November 14, 2012, reference 01, decision is affirmed. 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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