

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PHIL B WEST
Claimant

APPEAL NO. 09A-UI-14978-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**Original Claim: 08/30/09
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Phil West filed a timely appeal from the September 28, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 4, 2009. Mr. West participated. Will Sager, Human Resources Manager, represented the employer.

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: Phil West was employed by Tyson Fresh Meats as a full-time production worker from January 2008 until September 2, 2009, when the employer discharged him for attendance. On August 29, August 31, and September 1, 2009, Mr. West was absent from work and failed to notify the employer of his need to be absent. During that time, Mr. West was traveling to and from Chicago to assist his mother, who was hospitalized. The employer's absence reporting policy required that Mr. West contact the employer at least 30 minutes prior to his shift if he needed to be absent. Mr. West was aware of the policy and had followed the policy in the past. Mr. West had a phone with him during his absence and had the number he needed to notify the employer of his need to be absent. Mr. West knew his employment was in jeopardy due to the number of attendance points he had acquired up to that point and elected not to contact the employer about the need to be absent. When Mr. West appeared for work on September 2, the employer discharged him from the employment.

All but one of Mr. West's prior absences had been for illness properly reported to the employer. On October 10, 2008, Mr. West was absent because he was incarcerated.

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).

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).

Mr. West had a compelling reason to be absent on August 29, August 31, and September 1. Had Mr. West given the employer proper notice of the absences and notice of the reason for the absences, they would have been excused absences under the applicable law. But, Mr. West knowingly and willfully failed to follow the employer's reasonable absence notification policy. That made each of these three absences an unexcused absence under the applicable law. They were indeed no-call, no-show absences. Three consecutive no-call, no-show absences can, under certain circumstances, be deemed a voluntary quit under the law. The three no-call, no-show absences in this instance constituted excessive unexcused absences and amounted to 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. West was discharged for misconduct. Accordingly, Mr. West 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. West.

DECISION:

The Agency representative's September 28, 2009, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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