

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL L BUNCH**  
Claimant

**APPEAL NO. 19A-UI-05126-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**  
Employer

**OC: 06/02/19**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Michael Bunch filed a timely appeal from the June 26, 2019, 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 Mr. Bunch was discharged on June 5, 2019 for excessive unexcused absences. After due notice was issued, a hearing was held on August 8, 2019. Mr. Bunch participated. Mehdina Kurtovic represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 19A-UI-05776-JTT. Exhibit A was received into evidence. The administrative law judge took official notice of the Agency's administrative record of Mr. Bunch's weekly claims (KCCO) and of the June 27, 2019, reference 03, decision that allowed benefits to Mr. Bunch effective June 23, 2019, provided he was otherwise eligible, based on the deputy's conclusion that Mr. Bunch was at that point able to work and available for work.

**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: Michael Bunch was employed by Tyson Fresh Meats as a full-time hog production line worker from 2017 until June 6, 2019, when the employer discharged him for attendance. Toward the end of the employment, Mr. Bunch was suffering from swelling of his feet that hindered his ability to drive to work and that made it uncomfortable for Mr. Bunch to perform his line production duties. Throughout the employment, Mr. Bunch suffered from hypertension issues that he had disclosed to the employer at the time of hire. If Mr. Bunch needed to be absent from work or late for work, the employer's attendance policy required that he call a designated telephone number at least 30 minutes prior to the scheduled start of his shift and speak with a human resources staff person or leave a voicemail message if no one answered. The employer reviewed the absence reporting policy with Mr. Bunch at the start of the employment. Mr. Bunch was aware of the absence reporting policy at all relevant times. The final absence that triggered the discharge occurred on June 1, 2019. Mr. Bunch was unable to drive to work that day due to swelling in his feet and was unable to locate another means to get to work. Mr. Bunch provided late notice to the employer of his need to be absent. The next most recent

absence that factored in the discharge was a May 10, 2019 absence due to illness. Mr. Bunch provided late notice to the employer of his need to be absent that day. That additional absence that factored in the discharge were all absences due to illness and were properly reported to the employer. On July 6, 2018, the employer issued a written attendance point warning to Mr. Bunch. The employer did not issue any further warnings or reprimands to Mr. Bunch prior to discharging him from the employment.

## **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 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 evidence establishes unexcused absences on May 10, 2019 and June 1, 2019, based on the late notice to the employer. The remainder of the absences that factored in the discharge were due to illness, were properly reported to the employer, and therefore were excused absences under the applicable law. Excused absences may not be used as a basis for disqualifying Mr. Bunch for unemployment insurance benefits. The two unexcused absences that factored in the discharge did not constitute excessive unexcused absences. Accordingly, Mr. Bunch is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

#### **DECISION:**

The June 26, 2019, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge was effective June 6, 2019. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/scn