

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DENYO, KOFFI**  
Claimant

**APPEAL NO. 12A-UI-05279-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**  
Employer

**OC: 04/01/12**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 27, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was started on May 30, 2012 and concluded on June 25, 2012. Claimant Koffi Denyo participated personally and was represented by attorney Christina Jacobs. Kris Rossiter represented the employer. French-English interpreter Melissa Abraham assisted with the hearing on June 25. Exhibits One through Seven, A and B were received into evidence.

**ISSUE:**

Whether Mr. Denyo separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Koffi Denyo is a non-native English speaker. Mr. Denyo's native language is French. On May 30, 2012, the administrative law had to stop and adjourn the appeal hearing a short time into Mr. Denyo's testimony when it became clear that Mr. Denyo did not understand the questions being put to him.

Mr. Denyo was employed by Tyson Fresh Meats, Inc. as a full-time production worker until April 3, 2012, when the employer discharged him for attendance. Mr. Denyo was assigned to the first shift and his scheduled start time was 6:15 p.m. Mr. Denyo would be scheduled to work 8 to 10-hour shifts. Mr. Denyo's immediate supervisor was Line Supervisor TJ Hidalgo.

The final absence that prompted the discharge occurred on March 30, 2012. On that day, Mr. Denyo was scheduled to work until 5:30 p.m. During the shift, Mr. Denyo asked Mr. Hidalgo for permission to leave early because he was not feeling well. Mr. Denyo was experiencing pain in his back and shoulder. Mr. Denyo had previously sought medical evaluation for his symptoms. Mr. Hidalgo told Mr. Denyo that he could not grant the request, but told him he could see the company nurse. Instead of going to see the nurse, Mr. Denyo next spoke to General Foreman Julian Fernandez. Mr. Fernandez was Mr. Hidalgo's immediate supervisor.

Mr. Denyo asked whether he could go home and Mr. Fernandez denied the request. Mr. Denyo then spoke with David Duncan, Human Resources Manager. Mr. Denyo was upset and told Mr. Duncan about the denial of his requests to leave work early. Mr. Duncan told Mr. Denyo that he should follow the supervisors' instructions. Mr. Denyo left the workplace shortly after 3:00 p.m. without management approval and without visiting with the nurse.

Mr. Denyo returned for his next shift on Monday, April 2. At that time, the employer suspended Mr. Denyo from the employment based on the unauthorized early departure on March 30. The employer had Mr. Denyo return for a meeting on April 3, at which time the employer notified Mr. Denyo that he was discharged from the employment. The employer prepared a Discipline Letter for use at the meeting. The document indicates that Mr. Denyo was discharged for walking off the job, leaving work without permission.

Mr. Denyo had a history of good attendance. Mr. Denyo's prior absences had been for illness and had been properly reported to the employer.

### **REASONING AND CONCLUSIONS OF LAW:**

Though the employer representative asserted at the hearing that Mr. Denyo had quit the employment, the employer's own exhibit indicates that the employer *discharged* Mr. Denyo from the employment on April 3, 2012. See Exhibit Two.

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).

The employer had the ability to present testimony from persons directly involved with, and possessing personal knowledge of, the events of March 30 through April 3. The employer elected not to present such testimony.

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).

The evidence in the record establishes an unexcused absence on March 30, 2012, when Mr. Denyo left work early without permission. The evidence indicates that Mr. Denyo made repeated requests to leave work early because he was not feeling well and that those requests were denied. The denial was a conditional denial. The supervisors directed Mr. Denyo to go see the company nurse. That was a reasonable position for the employer to take in light of Mr. Denyo's assertion that he needed to leave due to illness. But, given Mr. Denyo's inability to understand and give a meaningful response to the basic, preliminary questions the administrative law judge put to him in English during the hearing on May 30, there is reason to question the extent to which Mr. Denyo understood the employer's various comments to him on March 30, 2012. There is sufficient evidence to establish that Mr. Denyo understood that his request to leave early was denied.

The evidence does not support the employer's assertion that Mr. Denyo voluntarily quit by leaving work early on March 30. This conclusion is supported by the employer's documentation, by Mr. Denyo's repeated requests for permission to leave before he left the workplace and by his reporting for work at the start of his next shift. Nothing in the record suggests that the employer believed on March 30 through April 3 that Mr. Denyo had voluntarily quit the employment.

The evidence establishes a discharge based on a single unexcused absence. That single absence is not enough to establish excessive unexcused absences or misconduct in connection with the employment. Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). Mr. Denyo was discharged for no disqualifying reason. Accordingly, Mr. Denyo is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Denyo.

**DECISION:**

The Agency representative's April 27, 2012, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/pjs