

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JAVONTAE M THOMAS
Claimant

APPEAL NO. 19R-UI-09580-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 09/22/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

This matter came before the administrative law judge pursuant to an Employment Appeal Board remand in Hearing Number 19B-UI-08209 and Javontae Thomas' timely appeal from the October 14, 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. Thomas was discharged on September 27, 2019 for excessive unexcused absenteeism. After due notice was issued, a hearing was held on January 6, 2020. Mr. Thomas participated. Lori Direnzo 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: Javontae was employed by Tyson Fresh Meats, Inc. as a full-time production worker in the freezer area from February 2019 until September 26, 2019, when the employer discharged him from the employment for attendance. Until September 16, 2019, Mr. Thomas was assigned to the second shift and his regular work hours were 3:00 p.m. to 11:00 p.m., Monday through Friday. Effective September 16, 2019, Mr. Thomas moved to the first shift and his regular work hours became 7:00 a.m. to 3:30 p.m. or 6:00 a.m. to 2:30 p.m., Monday through Friday. Mr. Thomas was also required to work on Saturdays as needed. At the start of the employment, the employer reviewed its absence reporting policy with Mr. Thomas. Under the policy, Mr. Thomas was required to call the designated absence reporting number at least 30 minutes prior to the scheduled start of his shift if he needed to be absent from or late for work. The absence reporting number was manned by a human resources representative. Under the policy, Mr. Thomas was required to provide the human resources representative with his employee ID number and reason for the absence. The human resources representative was supposed to document the telephone call.

The final absence that triggered the discharge occurred on September 25, 2019, when Mr. Thomas was absent due to illness but provided less than 30 minutes' notice of his need to be absent. On September 24, 2019, Mr. Thomas vomited while working on the production line. As Mr. Thomas was taking steps to clean up the mess, his supervisor directed him to go home immediately and Mr. Thomas complied. The employer initially assigned half an attendance point to the September 24 absence, but the supervisor subsequently excused the absence and rescinded the one-half attendance point. As Mr. Thomas was driving to work on September 25, he had an involuntary bowel movement. Mr. Thomas was three or four miles from his home at the time and immediately traveled back to his home. Mr. Thomas waited until he got back home to give notice to the employer that he needed to be absent due to illness. By that time, it was 20 minutes prior to the scheduled start of his shift. The employer documented the late call and assigned three attendance points to the absence. Mr. Thomas reported for work on September 26, 2019 and was discharged toward the end of his shift.

In making the decision to discharge Mr. Thomas from the employment, the employer considered additional absences dating back to May 2019. On May 21, Mr. Thomas was absent from work due to numbness in his left hand that prompted him to seek evaluation at an emergency room. Mr. Thomas is right-handed. Mr. Thomas' work involved loading and unloading trucks, as well as palletizing boxes of product. The work required that Mr. Thomas be able to use both of his hands. Mr. Thomas gave timely and proper notice to the employer of his need to be absent.

On June 6, Mr. Thomas was absent from work so that he could attend a forcible entry and detainer court proceeding. Mr. Thomas' landlord was seeking to evict Mr. Thomas from his apartment due to Mr. Thomas' non-payment of rent. Mr. Thomas provided timely and proper notice to the employer regarding his need to be absent to attend the court proceeding.

On July 13, Mr. Thomas was absent due to illness and properly notified the employer.

On July 15, Mr. Thomas was absent due to a motor vehicle accident that made his vehicle inoperable. Mr. Thomas was on his way to work when the collision occurred. Mr. Thomas was not hurt, but needed to attend to having his vehicle towed. Mr. Thomas gave timely and proper notice to the employer regarding his need to be absent from his shift. The employer excused the absence, but erroneously documented an absence due to illness.

On August 21, Mr. Thomas reported for work without his steel-toed work boots and his supervisor sent him home for the day. The employer generally provides employees with steel-toed work boots. Mr. Thomas had elected to purchase his own boots and these were the boots that he forgot on August 21. The supervisor elected to send Mr. Thomas home, rather than issue him a pair of company boots so that he could stay and perform his work duties. The supervisor initially assigned three attendance points based on the incident, but subsequently reduced the number of attendance points to one attendance point.

On August 22, Mr. Thomas reported for work at 6:00 p.m., rather than at 3:00 p.m. A week earlier, Mr. Thomas had notified his supervisor that he would need to be late to work on August 22, due to the need to transport and otherwise assist his mother, who was undergoing a surgery concerning a kidney. The supervisor did not document the request for time off and, after the absence, elected to deem the absence unexcused.

On September 18, 2019, Mr. Thomas was absent due to a lack of transportation. Mr. Thomas had just transitioned to the day shift on very short notice and needed to attend to a car repair so that he could continue to report for work. Mr. Thomas properly reported his need to be absent.

The supervisor acknowledged the extenuating circumstances and excused absence. However, the employer erroneously documented an absence due to illness.

Prior to discharging Mr. Thomas from the employment, the employer issued three attendance point written notices to Mr. Thomas. On July 13, the employer notified Mr. Thomas that he had incurred three attendance points. On September 18, the employer notified Mr. Thomas that he had incurred six attendance points. Immediately prior to discharging Mr. Thomas on September 26, the employer notified Mr. Thomas that he had incurred three additional attendance points in connection with the September 25 absence.

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).

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.

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).

The administrative law judge notes that the employer elected not to present testimony from anyone with personal knowledge of the matters that factored in the discharge.

The evidence in the record establishes a discharge for no disqualifying reason. The evidence in the record fails to establish excessive unexcused absences. The weight of the evidence establishes a final absence on September 25, 2019 that was due to illness. The weight of the evidence further establishes that Mr. Thomas had good cause, based on the particular circumstances, for providing less than 30-minutes' notice of his need to be absent. Mr. Thomas provided notice to the employer as soon as he was reasonably able to provide such notice. Accordingly, the final absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Mr. Thomas for unemployment insurance benefits. The weight of the evidence establishes an additional excused absence on September 24, when the supervisor directed Mr. Thomas to immediately leave the workplace in response to Mr. Thomas vomiting at work. The weight of the evidence establishes an excused absence on May 21, when Mr. Thomas was absent due to a bona fide medical concern that impacted his ability to perform his work duties and gave proper notice of his need to be absent. The weight of the evidence establishes unexcused absence on June 6, when Mr. Thomas was absent to that he could attend an eviction proceeding that was based on his failure to pay his rent, a matter of personal responsibility. The evidence establishes a July 13 absence that was due to illness, that was properly reported to the employer, and was therefore an excused absence under the

applicable law. The weight of the evidence establishes an excused absence on July 15, when Mr. Thomas was in an accident in his vehicle while he was enroute to work that disabled his vehicle and provided proper notice to the employer of need to be absent under those extenuating circumstances beyond his control. The weight of the evidence establishes an excused absence on August 21, when the employer elected to send Mr. Thomas home after he forgot the steel-toed boots he had purchased and the supervisor elected not to follow the employer's protocol of issuing company steel-toed boots to Mr. Thomas so that he could stay and perform his work duties. The weight of the evidence establishes an excused late arrival on August 22, when Mr. Thomas was absent to assist his mother with getting to and from a surgical procedure and had given timely notice to the employer regarding his need to be late for work for that purpose.

Because the evidence in the record establishes a discharge for no disqualifying reason, Mr. Thomas is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The October 14, 2019, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge occurred on September 26, 2019. 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

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