

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JERRY SONPON
Claimant

APPEAL NO. 07A-UI-02882-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 01/28/07 R: 02
Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences
Iowa Code Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Tyson Fresh Meats filed a timely appeal from the March 7, 2007, reference 1, decision that allowed benefits. After due notice was issued, a hearing was held on April 6, 2006. Claimant Jerry Sonpon provided a telephone number for the hearing, but was not available at that number at the scheduled time of the hearing. Tom Barragan, Training Coordinator, represented the employer. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant and received employer's Exhibits One and Two into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jerry Sonpon was employed by Tyson Fresh Meats as a full-time production worker from June 12, 2006 until December 27, 2006, when Jamie Frye, Plant Manager, and Tom Barragan, Training Coordinator, discharged him. On December 19, 2006, Mr. Sonpon left work early without authorization. Mr. Sonpon went home and later returned to clock out. On December 20, Mr. Sonpon was absent from work for personal reasons and failed to notify the employer of the need to be absent. On December 21, Mr. Sonpon returned to work. At that time, the employer suspended Mr. Sonpon and told him to return the next day, December 22, at 10:00 a.m. to discuss his unauthorized absences from the employment. On December 22, Mr. Sonpon notified the employer that he could not appear at 10:00 a.m., but would appear at 1:00 p.m. Mr. Sonpon then failed to appear. The employer then arranged a meeting with Mr. Sonpon for December 23 and Mr. Sonpon again failed to appear. On December 26, the employer met with Mr. Sonpon to discuss his absences. The employer told Mr. Sonpon that he was placed back on suspension pending a decision about whether he would be allowed to continue in the employment. The employer directed Mr. Sonpon to appear at his normal work time on

December 27, but Mr. Sonpon did not appear at that time. Mr. Sonpon appeared at the workplace in the afternoon, at which time the employer discharged him from the employment.

The employer had a written attendance policy that required Mr. Sonpon to contact the employer at least 30 minutes prior the scheduled start of his shift if he needed to be absent. Mr. Sonpon was aware of the policy.

Mr. Sonpon established a claim for benefits that was effective January 28, 2007 and has received benefits totaling \$1,519.00.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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).

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 Mr. Sonpon's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *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 Mr. Sonpon's final absence on December 27 as well as the absences on December 19, 20, 22, and 23 were all unexcused absences. These unexcused absences were excessive. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Sonpon was discharged for misconduct. Accordingly, Mr. Sonpon 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. Sonpon.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Mr. Sonpon has received benefits for which he has been deemed ineligible, those benefits constitute an overpayment that Mr. Sonpon must repay to Iowa Workforce Development. Mr. Sonpon is overpaid \$1,519.00.

DECISION:

The Agency representative's March 7, 2007, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and 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. The claimant is overpaid \$1,519.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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