

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CASEY M SCOTT**  
Claimant

**APPEAL NO. 09A-UI-06962-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 03/22/09**  
**Claimant: Appellant (5)**

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

**STATEMENT OF THE CASE:**

Casey Scott filed a timely appeal from the April 28, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 1, 2009. Mr. Scott participated. Ryan Roberts, Store Director, represented the employer and presented testimony through Mike Wallace, Market Manager, and Katie Gemaelich, Manager of Perishables.

**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: Casey Scott was employed by Hy-Vee as a part-time meat clerk from August 4, 2008. Mr. Scott last performed work for the employer on November 25, 2009. Mr. Scott's immediate supervisor was Mike Wallace, Market Manager. On November 25, Mr. Scott appeared for work, but then left after 30 minutes. Mr. Scott was then absent without notifying the employer for three consecutive shifts on November 26, 28, and 30.

Mr. Scott contacted Mr. Wallace during the first week of December. At that time, Mr. Scott said he had a substance abuse problem that he needed to deal with. Mr. Wallace told Mr. Scott that if he needed to provide written documentation of some kind from a substance abuse professional or medical professional to protect his job. Mr. Wallace did not hear further from Mr. Scott.

The employer has an attendance policy contained in an employee handbook. Mr. Scott had received a copy of the handbook on his first day of employment. The employer's policy required that Mr. Scott notify his supervisor at least two hours prior to the scheduled start of his shift if he needed to be absent. The employer's policy also indicated that being absent three days in a row without notifying the employer was grounds for discharge from the employment.

Mr. Scott had been received two written reprimands for attendance. On October 24, Mr. Scott took an unauthorized hour break and then left work early for personal reasons. On October 25, Mr. Scott notified the employer he would be 15 minutes late, then appeared for work more than five hours late with just 30 minutes remaining in his shift.

Two and a half to three weeks after Mr. Scott last performed work for the employer, he contacted the store and learned that he was no longer deemed an employee.

## **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).

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).

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 weight of the evidence indicates that the employer discharged Mr. Scott from the employment after Mr. Scott was absent three days without notifying the employer and after Mr. Scott failed to provide documentation—during a two and a half to three week absence--to support his need to be away from the employment for an extended period so that he could address a substance abuse problem. These events followed two unexcused absences in October. The weight of the evidence establishes excessive unexcused absences and, accordingly, misconduct in connection with the employment that disqualifies Mr. Scott for unemployment insurance benefits.

Mr. Scott 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. Scott.

#### **DECISION:**

The Agency representative's April 28, 2009, reference 01, decision is modified as follows. 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 for benefits paid to the claimant.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs