

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES A SONDAG
Claimant

APPEAL NO. 14A-UI-09536-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AEROTEK INC
Employer

OC: 07/27/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

James Sondag filed a timely appeal from the September 9, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on October 3, 2014. Mr. Sondag participated. Jacki Finley represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 14A-UI-09537-JTT. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant.

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: Aerotek, Inc. is a staffing agency. Aerotek placed James Sondag in a full-time, temp-to-hire work assignment at Pickwick Manufacturing Services in Cedar Rapids. The work hours were 5:30 a.m. to 4:00 p.m., Monday through Thursday, with overtime work on Fridays as needed. Ms. Sondag started the assignment in November 2013 and last performed work in the assignment on Tuesday, July 15, 2014. Mr. Sondag's supervisor at Pickwick was Brett Block, Manufacturing Manager. Jacki Finley, a recruiter with Aerotek monitored Mr. Sondag's progress in the assignment.

If Mr. Sondag needed to be absent from all or part of his shift at an assignment, the Aerotek work rules required that he notify the client business and Aerotek prior to the absence and prior to the scheduled start of the shift. Mr. Sondag was aware of the policy and the requirement that he contact both the client business and Aerotek. Aerotek had reviewed the policy with Mr. Sondag at the start of his employment.

On July 15, 2014, Mr. Sondag left work early due to illness. Mr. Sondag told Mr. Block of his need to leave work. Prior to July 18, 2014, Mr. Sondag did not notify Aerotek of his need to

leave work early on July 15, 2014. On July 16 and 17, 2014, Mr. Sondag was absent due to illness. Mr. Sondag gave proper notice to Pickwick, but did not provide notice to Aerotek.

Pickwick had scheduled overtime work for Friday, July 18, 2014. Because Mr. Sondag had not been at work on July 16 and 17, he was unaware of the overtime work set for July 18, 2014 and did not appear for work that day. On July 18, Mr. Sondag called Aerotek about midway through what would have been his overtime shift at Pickwick. Mr. Sondag and Ms. Finley agreed that Mr. Sondag should appear for work on Monday, July 21, 2014, and see whether Pickwick would allow him to continue in the assignment. On July 21, 2014, Mr. Sondag called Pickwick between 8:00 a.m. and 9:00 a.m., to indicate that he would be late getting to work. The Pickwick supervisor told Mr. Sondag to call Aerotek. Pickwick had decided to end the assignment due to attendance. Mr. Sondag had gone to the emergency room at 4:45 a.m. on July 21, but was released to return to work. Mr. Sondag had not notified Pickwick or Aerotek prior to the scheduled start of his shift that he needed to be late that day. Aerotek elected not to place Mr. Sondag in another assignment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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). 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). 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 unexcused absences on July 15, 16, 17 and 21, 2014. On July 15, Mr. Sondag failed to notify Aerotek, his employer, of his need to leave work early. On July 16 and 17, Mr. Sondag failed to notify Aerotek of his need to be absent. On July 21, Mr. Sondag failed to notify Aerotek or the client business prior to the shift of his need to be absent. Mr. Sondag's unexcused absences were excessive and constituted misconduct in connection with the employment. Accordingly, Mr. Sondag 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.

DECISION:

The claims deputy's September 9, 2014, reference 01, decision is affirmed. The claimant was discharged for misconduct. Effective July 21, 2014, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs