

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ALI A HUSSEIN**  
Claimant

**APPEAL NO. 14A-UI-08049-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DEE ZEE INC**  
Employer

**OC: 07/06/14**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Ali Hussein filed a timely appeal from the July 28, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was started on September 15, 2014 and completed on September 18, 2014. Attorney Jessica Taylor represented Mr. Hussein and presented testimony through Mr. Hussein and Mohammed Abd. Lacey Leichter represented the employer. Arabic-English interpreters Vivian Salama and Magdy Salama assisted with the hearing. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Six and A and B into evidence.

**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: Ali Hussein is an immigrant from Iraq. Mr. Hussein's ability to read and understand English is very limited. Mr. Hussein was employed by Dee Zee, Inc. as a full-time machine operator from January 2014 until June 18, 2014 when the employer discharged him for attendance. Mr. Hussein's work hours were 11:00 p.m. to 7:00 a.m. from Sunday evening through Friday morning. His immediate supervisor was Shift Manager Andrew Cores.

The employer has a written attendance policy set forth in a handbook. The employer had Mr. Hussein sign his acknowledgement of receipt of the handbook. The employer took no steps whatsoever to make certain that Mr. Hussein understood the acknowledgment form he signed or the contents of the handbook. Mr. Hussein understood that he needed to notify the employer if he needed to be absent from the employment. Mr. Hussein's practice was to notify the employer of his absences via computer. The employer accepted a telephone call or computer communication as appropriate notice of absences. Mr. Hussein did not understand that he needed to make contact with the employer during every day of a multiple day absence if he had given the employer notice that he would need to be absent multiple days.

The final absences that triggered the discharge occurred on June 15, 16 and 17, 2014. During that time, Mr. Hussein was developing pneumonia. At about 10:00 p.m. on June 15, 2014, Mr. Hussein sent a message to Mr. Cores via computer to indicate that he was sick, would not be at work that night, and that he intended to see a doctor in the morning. Mr. Cores acknowledged receipt of the message, but told Mr. Hussein that he had very limited accrued time off benefit and not enough to cover the absence. On June 16, 2014 Mr. Hussein went to the doctor and was diagnosed with pneumonia. Mr. Hussein was very ill. Despite that, Mr. Hussein went to the work place. When Mr. Hussein arrived at the workplace, a coworker and friend, Mohammed Abd, saw that Mr. Hussein was ill and engaged Mr. Hussein in conversation. Because Mr. Hussein was clearly very ill, Mr. Abd agreed to deliver Mr. Hussein's medical excuse to Mr. Coree. Mr. Hussein was unaware that the employer might deem it inappropriate notice if he had a coworker deliver the written notice that he needed to be absent. The medical documentation indicated that Mr. Hussein needed to rest for three days. Mr. Abd delivered the medical documentation to Mr. Coree and reported back to Mr. Hussein that he had delivered the documentation. Mr. Hussein did not make further contact with the employer regarding his need to be absent on June 16 or June 17, 2014.

On June 18, 2014 Mr. Hussein appeared for work as scheduled. Mr. Hussein was still ill. The employer notified Mr. Hussein at that time that he was discharged for attendance. The employer also notified Mr. Hussein at that time that the employer did not accept medical excuses. The employer notified Mr. Hussein that he was discharged under the employer's attendance point system. Mr. Hussein had not previously heard or understood anything about an attendance point system.

In making the decision to discharge Mr. Hussein from the employment, the employer considered earlier absences. The most recent such absences had occurred on June 1 and 2, 2014. On June 1, 2014 Mr. Hussein left work early because his wife was sick and in the hospital. Mr. Hussein was absent the next day for the same reason. Mr. Hussein provided timely notice to the employer of his need to be gone both days. The only other absence that factored in the discharge occurred on May 20, 2014.

#### **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 a discharge triggered by absences that were excused absences under the applicable law. Though the employer knew that Mr. Hussein had minimal English skills, the employer took no steps to review its attendance policy with Mr. Hussein to make certain that he understood what was expected of him. The employer had the ability to make certain that Mr. Hussein understood the policy. The employer's failure to communicate the particulars of the policy to Mr. Hussein was unreasonable. Under the circumstances, the administrative law judge, unlike the employer, deems it inappropriate to hold Mr. Hussein to the policy. Instead, the test should be whether Mr. Hussein took reasonable steps to inform the employer of his need to be absent from work. He did. Each of the final three absences that triggered the discharge was due to illness. Mr. Hussein took reasonable, appropriate, and timely steps to notify the employer of his need to be absent. Accordingly each of those final absences was an excused absence under the applicable law and cannot be used as a basis for disqualifying Mr. Hussein for benefits. The evidence fails to establish a current act of misconduct.

Because the evidence fails to establish a current act of misconduct, the administrative law judge need not consider the prior absences. However, the administrative law judge notes that Mr. Hussein's next most recent absences on June 1 and 2, 2014 were due to his wife's serious illness and were appropriately reported to the employer. Accordingly, those absences were also excused absences under the applicable law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Hussein was discharged for no disqualifying reason. Accordingly, Mr. Hussein is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The Claims Deputy's July 28, 2014, reference 01, decision is reversed. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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