

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES E TUCKER
Claimant

APPEAL NO. 14A-UI-07808-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AEROTEK INC
Employer

OC: 06/29/14
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.5(1)(j) – Separation From Temporary Employment

STATEMENT OF THE CASE:

Charles Tucker filed a timely appeal from the July 22, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on August 20, 2014. Mr. Tucker participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Exhibit A was received into evidence.

ISSUE:

Whether Mr. Tucker was discharged from a temporary work assignment for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether Mr. Tucker's separation from the temporary employment firm was for good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Charles Tucker was employed by Aerotek, Inc., a temporary employment firm, and performed work in a full-time, temp-to-hire assignment at PMX in Cedar Rapids. Mr. Tucker started the assignment on May 15, 2014 and last performed work in the assignment on June 25, 2014. Mr. Tucker's work hours were 6:00 p.m. to 6:00 a.m. After Mr. Tucker finished his shift on the morning of June 26, 2014, he had to take his ill daughter to the hospital. At 3:00 p.m., Mr. Tucker notified Aerotek and PMX that he would need to be absent from his shift that evening. The employer's policy required that Mr. Tucker notify both the temporary employment firm and the client business if he needed to be absent. Mr. Tucker complied with that requirement to provide proper notice to the employer of his need to be absent due to his daughter's illness. Mr. Tucker was next scheduled to work on Monday, June 30, 2014. On that day, a representative of Aerotek telephoned Mr. Tucker and told him that the assignment had been ended due to attendance. Mr. Tucker had been absent one other time during the assignment. On that prior occasion, Mr. Tucker had reported to work ill and had been sent home by the supervisor.

At the time that Aerotek notified Mr. Tucker of the discharge from the assignment, there was no discussion regarding additional work assignments. Later that same week, Mr. Tucker contacted Aerotek to discuss possible additional work and that he had not been allowed to provide a medical excuse to support his need to be absent on June 26, 2014. Mr. Tucker has provided for the appeal hearing a signed July 2, 2014 note from Cindy Pospisil, R.N., a nurse with St. Luke's Hospital in Cedar Rapids. The note indicates that from June 26 through July 2, 2014, Mr. Tucker was by his daughter's bedside during her hospitalization on the St. Luke's Pediatrics floor.

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 employer did not appear for the hearing and did not present any evidence to establish a discharge for misconduct. The evidence in the record establishes that the final absence that triggered the discharge was due to the illness of a dependent minor child and that Mr. Tucker properly reported the absence to the employer and to the client business. The absence was an excused absence under the applicable law and cannot be considered against Mr. Tucker when determining his eligibility for unemployment insurance benefits. The evidence indicates that the only prior absence was also due to illness, was properly reported, and was an excused absence under the applicable law. The discharge from the temporary employment work assignment was not for misconduct and would not disqualify Mr. Tucker for unemployment insurance benefits.

Iowa Code § 96.5-1-j provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department, but the individual shall not be disqualified if the department finds that:

j. The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.

To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.

For the purposes of this paragraph:

(1) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.

(2) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

Iowa Admin. Code r. 871-24.26(19) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

The employer has presented no evidence to prove that the employer had an end-of-assignment notification requirement that complied with the requirements of the statute. In the absence of such proof, Mr. Tucker fulfilled his contract of hire with the temporary employment firm when he completed the assignment at PMX and was under no further obligation to seek additional assignments through the employer. Mr. Tucker's June 30, 2014 separation from the temporary employment firm was for good cause attributable to the employer.

Mr. Tucker is eligible for benefits provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The claims deputy's July 22, 2014, reference 01, decision is reversed. The claimant was discharged from his temporary work assignment on June 30, 2014 for no disqualifying reason. The claimant's separation from the temporary employment firm was effective June 30, 2014 and was for good cause attributable to the temporary employment firm. 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

jet/pjs