

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARANG A ATEM
Claimant

APPEAL NO. 14A-UI-12214-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TPI IOWA LLC
Employer

OC: 11/02/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Garang Atem filed a timely appeal from the November 20, 2014, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits; based on an Agency conclusion that Mr. Atem was discharged for excessive unexcused absenteeism. After due notice was issued, a hearing was held on December 19, 2014. Mr. Atem participated personally was represented by attorney Samuel Aden. Danielle Williams, Human Resources Coordinator, represented the employer. Exhibits A through I were received 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: Garang Atem was employed by TPI Iowa, L.L.C. as a full-time production laborer from August 2013 until November 6, 2014 when the employer discharged him, ostensibly for attendance. Mr. Atem's work hours were 10:00 p.m. to 6:00 a.m., Monday evening through Saturday morning. Mr. Atem's supervisor as of July 2014 was Barb Sinnott, Finishing Manager. During the last months of the employment, Mr. Atem began to suffer contact dermatitis caused by exposure to substances in the workplace. Mr. Atem was prescribed medication that carried potential side effects and Mr. Atem suffered from side effects including dizziness. Mr. Atem lived in Clive and the workplace was in Newton. Mr. Atem ordinarily commuted to work in his personal vehicle. A doctor had counseled Mr. Atem against driving if he felt dizzy as a result of the medication.

Mr. Atem was discharged from the employment after he appeared for work as scheduled on November 5, 2014 and refused to perform duties that his doctor had restricted him from performing due to the contact dermatitis. The duties were outside Mr. Atem's regular duties at the time. The employer was aware of the medical restriction. When Mr. Atem refused to perform the duties that would aggravate his illness, Ms. Sinnott escorted him out of the workplace. On November 6 the employer notified Mr. Atem that he was discharged from the employment for exceeding the allowable attendance points.

If Mr. Atem needed to be absent from work, the employer's work rules required that Mr. Atem telephone a designated department number and leave a voice mail message for his supervisor. The requirement was in the employee handbook that the employer provided to Mr. Atem and Mr. Atem was aware of the requirement. The final two absences that factored in the discharge occurred on October 31, 2014 when Mr. Atem was absent due to medication-related dizziness. Mr. Atem properly notified the employer by calling the designated number an hour prior to the scheduled start of his shift. On October 30, 2014 Mr. Atem had reported for work as scheduled, but the employer did not have enough work and gave employees the option of going home early and using vacation. Mr. Atem exercised that option. On October 28 Mr. Atem was absent due to the effects of the medication and properly notified the employer. The next most recent alleged absence occurred on October 20, 2014 but Mr. Atem was at work that day. The next most recent absence had been on September 15, 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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee’s failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer’s request in light of the circumstances, along with the worker’s reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

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 claimant has presented sufficient evidence to rebut the employer’s assertion that the discharge was based on attendance. The weight of the evidence indicates instead that the discharge was based on Mr. Atem’s refusal to perform duties that would violate his medical restriction. Mr. Atem reasonably refused Ms. Sinnott’s unreasonable directive that he perform the duties. Even if the decision to discharge Mr. Atem had indeed been based on attendance, the evidence in the record fails to establish a current unexcused absence. The employer failed to present testimony from Ms. Sinnott. The employer had the ability to present such testimony

and elected not to. The employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish insubordination in connection with the November 5 refusal to perform work or with regard to alleged unexcused absences. The final two absences that factored in the discharge were for illness. The weight of the evidence indicates that the absences were properly reported to the employer. The employer has presented insufficient to rebut Mr. Atem's testimony that he properly notified the employer of those absences and that he was at work on October 20, 2014.

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

DECISION:

The November 20, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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