

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TOMMIE C MOORE
Claimant

APPEAL NO. 15A-UI-10520-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JACOBSON WAREHOUSE CO INC
Employer

OC: 08/23/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Tommie Moore filed a timely appeal from the September 17, 2015, reference 02, decision that that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that he had been discharged on August 6, 2015 for excessive unexcused absences. After due notice was issued, a hearing was held on October 1, 2015. Mr. Moore participated. The employer did not participate. The employer representative of record, Thomas & Thorngren, was aware of the hearing, but neither the employer nor the representative responded to the hearing notice instructions to register a telephone number for the hearing.

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: Tommie Moore was employed by Jacobson Warehouse Company, Inc., as a full-time packer from January 2015 and last performed work for the employer on August 6, 2015. On that that day, Mr. Moore was late because he had overslept. On that day, the employer notified Mr. Moore that he was suspended indefinitely while the employer reviewed his attendance points. Mr. Moore had also been late on August 4, 2015 due to oversleeping. The employer had suspended Mr. Moore for the day on August 5, 2015. After Mr. Moore was indefinitely suspended on August 6, 2015, he was hospitalized on August 11, 2015. After he was discharged from the hospital, he made contact with the employer regarding whether he could return to the employment. The employer advised at that time that the employer had not heard back from the human resources department regarding the review of Mr. Moore's attendance points. The employer directed Mr. Moore to obtain a medical release from his doctor. Mr. Moore subsequently presented the medical release to the employer. However, at that time, the employer notified Mr. Moore that the employer had discharged him for incurring nine attendance points. Mr. Moore was only aware of having incurred eight points and was unable to obtain an explanation from the employer regarding how he got the extra point.

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 failed to participate in the hearing and, thereby, failed to present any evidence to support the allegation that Mr. Moore was discharged for misconduct in connection with the employment. Mr. Moore's testimony was sufficient to establish an unexcused absence on August 4 and 6, 2015. In the absence of evidence from the employer to establish additional unexcused absences, the administrative law judge concludes that the evidence is insufficient to establish excessive unexcused absences. Mr. Moore was discharged for no disqualifying reason. Accordingly, Mr. Moore is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The September 17, 2015, reference 02, 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

jet/pjs