

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN R EID
Claimant

APPEAL NO. 09A-UI-01866-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**WORKSOURCE INC
WORKSOURCE STAFFING**
Employer

**OC: 03/16/08 R: 04
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Kevin Eid filed a timely appeal from the February 3, 2009, reference 05, decision that denied benefits. After due notice was issued, a hearing was held on February 26, 2009. Mr. Eid participated. Jamie Brecount, Branch Manager, represented the employer.

ISSUE:

Whether the claimant was discharged from his work assignment for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

Whether the claimant separated from the staffing agency for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a staffing agency. Kevin Eid established his employment relationship with Worksource Staffing on August 8, 2008. On September 8, 2008, Worksource Staffing placed Mr. Eid in a full-time trial-to-hire position at client business Bagcraft Papercon. After a three-week training period, Bagcraft Papercon placed Mr. Eid on the second shift. The hours of the second shift were 2:00 p.m. to 10:00 p.m. Mr. Eid's immediate supervisor at Bagcraft Papercon was Duane Cross, Second Shift Supervisor. Jay Walker was general manager for Bagcraft Papercon.

On December 19, 2008, Mr. Walker notified Worksource Staffing Branch Manager Jamie Brecount that Bagcraft Papercon was ending Mr. Eid's assignment due to attendance and safety concerns. The employer's witness, Ms. Brecount, does not know what the safety concerns were.

The final absence that triggered the discharge from the assignment occurred on December 19, 2008, when Mr. Eid notified Bagcraft Papercon that he would be absent because his car had broken down and he needed to work on his car. The attendance policy required that Mr. Eid

notify both Worksource Staffing and Bagcraft Papercon one hour prior to his shift if he needed to be absent. Mr. Eid did that on December 19. The attendance policy also indicated that Mr. Eid could be discharged for accruing three attendance points during a 90-day probationary period of employment. Mr. Eid was aware of the attendance policy and the absence notification policy.

In making the decision to discharge Mr. Eid from the work assignment, Bagcraft Papercon considered two prior absences. The first absence was for the period of October 8-14, 2008, when Mr. Eid was absent because his girlfriend had been the victim of a serious crime and Mr. Eid needed to help care for the girlfriend. Mr. Eid properly notified the employer of his absence on October 8. The employer considered the entire absence an approved absence, but assigned one attendance point. The other absence considered in making the decision to discharge Mr. Eid from the assignment occurred on October 30. On that date, Mr. Eid was absent due to illness and properly notified the employer, who assigned one attendance point.

At the time, Mr. Eid discussed the discharge with Worksource Staffing. Worksource Staffing had no other assignments available for Mr. Eid. Worksource Staffing was however willing to consider Mr. Eid for other assignments.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

871 IAC 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.

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).

The weight of the evidence fails to establish that safety issues were the basis for the discharge from the assignment. The evidence indicates that the final absence that prompted the discharge was an unexcused absence. Though it was properly reported, it was based on a matter of personal responsibility, transportation. The evidence fails to establish any other absences that may be deemed unexcused absences under the applicable law. A single unexcused absence does not constitute misconduct in connection with the employment. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Eid was discharged from the work assignment for no disqualifying reason. The evidence indicates that Mr. Eid's discharge from the assignment was effectively a discharge from the employment with Worksource Staffing, since that company had no other assignment for Mr. Eid at that time. Mr. Eid is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Eid.

DECISION:

The Agency representative's February 3, 2009, reference 05, 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/css