IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRIAN E SMITH Claimant	**APPEAL NO. 16A-UI-02738-JTT**
	ADMINISTRATIVE LAW JUDGE DECISION
CITY OF CEDAR RAPIDS Employer	
	OC: 02/07/16 **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 24, 2016 (reference 01) decision that allowed benefits to the claimant, provided he was otherwise eligible, and that held the employer's account could be charged for benefits; based on an Agency conclusion that the claimant had been discharged on October 19, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on March 28, 2016. Claimant Brian Smith did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Jan Rushford represented the employer and presented additional testimony through Brent Neighbor. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and Exhibits One through Seven were received into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brian Smith was employed by the City of Cedar Rapids as a full-time, seasonal Equipment Operator until October 19, 2015; when Brent Neighbor, Parks Maintenance Supervisor, discharged him from the employment. Mr. Neighbor was Mr. Smith's immediate supervisor throughout the employment. Mr. Smith had started the employment as a parks laborer in spring 2015 and had been promoted to the Equipment Operator position in August 2015. The duties involved mowing city properties with a commercial mower. The work hours in the Equipment Operator position were 7:00 a.m. to 3:00 p.m., Monday through Friday. Mr. Smith was allowed a 30-minute unpaid lunch break, to be taken around noon. Mr. Smith was also allowed a 15-minute paid morning break, to be taken around 9:00 a.m. Though Mr. Smith was also allowed a 15-minute paid afternoon break, the established practice (authorized by Mr. Neighbor) was for the equipment operators to add the 15-minute afternoon break to the lunch break to make an effective 45-minute lunch break.

The final incident that triggered the discharge occurred on October 16, 2015; when Mr. Smith was absent without notifying the employer of a need to be absent. The employer's policy required that Mr. Smith notify Mr. Neighbor at least 15 minutes prior to the scheduled start of his shift if he needed to be absent. Mr. Smith was aware of the policy had followed the policy in connection with earlier absences. Earlier in the employment, Mr. Smith had been absent for three or four days due to a family member's illness. Mr. Smith had provided proper notice of the absence and Mr. Neighbor had approved the absence. When Mr. Smith appeared for work at 6:50 a.m. on Monday, October 19, 2015, Mr. Neighbor confronted him about the no-call/no-show absence. When asked by Mr. Neighbor for an explanation of the no-call/no-show absence, Mr. Smith was unable to provide a reason. Mr. Neighbor reminded Mr. Smith that he had warned him as part of a prior reprimand that any additional rules infractions would result in his termination from the employment. Mr. Neighbor then notified Mr. Smith that he was discharged.

In making the decision to discharge Mr. Smith from the employment, the employer considered two other incidents. On October 5, 2015, Mr. Smith took an unauthorized extended lunch break; from at least 11:35 a.m. to 12:55 p.m. In addition, Mr. Smith drove the employer's mower the equivalent of a city block to a Taco John's restaurant; rather than walking to the restaurant. To get to the restaurant, Mr. Smith had to cross a busy street with the mower. Mr. Neighbor spend more than hour trying to reach Mr. Smith and located him working in a park after Mr. Smith returned from lunch. At that time, Mr. Smith acknowledged knowing that he was not supposed to drive the mower to and from the restaurant. On October 6, 2015, Mr. Neighbor issued a written reprimand to Mr. Smith based on the October 5, 2015 conduct and warned that "Breaking any further rules will result in immediate termination."

The second additional incident the employer considered as a factor in the discharge had occurred on July 31, 2015; when Mr. Smith had operated the employer's mower without wearing a seat belt in violation of the employer safety practices. On August 5, 2015, Mr. Neighbor issued a written warning to Mr. Smith concerning the July 31 conduct and warned that further violation of safety standards could result in further discipline up to and including termination of the employment.

Mr. Smith established an original claim for unemployment insurance benefits that was effective February 7, 2016 and has been paid $936.00 in benefits for the six-week period of February 7, 2016 through March 19, 2016. The City of Cedar Rapids is a "reimbursable" base-period employer for purposes of the claim.

On February 23, 2016, a Workforce Development Claims Deputy held a fact-finding interview to address Mr. Smith's separation from the employment. Mr. Neighbor represented the employer at that proceeding.

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 two unexcused absences. The most recent unexcused absence occurred on October 16, 2015; when Mr. Smith was a no-call/no-show. The other unexcused absence occurred on October 5, 2015; when Mr. Smith took an unauthorized extended lunch break. These two unexcused absences were insufficient to establish excessive unexcused absences. The other conduct that the employer took into consideration was the isolated safety violation on July 31, 2015 and the isolated unauthorized operation of the mower for the length of a city block during lunch on October 5, 2015.

The conduct that factored in the discharge does not rise to the level of substantial misconduct that would disqualify Mr. Smith for unemployment insurance benefits. Accordingly, Mr. Smith is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 24, 2016 (reference 01) decision is affirmed. The claimant was discharged on October 19, 2015 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/can