

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BURLINGAME, STEVE, C**  
Claimant

**APPEAL NO. 13A-UI-01522-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JACOBSON STAFFING COMPANY LC**  
Employer

**OC: 07/15/12**  
**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 January 31, 2013, reference 03, decision that allowed benefits provided the claimant was otherwise eligible and that held the employer's account could be charged. After due notice was issued, a hearing was held on March 7, 2013. Claimant Steve Burlingame participated. Susan Frances, Account Manager, represented the employer. Exhibits One, Two, Three, and Six were received into evidence.

**ISSUES:**

Whether Mr. Burlingame was discharged from the assignment at George Evans Company for misconduct in connection with the temp-to-hire work assignment.

Whether Mr. Burlingame was discharged from his employment with Jacobson Staffing Company, L.C. for misconduct in connection with the employment.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Jacobson Staffing Company is a temporary employment agency. Claimant Steve Burlingame has performed work for that employer at various distinct times beginning in 2004. Mr. Burlingame most recently returned to the employer in 2012 after having not performed work for the employer since 2008. Since Mr. Burlingame returned in 2012, he performed work in only one full-time, temp-to-hire work assignment at George Evans Company. The assignment started on August 6, 2012 and ended on December 3, 2012 at the request of George Evans Company. The work hours were initially 2:00 p.m. to 10:00-10:30 p.m. The quit time was formalized as 10:30 p.m. as of September 24, 2012. Mr. Burlingame was discharged from the assignment. The discharge from the assignment became a discharge from Jacobson Staffing Company. Roberta Shinbori, Operations Manager, was the Jacobson Staffing representative who monitored Mr. Burlingame's assignment at George Evans.

The final incident that triggered the discharge was an absence on November 30, 2012 that George Evans Company documented as no-call/no-show. Mr. Burlingame was scheduled to start his shift at 2:00 p.m. At around 1:00 p.m., Mr. Burlingame received word from his sister

that his mother had suffered a stroke and had been transported to the hospital. Mr. Burlingame had left his five-year-old child in his mother's care that day. Prior to the scheduled start of the shift, Mr. Burlingame telephoned Ms. Shinbori, explained his situation, and explained that he would be unable to appear for his shift. Ms. Shinbori told Mr. Burlingame to attend to his mother and that Ms. Shinbori would notify George Evans Company of the absence. Under Jacobson Staffing Company's written attendance policy, Mr. Burlingame was obligated to notify George Evans Company only if he could not make contact with the office at Jacobson Staffing Company. After Mr. Burlingame notified Jacobson Staffing Company of his need to be absent, he made arrangements to collect his child and then went to the hospital to be with his mother.

Mr. Burlingame was next scheduled to work on December 3, 2012. When Mr. Burlingame appeared for his shift, his supervisor at George Evans Company, issued a written reprimand for the November 30 absence and told Mr. Burlingame that he was discharged from the assignment. The supervisor acknowledged at the time that Ms. Shinbori had indeed notified George Evans Company that Mr. Burlingame would be absent on November 30.

In making the decision to end the assignment, George Evans Company had considered prior incidents, the most recent of which was a written reprimand issued on October 8, 2012 for attendance.

#### **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). 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 fails to establish a current act of misconduct. The discharge from the assignment, and the discharge from the employment, was triggered by the November 30, 2012 absence. The absence was based on a bona fide family emergency. Mr. Burlingame had properly notified the employer, Jacobson Staffing Company, pursuant to the employer's written attendance policy. The written policy required him to do no more. Even if it had required more, Mr. Burlingame reasonably relied upon Ms. Shinbori's statement on November 30 that she would take care of notifying George Evans Company. The next most recent matter that factored into the discharge from the assignment or discharge from the employment was the October 8, 2012 reprimand, which was not a current act at the time the separation. In the absence of the current act of misconduct, the administrative law judge concludes that Mr. Burlingame was discharged from the assignment and discharged from the employment for no disqualifying reason. Because there was no current act of misconduct, the administrative law judge need not

consider the prior incidents or events that may have factored in the discharge. Mr. Burlingame is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The Agency representative's January 31, 2013, reference 03, decision is affirmed. The claimant was discharged on December 3, 2012 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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