

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID C KRECK
Claimant

APPEAL NO. 12A-UI-04228-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TRINITY REGIONAL MEDICAL CENTER
Employer

OC: 03/18/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

David Kreck filed a timely appeal from the April 10, 2012, reference 01 decision that denied benefits. After due notice was issued, a hearing was held on May 16, 2012. Claimant participated. Ted Vaughn, manager of human resources, represented the employer and presented additional testimony through Clayton Will and Mark Wurscher.

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: David Kreck was employed by Trinity Regional Medical Center as a full-time painter from 2007 until March 12, 2012, when the employer discharged him for attendance. Mr. Kreck's immediate supervisor was Will Clayton, building and grounds carpentry supervisor. Mr. Kreck's normal work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. If Mr. Kreck needed to be absent from work, the employer's established protocol required that he let his supervisors know prior to the scheduled start of his shift. Mr. Kreck knew this.

The final incidents that triggered the discharge were Mr. Kreck's absences from scheduled shifts on March 8 and March 9, 2012. On both days, he was scheduled to work at 7:00 a.m. At 5:30 a.m., on March 8, Mr. Kreck left a message on Mr. Clayton's office answering machine indicating that something had come up and that he would be in late. Mr. Kreck arrived for work at 3:00 p.m. Mr. Kreck indicates that he had car trouble, but knew about it well before the start of his shift, and elected to stay home and work on his car rather than catch a ride to work. After Mr. Kreck showed up for work in the afternoon, he stayed several hours and performed painting duties. While Mr. Kreck was at the workplace on March 8, Mr. Clayton specifically told Mr. Kreck that he wanted Mr. Kreck at work at 7:00 a.m. the next morning. Mr. Kreck did not show up for work the next morning or notify the employer that he was going to be absent or late. Instead, Mr. Kreck showed up at 2:50 p.m. Mr. Clayton reminded Mr. Kreck that he had told him he had projects for him to work on that day and Mr. Kreck acknowledged having been told that. Mark Wurscher, manager of buildings and grounds, had announced the work hours two weeks earlier at a staff meeting.

In making the decision to end Mr. Kreck's employment, the employer considered prior absences. Those absences were due to illness and were properly reported. The employer also considered reprimands for attendance that were issued on October 5, 2011; December 8, 2011; and February 8, 2012.

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).

Mr. Kreck's consecutive absences on March 8 and March 9 were unexcused absences under the applicable law and demonstrated a willful disregard of the employer's interests. On March 8, Mr. Kreck was absent for personal reasons, could have made it to work, but decided not to appear for work until 30 minutes before the scheduled end of his shift. The very next day, despite the employer reinforcing the 7:00 a.m. start time, Mr. Kreck decided not to show until 2:50 p.m. The weight of the evidence in the record refutes Mr. Kreck's assertion that he was merely exercising approved flex time. He clearly was not. Under the circumstances, the unexcused absences were excessive, and constituted misconduct in connection with the employment. The earlier absences were excused absences under the applicable law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for misconduct. Accordingly, the claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to the claimant.

DECISION:

The Agency representative's April 10, 2012, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw