

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FITAH M ISSA
Claimant

APPEAL NO. 11O-UI-00865-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS DAIRY INC
Employer

OC: 08/30/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

This matter was before the administrative law judge upon remand by the Employment Appeal Board in hearing number 11B-UI-14285 for a new hearing. The employer had filed a timely appeal from the October 7, 2010, reference 01, decision that allowed benefits. After due notice was issued, the new hearing was held on February 21, 2011. Claimant participated. Tom Kuiper of TALX represented the employer and presented testimony through Justin Dodge.

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: Fitah Issa was employed by Wells Dairy as a full-time production worker until August 13, 2010, when Production Supervisor Ryan Wright and Human Resources Generalist Justin Dodge discharged him for attendance. Mr. Wright was Mr. Issa's immediate supervisor. Mr. Dodge had no contact with Mr. Issa during the employment.

The absence that triggered the discharge occurred on August 12, 2010, when Mr. Issa was absent due to illness and properly reported the absence to the employer by calling the designated automated absence reporting telephone number before the start of the shift. Mr. Issa had a stomach ulcer and had made Mr. Wright aware of his health issues. Mr. Issa had also been absent on August 11, 2010 for the same reason and had properly notified the employer prior to the scheduled start of the shift. Mr. Issa appeared at the scheduled start of his shift on August 13, but was not allowed to clock in. Instead, a supervisor told Mr. Issa to wait. Mr. Issa was later directed to clock in. Mr. Wright notified Mr. Issa that he had gone over the allotted attendance points as a result of the absences on August 11 and 12 and was discharged from the employment.

The employer considered prior absences and tardiness in making the decision to discharge Mr. Issa from the employment. The next most recent absence had been on July 26, 2010.

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 evidence fails to establish unexcused absences on August 11, 12, or 13, 2010. The weight of the evidence establishes that the absences on August 11 and 12 were each due to illness, that Mr. Issa had previously made his supervisor aware of his ongoing health issues, and that Mr. Issa properly notified the employer of the absences by called the designated number prior to the scheduled start of his shift. The weight of the evidence establishes that Mr. Issa appeared for work on time on August 13, but was directed by a supervisor to wait to clock in. There was no tardiness on August 13. The absences on August 11 and 12 were excused absences under the applicable law. The evidence fails to establish a current act of misconduct. In the absence of a current act of misconduct, that administrative law judge concludes that Mr. Issa was discharged for no disqualifying reason. Because there was no current act of misconduct, the administrative law judge need not consider the attendance matters on or before July 26, 2010.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

DECISION:

The Agency representative's October 7, 2010, reference 01, decision is affirmed. 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/kjw