

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLAS R RICE
Claimant

APPEAL NO. 08A-UI-11146-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BLACKHAWK AUTOMATIC
SPRINKLER INC**
Employer

OC: 10/19/08 R: 04
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Nicholas Rice filed a timely appeal from the November 21, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 12, 2008. Mr. Rice participated. Steve Brown, General Superintendent, represented the employer. Exhibits One, Three, and Four were received into evidence.

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: Nicholas Rice was employed by Blackhawk Automatic Sprinklers, Inc., during two separate periods. The dates for the first period of employment were May 15, 2001 to December 1, 2006. The most recent period of employment began on November 12, 2007 and ended on October 15, 2008, when Steve Brown, General Superintendent, discharged Mr. Rice from the employment. Mr. Rice worked as a full-time journeyman sprinkler fitter/foreman. Mr. Brown was Mr. Rice's immediate supervisor.

The final incident that prompted the discharge occurred on October 15, 2008, when Mr. Rice left a job site early without notifying the employer that he was leaving. The employer's established work hours were 7:00 a.m. to 3:30 p.m. Mr. Brown learned about the early departure when Mr. Rice's apprentice and brother, Dan Rice, contacted Mr. Brown with a question that would ordinarily be fielded by the job site foreman, Nicholas Rice. Mr. Brown drove to the job site. Mr. Brown arrived at the job site at 11:40 a.m. Neither Nicholas Rice nor Dan Rice was at the job site. The key to the mechanical lift was still in the lift. Tools were left out. Mr. Brown made unsuccessful attempts to reach Nicholas Rice and Dan Rice on their personal cell phones. Mr. Brown thought the men may have taken an early lunch. Mr. Brown cleaned up the job site and waited for the two men to return from lunch. Neither worker returned to the job site. Trade

rules regarding apprentices prohibited Dan Rice from working alone on a job site without a foreman.

At about 1:00 p.m., Mr. Brown telephoned Nicholas Rice's residence and spoke with Nicholas Rice. Mr. Rice told Mr. Brown that he had needed to leave early to collect his infant child from the babysitter. Mr. Rice was aware that the employer's written attendance policy required him to telephone Mr. Brown if he needed to leave work early. Mr. Rice cited a dead cell phone as the reason he did not contact the employer. Mr. Brown had left the job site shortly after 11:00 a.m. after receiving a call from his son's babysitter. Mr. Brown's infant son suffers from a chronic lung condition. Mr. Brown needed to collect his son from the babysitter, take him home, and give an Albuterol breathing treatment with a nebulizer machine. The treatment takes 15 to 20 minutes. Mr. Brown's call came toward the end of the Albuterol treatment. When Nicholas Rice left the job site, Dan Rice was still there. Nicholas Rice assumed that his apprentice would clean up the job site before leaving. Mr. Rice told Mr. Brown that he would make up the missed time. Mr. Brown found this proposal unacceptable and discharged Mr. Rice from the employment.

On Monday, October 13, 2008, Mr. Brown received word from a colleague that Nicholas Rice could not be located at the job site. Mr. Rice was in fact working at the job site and made contact shortly thereafter with the person who had been looking for him.

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).

A single unexcused absence does not constitute misconduct. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

The weight of the evidence in the record establishes that the absence on October 15, 2008 was an unexcused absence. Though the absence was based on a compelling reason, illness of a child, Mr. Rice did not properly notify the employer of the need to leave work early. As pointed out by the employer, Mr. Rice would have had access to his brother’s cell phone at the job site before Mr. Rice left the job site and could have made a quick call to the employer. The weight of the evidence in the record fails to establish any other unexcused absences in connection with the most recent period of employment. Mr. Rice’s single unexcused absence did not constitute misconduct and would not disqualify him for unemployment insurance benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). The weight of the evidence indicates that Mr. Rice’s brother and apprentice was at the job site after Mr. Rice departed to collect his child. The weight of the evidence indicates that Mr. Rice reasonably concluded that his brother and apprentice would clean the job site. The evidence fails to establish negligence and/or

carelessness on the part of Nicholas Rice in connection with the condition of the job site. Even if the evidence had established negligence and/or carelessness in connection with October 15, 2008, a single incident of carelessness/negligence would not constitute misconduct and would not disqualify Mr. Rice for unemployment insurance benefits.

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

DECISION:

The Agency representative's November 21, 2008, reference 01, 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