

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HORNER, JARED, P
Claimant

APPEAL NO. 10A-UI-17679-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TEAM STAFFING SOLUTIONS INC
Employer

OC: 02/14/10
Claimant: Appellant (5-R)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 17, 2010, reference 05, decision that denied benefits. After due notice was issued, a hearing was held on February 11, 2011. Claimant participated. Sarah Fiedler, Claims Administrator, represented the employer. Exhibit A was received into evidence.

ISSUE:

Whether the claimant separated from the employer for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jared Horner last performed work for Team Staffing Solutions in a full-time temp-to-hire position at Wilton Precision Steel in Wilton. Mr. Horner started the assignment on May 10, 2010 and continued in the assignment until November 5, 2010, when Wilton Precision Steel ended the assignment due to attendance. Mr. Horner did not complete the assignment. During his time in the assignment, Mr. Horner was tardy for personal reasons on July 24, 29, August 7, 11, 14, 21, September 14, 18, 25, 27, 28, and 29, October 1, and 28, and November 1, 2010. It was the final instance of tardiness on November 1 that prompted Wilton Precision Steel to end the assignment.

Mr. Horner was required to follow both Team Staffing Solutions' attendance policy and Wilton Precision Steel's attendance policy. If he needed to be late, Mr. Horner was required to notify both companies. Mr. Horner was aware of these requirements. Mr. Horner never did notify either company when he needed to be late.

If Mr. Horner needed to be absent for all or part of the day, Mr. Horner was required to contact both companies prior to the shift. Mr. Horner was aware of these requirements, but never contacted Team Staffing Solutions regarding his need to be gone from work.

Mr. Horner had other absences beyond the tardiness referenced above. Mr. Horner was absent due to illness on July 19; was absent for personal reasons on August 20; left work early due to illness on August 24; was absent without notifying either company on September 3; was absent due to illness on September 13; and was absent due to illness on October 18.

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 in the record establishes that Mr. Horner was discharged from his full-time temp-to-hire assignment due to excessive unexcused tardiness and other unexcused absences. Mr. Horner accumulated 21 unexcused absences between July 19 and November 1, 2010. Mr. Horner's excessive unexcused absences constituted misconduct. Because Mr. Horner was discharged from the full-time temp-to-hire assignment for misconduct that disqualifies him for unemployment insurance benefits, and because Mr. Horner did not in fact *complete* the assignment at Wilton Precision Steel, the administrative law judge does not need to address whether Mr. Horner made timely contact with Team Staffing Solutions subsequent to being discharged from the assignment. See Iowa Code section 96.5(1)(j). Mr. Horner 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 Mr. Horner.

The evidence in the record raises the question of whether Mr. Horner has been available for work since he established the additional claim for unemployment insurance benefits that was effective November 14, 2010. This matter will be remanded to the Claims Division for determination of the claimant *availability* for work.

DECISION:

The Agency representative's December 17, 2010, reference 05, decision is modified as follows. The claimant was discharged from his temp-to-hire work assignment on November 5, 2010 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.

This matter is remanded to the Claims Division for determination of whether the claimant has been available for work since he established the additional claim for benefits that was effective November 14, 2010.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs