

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LOGAN W RILEY**  
Claimant

**APPEAL NO. 07A-UI-04769-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FERGUSON ENTERPRISES INC**  
Employer

**OC: 04/01/07 R: 03  
Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absences

**STATEMENT OF THE CASE:**

Ferguson Enterprises filed a timely appeal from the May 3, 2007, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 29, 2007. Claimant Logan Riley participated. Human Resources Administrator Debra Damge represented the employer and presented additional testimony through Operations Manager Ted Simons. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received Exhibits One through Five into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Logan Riley was employed by Ferguson Enterprises as a full-time receiving clerk from August 29, 2005 until April 2, 2007, when Human Resources Administrator Debra Damge, Operations Manager Ted Simons, and the Facilities Manager discharged him for attendance. Mr. Riley's hours of employment were 3:00 p.m. to 11:30 p.m., Monday through Friday.

The employer's written corporate attendance policy required Mr. Riley to notify the employer prior to the scheduled start of his shift if he needed to be absent. The attendance policy specific to the distribution center where Mr. Riley worked required him to notify the employer at least 15 minutes prior to the scheduled start of his shift. Mr. Riley was aware of the attendance policies.

The final absence that prompted the discharge occurred on March 28, 2007, when Mr. Riley was tardy because he had overslept. Mr. Riley's next most recent absence, for a matter other than illness properly reported, had been on January 22, when Mr. Riley was tardy due to problems with his car. Mr. Riley had left work early on June 20 and July 18, 2006, with the approval of his immediate supervisor. The employer lacks information regarding why Mr. Riley left early on those days. Mr. Riley does not specifically remember those dates, but was suffering from migraine headaches during the general time period. Mr. Riley had been tardy on April 4 and May 26, 2006. The rest of Mr. Riley's absences were for illness properly reported to the employer.

The employer issued written warnings for attendance. However, these were prompted at least in part by absences based on illness properly reported.

#### **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 the final absence on March 28, 2007 was an unexcused absence under the applicable law. The evidence establishes unexcused tardiness on April 4 and May 26, 2006, and on January 22. The evidence is insufficient to establish any other unexcused absences. The evidence indicates more that a two-month span between the tardiness on January 22 and the final tardiness on March 28. The evidence establishes an eight-month span between the tardiness in May 2006 and the tardiness in January 2007. The evidence in the record fails to establish excessive unexcused absences.

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

**DECISION:**

The claims representative's May 3, 2007, reference 02, 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