

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

COREY P GESELL
Claimant

APPEAL NO. 12A-UI-04788-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARKETLINK INC
Employer

OC: 02/26/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 24.32(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

Marketlink, Inc. filed a timely appeal from a representative's decision dated April 24, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on May 21, 2012. Claimant participated. The employer participated by Ms. Heidi Hatten and Ms. Kim Higginbotham. Employer's Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Corey Gesell was employed by Marketlink, Inc. from October 18, 2011 until February 24, 2012 when he was discharged from employment. Mr. Gesell worked as a full-time telesales representative and was paid by the hour. His immediate supervisor was Nate King.

The claimant was discharged on February 24, 2012. At the time of job separation the employer indicated to Mr. Gesell that he was being discharged for an attendance infraction that had taken place approximately nine days earlier on February 15, 2012 when the claimant had failed to report for work and did not provide notification to the employer. Under company policy employees are subject to discharge if they have two incidents of no-call/no-show during the time that they are employed by the company.

During the weeks preceding Mr. Gesell's job separation, the program that Mr. Gesell was assigned to was winding down and the claimant's hours had been reduced. It is the claimant's belief that his job separation took place because the employer did not have sufficient work to continue to employ the claimant.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

The evidence in the record establishes that the claimant had failed to report and did not provide notification to the employer of his impending absences on December 12, 2011 and February 15, 2012. The claimant was not discharged at or near the time of his most recent attendance infraction but was allowed to continue working by the company. During that time the company was experiencing a slow down on the program to which Mr. Gesell was assigned. His working hours were being reduced. The claimant was not discharged from employment until approximately nine days after his most recent attendance infraction. At that time the employer had substantially less work for the claimant.

The administrative law judge concludes based upon the totality of the evidence in the record that the claimant was not discharged for a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated April 24, 2012, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs