

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATHEW A HUBER
Claimant

APPEAL NO. 07A-UI-02439-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PICKWICK COMPANY
Employer

**OC: 02/04/07 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:

Pickwick Company filed a timely appeal from the March 1, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 28, 2007. Claimant Mathew Huber participated. Wendy Gasper, Human Resources Clerk, represented the employer and presented additional testimony through Ken Moyer, Assistant Production Manager. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received employer's Exhibits One through Four 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: Mathew Huber was employed by Pickwick Company as a full-time, second-shift painter from May 30, 2006 until February 1, 2007, when Second-shift Supervisor Dick Wolfe and Assistant Production Manager Ken Moyer discharged him for attendance.

The final absence that prompted the discharge occurred on January 30, 2007, when Mr. Huber left work early due to illness. Mr. Huber's early departure was approved by his immediate supervisor. The employer's records suggest that Mr. Huber had been absent on January 28, 2007, a Sunday. However, on January 23, Assistant Production Manager Ken Moyer had told Mr. Huber that he would no longer be allowed to work on Sundays. On January 17, Mr. Huber had left work early due to illness and the early departure was approved by his immediate supervisor. Mr. Huber's illness on January 17 and 30 was a response to paint fumes and respiratory equipment that was overdue for replacement and not functioning properly. Mr. Huber's prior absences had been a combination of unexcused absences and absences due to illness properly reported to the employer.

The employer has a written attendance policy set forth in an employee handbook. Mr. Huber received a copy of the handbook at the time of hire and received a revised copy in October 2006. The attendance policy required Mr. Huber to notify the employer within one hour prior to the scheduled start of his shift or within one hour after the scheduled start of his shift if he needed to be absent. The attendance policy also subjected Mr. Huber to discipline if the employer deemed his absences excessive, regardless of whether the absence was due to illness properly reported or another cause.

Mr. Huber utilized a time clock to record his work hours and to record work performed on individual projects. Mr. Huber's immediate supervisor, Lead Person Mike Koshatka, was responsible for monitoring Mr. Huber's attendance and keeping detailed records of attendance issues. Mr. Koshatka is still employed by Pickwick Company but did not testify at the hearing.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 Mr. Huber's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *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 January 30, 2007, was for illness properly reported to the employer. Accordingly, the final absence that prompted the discharge was an excused absence under the applicable law. Because the final absence that prompted the discharge was an excused absence, the evidence in the record fails to establish a "current act" upon which a disqualification for unemployment insurance benefits might be based. See 871 IAC 24.32(8). Because there was no "current act," the administrative law judge need not consider the prior absences and whether they were excused, unexcused, and/or excessive. See 871 IAC 24.32(8). However, the administrative law judge concludes Mr. Huber was not scheduled to work on January 28 and, therefore, could not be considered absent for that day. The administrative law judge further concludes Mr. Huber's absence on January 17 was for illness properly reported to the employer and, therefore, an excused absence under the applicable law. The administrative law judge notes that the employer had the ability to present more direct and satisfactory evidence through the testimony on Lead Person Mike Koshatka and elected not to present such evidence. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976) and 871 IAC 24.32(4).

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

DECISION:

The claims representative's March 1, 2007, 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/css