

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL A HANDY**  
Claimant

**APPEAL NO: 06A-UI-08655-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OSKALOOSA MOTORS LLC**  
Employer

**OC: 07/30/06 R: 03**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

Oskaloosa Motors filed a timely appeal from the August 22, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 13, 2006. Claimant Michael Handy participated. General Manager Del Morford represented the employer and presented additional testimony through Body Shop Manager Jason Harland. The administrative law judge took official notice of Agency records regarding benefits disbursed to the claimant.

**ISSUE:**

Whether the claimant was discharged for substantial misconduct in connection with the employment that disqualifies him for unemployment insurance benefits. He was not.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Michael Handy was employed by Oskaloosa Motors as a full-time auto detailer from January 4, 2005 until August 2, 2006, when Body Shop Manager Jason Harland discharged him. The employer based its decision to discharge Mr. Handy on three things. The first was Mr. Handy's tardiness on August 2, 2006, and prior attendance issues. The second was Mr. Handy's mother's use of the company cell phone to report the August 2 tardiness. The third was Mr. Handy's unsatisfactory work performance.

The final incident that prompted the discharge occurred on August 2, when Mr. Handy was late returning from his lunch break for personal reasons. Mr. Handy had his mother use his company-issued cell phone to notify Mr. Harland that he would be absent for the rest of the day because he was looking for a new job. A few minutes later, Mr. Harland telephoned Mr. Handy and reached him on the company cell phone. Mr. Harland told Mr. Handy that the employer had work for him to do that afternoon. Mr. Handy immediately reported to work. However, Mr. Handy had exceeded the allotted time for his lunch break and, therefore, was tardy returning to work. The employer asserts there were prior attendance issues, but did not present evidence regarding prior absences.

The employer had most recently discussed Mr. Handy's job performance with him on August 1. Mr. Handy worked on commission and was expected to generate at least six to eight flat-rate billable hours per day, or 40 billable hours per week. At the end of the employment, Mr. Handy was actually generating four to six billable hours per day. The employer received a daily report of the billable hours generated by the service department and/or body shop and would regularly discuss with Mr. Handy the discrepancy between the established goal and his performance. Mr. Handy's ability to reach the established goal was negatively impacted by three things. One hindrance was the weather. Mr. Handy performed his auto detailing duties in a shop that lacked air conditioning. Mr. Handy found he was not able to work as quickly in 90 to 100 degree heat. Another hindrance was Mr. Handy's responsibility to operate the employer's tow truck as needed. The employer believed that yet another hindrance was Mr. Handy's time management or lack of the same. Mr. Handy routinely acknowledged his obligation to strive towards the goals set by the employer.

### **REASONING AND CONCLUSIONS OF LAW:**

The question is whether the evidence in the record establishes that Mr. Handy was discharged for misconduct in connection with the employment. 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.

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. Handy’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 fails to establish misconduct that would disqualify Mr. Handy for unemployment insurance benefits. Regarding the issue of attendance, the evidence establishes only the one unexcused absence or tardy on August 2. The employer failed to present available information by which the employer might have established other unexcused absences. A single unexcused absence does not constitute misconduct. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Mr. Handy’s mother’s use of his company-issued cell phone to notify the employer that Mr. Handy would not be returning to work in the afternoon on August 2 constituted a business use of the phone and was not misconduct. Finally, the evidence fails to establish that Mr. Handy’s inability to meet the employer’s production expectations resulted from any willful or intentional disregard of the employer’s interests or from recurrent negligence or carelessness. Though the decision to discharge Mr. Handy was within the employer’s discretion, the evidence in the record fails to establish substantial misconduct that would disqualify him for unemployment insurance benefits. The administrative law judge concludes that Mr. Handy was discharged for no disqualifying reason. Accordingly, Mr. Handy is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits paid to Mr. Handy.

**DECISION:**

The Agency representative's August 22, 2006, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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