**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**JERMAINE L CARR**
Claimant

**WINEGARD COMPANY**
Employer

**APPEAL NO. 12A-UI-08887-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 06/24/12**
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Jermaine Carr filed a timely appeal from the July 18, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 16, 2012. Mr. Carr participated. Carrie Hale, employee relations representative, represented the employer.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Jermaine Carr was employed by the Winegard Company as a full-time pad printer from November 2011 until June 25, 2012, when Carrie Hale, employee relations representative, and Karl Ingwersen, focus factory manager, discharged him for attendance. Mr. Carr's usual work hours were 6:00 a.m. to 2:00 p.m., Monday through Friday. If Mr. Carr needed to be absent from work, the employer's written policy required that he notify the employer no later than one hour after the scheduled start of his shift. Mr. Carr was aware of this requirement.

The final absence that triggered the discharge occurred on June 22, 2012. On that day, Mr. Carr was absent from work because he had participated in a drunken fist fight over a female the night before and his hands were swollen from his participation in the fight. Mr. Carr had gone to the emergency in the early hours of the morning. Mr. Carr did not notify the employer of his absence within an hour after the scheduled start of his shift. Mr. Carr's telephone was out of service because Mr. Carr had not made the payment. Sometime during mid-morning to late morning, Mr. Carr went to the workplace with his documentation from the emergency room and told the employer he was unable to work that day.

The next most recent absence that factored in the discharge had occurred on June 7, 2012. Mr. Carr had gone to the emergency room on June 6 due to a problem with his teeth. Mr. Carr contacted the employer on June 6 after the emergency room visit to let the employer know he would be absent on June 7 and would return to work on June 8. The doctor's note Mr. Carr

obtained and presented to the employer on June 8 said he could return to work on June 7. On June 7, Mr. Carr had telephoned the employer at 7:14 a.m. to again indicate he would be absent due to illness. Mr. Carr returned to work the next day and brought the doctor's excuse that said he could return on June 7.

The employer considered other absences in making the decision to discharge Mr. Carr from the employment. On March 26, Mr. Carr was absent because he had traveled to Chicago and was delayed returning to Iowa. Mr. Carr was absent on April 3 for the same reason. On April 10, Mr. Carr contacted the employer at 7:14 a.m. to indicate he would be absent.

The employer's policy and practice is to review attendance at the end of the month and issue progressive discipline in connection with that review. Mr. Carr had two absences during June, prior to the employer's review of his attendance for that month. Because there were two absences that month, the employer bypassed the progressive discipline step of suspending Mr. Carr and moved forward with discharging him from the employment. Mr. Carr was aware of the employer's progressive discipline policy.

**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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The evidence in the record establishes that the final absence on June 22 was an unexcused absence. The absence was based on Mr. Carr getting into a drunken physical altercation. Such conduct is volitional. In other words, Mr. Carr's own intentional fighting conduct is what caused the absence on June 22. The weight of the evidence establishes that the June 7, 2012 absence was also an unexcused absence. Though Mr. Carr properly notified the employer of the absence by calling on June 6, the weight of the evidence indicates that Mr. Carr provided the employer with a doctor's note that said he was fine to return to work in June 7. While the absence of a doctor's note would not cause the absence to be unexcused, the doctor's note indicates there was no reason for Mr. Carr to be absent from work on June 7.

The evidence establishes additional unexcused absences on March 26, April 3, and April 30. Mr. Carr concedes these three absences were for personal reasons and not due to illness.

Thus, the weight of the evidence establishes five unexcused absences between March 26 and June 25. The unexcused absences were excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Carr was discharged for misconduct. Accordingly, Mr. Carr 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.

**DECISION:**

The Agency representative's July 18, 2012, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw