

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD B DUNCAN
Claimant

APPEAL NO. 17A-UI-00092-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEE ZEE INC
Employer

OC: 11/06/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Richard Duncan filed a timely appeal from the December 30, 2016, reference 02, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Duncan had been discharged on September 23, 2016 for violation of a known company rule. After due notice was issued, a hearing was started on January 25, 2017 and concluded on January 26, 2017. Mr. Duncan participated. Sara Tew, Human Resources Specialist, represented the employer. Exhibits 1, 2 and 3 were received into evidence.

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: Richard Duncan was employed by Dee Zee, Inc., as a full-time powder coat hanger from August 29, 2016 until September 23, 2016, when Shift Manager Chuck Scarlett discharged him for attendance. Mr. Scarlett was Mr. Duncan's immediate supervisor. Mr. Duncan was assigned to the overnight shift. After some initial confusion about the work hours, Mr. Duncan's work hours became 10:00 p.m. to 6:00 a.m., Sunday evening through Friday morning. The employer reviewed its written attendance policy with Mr. Duncan at the start of the employment. The policy required that Mr. Duncan telephone the employer at least 30 minutes prior to the scheduled start of his shift each day he needed to be absent from the employment.

Mr. Scarlett's decision to discharge Mr. Duncan from the employment followed three shifts for which Mr. Duncan was absent without notifying the employer. On September 19, 2016, Mr. Duncan was absent without notifying the employer. Mr. Duncan returned to work on the evening of September 20, 2016. Mr. Duncan was then absent from his shifts on September 21

and 22 without notifying the employer. On September 23, 2016, Mr. Scarlett documented termination of the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in a discharge 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 weight of the evidence in the record establishes excessive unexcused absences. The weight of the evidence establishes that Mr. Duncan was indeed a no-call, no-show on September 19, 21 and 22, 2016. The credibility and reliability of Mr. Duncan's testimony was an issue in the hearing. At a number of points, Mr. Duncan provided internally inconsistent testimony that included repeated misstatement of the month in question and conflicting statements regarding when he purportedly traveled to Minnesota with his family. On the other hand, the employer witness lacked personal knowledge of the matters in question. The most reliable evidence turned out to be the employer documentation generated at the time of the employment and at the time the events in question were unfolding. There would be no basis for Mr. Scarlett to document on September 23 a termination based on three no-call, no-show absences on September 19, 21 and 22 if Mr. Duncan had indeed given notice of his need to be absent on those dates. The weight of the evidence indicates that Mr. Duncan did not in fact provide the required notice to the employer on those dates. These three unexcused absences are sufficient to establish excessive unexcused absences. Accordingly, the administrative law judge need not further consider earlier absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Duncan was discharged on September 23, 2016 for misconduct in connection with the employment. Accordingly, Mr. Duncan is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Duncan must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The December 30, 2016, reference 02, decision is affirmed. The claimant was discharged on September 23, 2016 for misconduct in connection with the employment based on excessive unexcused absences. 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 amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs