

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

GLENN D THOMPSON
Claimant

APPEAL NO. 18A-UI-02789-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CALCIUM PRODUCTS INC
Employer

OC: 01/28/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Glenn Thompson filed a timely appeal from the February 22, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Thompson was discharged on January 29, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on March 28, 2018. Mr. Thompson participated. Craig Graham 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: Glenn Thompson was employed by Calcium Products, Inc. as a full-time machine operator from 2015 until January 29, 2018, when Craig Graham, Plant Manager, discharged him from the employment for attendance. Mr. Thompson's core work hours were 5:00 a.m. to 5:00 p.m., Monday through Friday. The employer also required scheduled overtime work on Saturdays or Sundays pursuant to business needs.

The employer has a written attendance policy set forth in the employee handbook the employer provided to Mr. Thompson at the start of his employment. If Mr. Thompson needed to be absent or late for work, the written attendance policy required that he call his supervisor or the designated absence reporting number at least an hour prior to the scheduled start of his shift. Mr. Thompson was aware of the absence reporting requirement.

The final absence that triggered the discharge occurred on January 29, 2018, when Mr. Thompson reported late for work because he overslept. Mr. Thompson awoke after the scheduled start of his shift and called an interim supervisor to give notice that he would be late. The final instance of tardiness followed several similar late arrivals due to oversleeping. These additional incidents occurred on November 3 and 22, December 8, 12, 19 and 29, 2017 and on

January 4, 2018. Mr. Thompson was also absent for personal reasons for scheduled overtime on December 2, 2017 and did not contact the employer until after the shift had ended.

On December 5, 2017, Mr. Graham issued a written warning for attendance to Mr. Thompson and imposed a three-day suspension. The employer had previously issued verbal warnings to Mr. Thompson for attendance. On January 16, 2018, Mr. Graham issued a second written warning for attendance to Mr. Thompson and imposed a five-day suspension. The written reprimand included a warning that further absences could result in termination of the employment. Mr. Thompson returned to work on January 23 and the final late arrival occurred six days after that.

Mr. Thompson had a history of interpersonal conflict with Mr. Graham that predated Mr. Graham's promotion to Plant Manager.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 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 a discharge on January 29, 2018 that was based on excessive unexcused absences. Each of the late arrivals referenced in the above findings of fact was due to Mr. Thompson oversleeping and was an unexcused absence under the applicable law. Mr. Thompson's no-call/no-call absence on December 2, 2017 was also an unexcused absence under the applicable law. There were nine unexcused absences during the roughly three-month period between November 3, 2017 and January 29, 2018. The absences occurred in the context of progressive discipline for attendance. The weight of the evidence establishes a discharge that was based on the ongoing attendance issues, rather than a discharge motivated by interpersonal conflict between Mr. Thompson and Mr. Graham.

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

DECISION:

The February 22, 2018, reference 01, decision is affirmed. The claimant was discharged on January 29, 2018 for misconduct in connection with the employment. 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