

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENNETH M KURZ
Claimant

APPEAL NO. 07A-UI-07217-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OMEGA CABINETS LTD
Employer

**OC: 06/17/07 R: 03
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Kenneth Kurz filed a timely appeal from the July 17, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 13, 2007. Mr. Kurz participated. Chase Thornburgh, Human Resources Manager, represented the employer.

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: Kenneth Kurz was employed by Omega Cabinets as a full-time wood worker from November 29, 2004 until June 10, 2007, when Human Resources Representative Amy Victors and Production Supervisor Nate Shirk discharged him for attendance. Mr. Kurz was assigned to the third shift and Mr. Shirk was Mr. Kurz's immediate supervisor.

The final absence that prompted the discharge occurred on June 10, 2007, when Mr. Kurz was absent due to a lack of appropriate childcare for his nine-year-old daughter. Mr. Kurz contacted his supervisor prior to the scheduled start of his shift to advise the supervisor of the childcare problem and his need to be late. Mr. Shirk told Mr. Kurz not to come to work, but to contact Ms. Victors the next morning. Mr. Kurz contacted Ms. Victors as directed and Ms. Victors advised Mr. Kurz that he was discharged from the employment.

Prior to the final absence, Mr. Kurz had most recently been absent on April 29, 2007. This absence was also due to a lack of appropriate childcare.

Mr. Kurz also had absences on March 13, March 22 and August 24, 2006, as well as on February 17, 2007. The employer was unable to provide details regarding these absences and Mr. Kurz does not clearly remember the details of these absences.

The employer issued written warnings for attendance to Mr. Kurz on February 21 and May 14, 2007. At the time of the last warning, the employer warned that if Mr. Kurz had another absence before August 24, 2007, he would be discharged.

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).

The weight evidence in the record establishes two unexcused absences on June 10, 2007 and April 29, 2007. Though Mr. Kurz was absence for important personal reasons on these days, the absences were still unexcused under the applicable law. The evidence is insufficient to establish any additional unexcused absences. The evidence does not establish excessively unexcused absences.

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

DECISION:

The claims representative's July 17, 2007, reference 01, decision is reversed. 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