

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

BRADLEY A GULICK
412 DIVISION ST
BURLINGTON IA 52601-5531

TRINITY LOGISTICS CORPORATION
3216 E 35TH STREET CT
DAVENPORT IA 52807

Appeal Number: 06A-UI-08184-JTT
OC: 07/16/06 R: 04
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Bradley Gulick filed a timely appeal from the August 9, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 29, 2006. Mr. Gulick participated and presented additional testimony through former Trinity Logistics employee Andrew Denavich. Administration Manager Patricia Meier represented the employer. Pursuant to the claimant's request, the administrative law judge took official notice of the Agency's administrative file, including the documents submitted for the fact-finding interview. Claimant's Exhibit A was received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Bradley Gulick was employed by Trinity Logistics Corporation as a full-time warehouseman from June 12, 2004 until July 19, 2006, when Warehouse Supervisor Adam Pfeifer discharged him for attendance.

The final absence that prompted the discharge occurred on July 19. Mr. Gulick had previously suffered a workplace injury to his back and was supposed to be assigned to modified work responsibilities. On the morning of July 19, Warehouse Supervisor Adam Pfeifer assigned Mr. Gulick to operate a forklift. Mr. Gulick had just seen the workers' compensation health care provider on July 17, at which time the provider had restricted Mr. Gulick from operating a forklift. Mr. Pfeifer told Mr. Gulick that he had spoken with the employer's workers' compensation doctor and that the doctor had given approval for Mr. Pfeifer to operate the forklift. The health care provider had not, in fact, given such approval. Mr. Gulick began experiencing back pain during the morning in connection with operating the forklift. Mr. Gulick was scheduled to take his lunch break from noon until 12:30 p.m. During his lunch break, Mr. Gulick contacted the employer's workers' compensation provider and attempted to schedule an appointment yet that day. The health care provider indicated no appointments were available and directed Mr. Gulick to utilize the emergency room if he needed more immediate treatment. At 12:25 p.m., Mr. Gulick telephoned Warehouse Supervisor Adam Pfeifer and told him that he needed to be seen by a doctor regarding his back pain and that the workers' compensation provider had directed him to go to the emergency room. Mr. Pfeifer instructed Mr. Gulick to return to the workplace and the employer would make arrangements for Mr. Gulick to be seen by a doctor. It was after 12:30 p.m. when Mr. Gulick concluded the telephone conversation with Mr. Pfeiffer. Mr. Gulick arrived back at the workplace at 12:38 p.m. At that time, Mr. Pfeiffer announced that Mr. Gulick was tardy and was being discharged from the employment due to excessive tardiness. Despite being discharged from the employment, Mr. Gulick still sought treatment at an emergency room on July 19 and attempted to provide the employer with a written medical excuse that excused Mr. Gulick from work effective at noon on July 19. Mr. Pfeifer refused to accept the medical excuse.

Mr. Pfeifer had issued a warning to Mr. Gulick on July 7 for excessive tardiness. At that time, Mr. Pfeifer warned Mr. Gulick that he would be discharged for any further incident of tardiness. Mr. Gulick had been two minutes tardy for work on July 6, but had contacted Mr. Pfeifer shortly before the start of his shift to advise that he would be tardy due to oversleeping. Mr. Gulick had also been tardy on June 8, 9, and 13. Prior to that, Mr. Gulick had most recently been tardy on March 24.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Gulick 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. Gulick'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 greater weight of the evidence in the record establishes that the final absence that prompted the discharge was an excused absence under the applicable law. The absence was due to pain related to a prior workplace injury and a need to seek medical evaluation and/or treatment. Mr. Gulick communicated his need to be absent to Mr. Pfeiffer before 12:30 p.m., the time he was scheduled to return from his lunch break. The evidence indicates that Mr. Gulick did, in fact, seek medical evaluation and/or treatment that day. Because the final absence that prompted the discharge was an excused absence under the applicable law, the evidence in the record fails to establish a "current act" that might serve as a basis for disqualifying Mr. Gulick for unemployment insurance benefits. See 871 IAC 24.32(8). Accordingly, Mr. Gulick was discharged for no disqualifying reason and is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Gulick. Because the final absence was an excused absence, the administrative law judge need not consider the prior absences. See 871 IAC 24.32(8).

The administrative law judge notes that the employer failed to present sufficiently direct and satisfactory evidence to support the allegation of misconduct, despite having the ability to present more direct and satisfactory evidence. See 871 IAC 24.32(4) and Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976). Such evidence might have come through testimony from Warehouse Foreman Adam Pfeiffer and/or others with firsthand information regarding the events in question. The hearsay evidence presented by the employer was insufficient to rebut testimony from Mr. Gulick regarding the final absence that prompted the discharge.

DECISION:

The Agency representative's August 9, 2006, 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.

jt/kjw