

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SPENCER L MILLIZER**

Claimant

**APPEAL NO. 08A-UI-00301-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**COMMERCIAL RESOURCES INC**

Employer

**OC: 12/09/07 R: 03  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Spencer Millizer filed a timely appeal from the January 2, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 24, 2008. Mr. Spencer participated. Rachel Hoffman, Human Resources Director, represented the employer and presented additional testimony through Heather Clark, Store Manager.

**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: Spencer Millizer was employed by Commercial Resources, Inc. (CRI), as a part-time delivery technician from April 20, 2006 until December 13, 2007, when Store Manager Heather Clark discharged him for attendance. Ms. Clark was Mr. Millizer's immediate supervisor. Mr. Millizer's residence was four blocks from the workplace. When Mr. Millizer was late or failed to appear for work, the employer was forced to reassign or reschedule appliance deliveries to customers. The employer's attendance notification policy required Mr. Millizer to notify Ms. Clark by the start of his shift if he needed to be absent or tardy. Mr. Millizer was aware of the policy.

Mr. Millizer had a history of unexcused absences. On July 16, 2007, Mr. Millizer did not report for his 9:00 a.m. shift. Mr. Millizer notified the employer at 12:24 p.m. that he would not be in. Mr. Millizer had traveled out of town and did not return to Centerville until noon or later. On October 8, 2007, Mr. Millizer was tardy for work because it was raining out and he waited until the rain stopped before he walked to work. The employer issued a written reprimand in response to this incident. On November 14, Mr. Millizer overslept and did not appear from his 9:00 a.m. shift until 12:15 p.m. On November 28, Mr. Millizer was late for his 9:00 a.m. shift for personal reasons. At 9:15 a.m., Ms. Clark sent another employee to Mr. Millizer's house to pick him up for work. The employer did not have an agreement with Mr. Millizer to provide him with transportation to work. In response to this absence, Ms. Clark told Mr. Millizer that he would be

discharged the next time he was late or absent and failed to notify her by the scheduled start of his shift. Ms. Clark had Mr. Millizer signed a reprimand that reflected this understanding.

The final absence that prompted the discharge occurred on December 12, 2007. On the evening of December 11, 2007, Centerville suffered a winter storm that downed tree limbs and power lines. Tree branches landed on or near the front steps of the apartment building where Mr. Millizer and his brother resided. A power line had also been knocked down in the front yard of the apartment building. Mr. Millizer's phone service was hooked up via his computer and Mr. Millizer initially lacked phone access because of the loss of power. Mr. Millizer and/or his brother and neighbor moved the tree limbs from the front steps. Alliant Energy field worker(s) came to repair the power line. Once the power was restored, Mr. Millizer's brother was able to notify the brother's employer that he would be absent. However, Mr. Millizer did not notify Commercial Resources, Inc., that he would be absent. The employer had several out-of-town deliveries scheduled for December 12, and the highways were passable. Other employees of CRI were able to make it into work on December 12.

When Mr. Millizer appeared for work on December 13, he made no attempt to talk to Ms. Clark about his absence on December 12. Ms. Clark spoke with Mr. Millizer at the end of the workday on December 13. During that discussion, Mr. Millizer referenced downed tree limbs and a downed power line. Though Mr. Millizer asserted at the hearing that an Alliant representative(s) had told his brother it would be unsafe to leave the residence and to be very careful if they did leave, Mr. Millizer had made no mention of such a warning when speaking with Ms. Clark on December 13.

#### **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 of the evidence in the record establishes an unexcused absence on December 12, 2007. The weight of the evidence indicates there were in fact downed tree branches and a downed power line in front of Mr. Millizer's residence. The weight of the evidence also indicates that Mr. Millizer was initially without power and initially could not use his telephone. The evidence indicates that power was restored in a timely fashion and, accordingly, that any inherent danger was resolved as well. The weight of the evidence does not establish that Alliant Energy warned Mr. Millizer, directly or indirectly, not to leave his residence. This very important piece of information was conspicuously absent from Mr. Millizer's discussion with Ms. Clark on December 13. This very important piece of information is also conspicuously absent from the notes that the Workforce Development claims representative recorded in connection with the fact-finding interview. The greater weight of the evidence indicates that no such warning was conveyed to Mr. Millizer, directly or indirectly. Even if the weight of the evidence did establish there was a warning, the greater weight of the evidence indicates that once Mr. Millizer's power

was restored on December 12, Mr. Millizer did not notify the employer. The weight of the evidence fails to support Mr. Millizer's assertion that he attempted to contact the employer on December 12. The weight of the evidence establishes a pattern of unexcused absences on July 16, October 8, November 14, and November 28, and that culminated in the final warning issued by the employer. The unexcused absences from October to December were excessive.

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

**DECISION:**

The Agency representative's January 2, 2008, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been 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

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