

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TODD TURNER
Claimant

APPEAL NO. 08A-UI-03693-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALORICA INC
Employer

**OC: 11/25/07 R: 01
Claimant: Appellant (2-R)**

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

STATEMENT OF THE CASE:

Todd Turner filed a timely appeal from the April 4, 2008, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on April 3, 2008. Mr. Turner participated personally and was represented by Attorney Frank Tenuta. The employer did not participate. On the day the hearing, the employer provided the name of a representative and a telephone number for the hearing. However, at the time of the hearing, the employer representative was not available at the number the employer had provided. Exhibits A and B 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: Todd Turner was employed by Alorica, Inc., as a full-time customer service representative from December 12, 2007 until March 10, 2008, when his immediate supervisor, Jennifer, discharged him due to attendance. The employer did not make Mr. Turner aware of a formal absence notification policy. However, a training supervisor had told Mr. Turner that if he needed to be absent, he should call a designated number and a human resources representative would forward his call to his supervisor's extension.

Mr. Turner last appeared and performed work for the employer on February 27, 2008. On March 2, 2008, Mr. Turner notified the employer before the scheduled start of his shift that he would be absent due to illness. March 3, 2008, Mr. Turner notified the employer before the scheduled start of his shift that he would be absent due to illness. On March 4, Mr. Turner again notified the employer prior to the start of his shift that he would be absent due to illness. In connection with each of these calls, Mr. Turner had left a voice mail message at his immediate supervisor's extension. On March 4, Mr. Turner had an appointment with a doctor and was diagnosed with the flu. After the appointment, Mr. Turner contacted his immediate supervisor and told her that he been seen at a hospital, that he had subsequently been seen by

a doctor, and that he continued to be sick. Mr. Turner told the supervisor that he had a note from the doctor. The supervisor told Mr. Turner to bring the note when he returned to work. In the late evening of March 9 or early morning of March 10, Mr. Turner notified the employer that he would be absent from his March 10 shift, and that he would call his immediate supervisor the next morning to speak directly to her.

On March 10, Mr. Turner spoke with his immediate supervisor. Mr. Turner told the supervisor that he was still sick and would most likely be absent from work on Tuesday, March 11, 2008. The supervisor indicated that Mr. Turner has missed a lot of work and that he need not bother to come back.

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).

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).

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).

By failing to participate in the hearing, the employer has failed to provide any evidence whatsoever to support an allegation that Mr. Turner was discharged for misconduct and misconduct cannot be established. See 871 IAC 24.32(4).

The evidence in the record establishes that each of Mr. Turner's absences was for illness properly reported to the employer. Accordingly, each of the absences would be an excused absence under the applicable law.

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

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The evidence in the record raises the question of whether Mr. Turner has been able to work and/or available for work since he established his claim for unemployment insurance benefits. This matter will be remanded to a claims representative so that Mr. Turner's work ability and/or availability can be investigated.

DECISION:

The Agency representative's April 4, 2008, reference 03, 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. The matter is remanded to a claims representative so that the claimant's work ability and/or availability can be investigated.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css