

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENNETH W IRWIN
Claimant

APPEAL NO. 08A-UI-01344-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA MOLD TOOLING CO INC
Employer

**OC: 11/18/07 R: 02
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Iowa Mold Tooling Company filed a timely appeal from the January 30, 2008, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on February 25, 2008. Claimant participated. Dana Dempsey represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five 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: Kenneth Irwin was employed by Iowa Mold Tooling Company as a full-time painter from April 30, 2007 until December 27, 2007, when Maria Oelke, Human Resources Manager, discharged him for attendance. The employer has a written attendance policy set forth in an employee handbook. Mr. Irwin acknowledged receipt of the handbook in writing on April 30, 2007. Under the attendance policy, Mr. Irwin was required to contact his immediate supervisor at least one hour prior the scheduled start of his shift if he needed to be absent. If the supervisor was not available, Mr. Irwin was to leave a voice mail message. Mr. Irwin's immediate supervisor from August 2007 until the termination was First Shift Plant Supervisor Mike Countryman. Mr. Countryman is still with the employer, but no longer in a supervisory position. The employer did not present testimony from Mr. Countryman. Until July, Mr. Irwin had worked on the second shift. The employer eliminated the second shift and moved Mr. Irwin to first shift. The employer then started a smaller second shift and moved Mr. Irwin back to the second shift. After three weeks back on the second shift, Mr. Irwin bid for and obtained first shift employment. Mr. Irwin's supervisor on the second shift had been Second Shift Plant Supervisor Matt Welter.

The employer's attendance policy starts employees with a certain number of points and then subtracts points for various absences, including absences due to illness properly reported to the employer. When the employee gets to one or zero points, the employer terminates the

employment after determining whether extenuating circumstances. Though the employer initiates the termination, the employer calls the termination a voluntary quit.

The final absence that prompted the discharge occurred on December 20, 2007, when Mr. Irwin was absent due to illness and properly reported the absence to his supervisor by leaving a message on the supervisor's voice mail one and a half hours prior to the scheduled start of the shift. The supervisor had not yet arrived at the workplace at the time Mr. Irwin made his call. Mr. Irwin stated in his message to the supervisor that he was sick and would not be at work that day. Mr. Irwin returned to work on December 21. Human Resources Representative Dana Dempsey told Mr. Irwin that he was probably getting low on attendance points and that she would need to review his attendance history. On December 22, the plant shut down for the Christmas holiday. Mr. Irwin returned to work on December 26. On December 27, Mr. Irwin was summoned to a meeting with the Human Resources Manager, his immediate supervisor and a union representative. The Human Resources Manager notified Mr. Irwin that he was being discharged for reaching one attendance point.

Prior to the absence on December 20, Mr. Irwin had most recently been absent on November 7, when he was absent due to illness and properly reported the absence. The next most recent absence was on August 30, 2007, when Mr. Irwin was again absent due to illness and properly reported the absence. On or about August 15, Mr. Irwin was absent for personal reasons. On August 7, Mr. Irwin was not absent, but forgot to clock in. Mr. Irwin subsequently realized his error. It took Mr. Irwin a while to locate a supervisor so he could report his time clock error.

The employer issued attendance point warnings to Mr. Irwin on August 20 and September 4.

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).

The administrative law judge notes that the employer failed to present any testimony from the Plant Supervisors who directly supervised Mr. Irwin's employment and to whom Mr. Irwin would have reported his absences. The employer had the ability to present such testimony. The employer elected instead to rely upon notes contained in the employer's attendance coding system.

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 greater weight of the evidence in the final absence that prompted the discharge was an absence due to illness properly reported to the employer. The absence was an excused absence under the applicable law. Because the final absence was an excused absence, the evidence fails to establish a "current act" of misconduct and, accordingly, the discharge would not disqualify Mr. Irwin for unemployment insurance benefits. See 871 IAC 24.32(8). Because

the final absence was an excused absence, the administrative law judge need not consider the earlier absences and whether they were excused absences under the applicable law. Nonetheless, the administrative law judge notes that the absences on August 30 and November 7 were absences due to illness properly reported and, therefore, excused absences under the applicable law. The evidence establishes only one absence that would be unexcused under the applicable law, August 15, 2007. A single unexcused absence does not constitute misconduct. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989)

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

DECISION:

The Agency representative's January 30, 2008, reference 03, decision is affirmed. 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/kjw