

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RONNEZE G WILDER
Claimant

APPEAL NO. 17A-UI-07671-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE HON COMPANY
Employer

OC: 07/02/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Ronneze Wilder filed a timely appeal from the July 24, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Wilder was discharged on June 30, 2017 for excessive unexcused absences. . After due notice was issued, a hearing was held on August 15, 2017. Mr. Wilder participated. Pamela Drake of Employers Edge represented the employer and presented testimony through Katina McDaniel. Exhibits 2 through 5 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: Ronneze Wilder was employed by The Hon Company as a full-time distribution support laborer from 2014 and last performed work for the employer on June 23, 2017. Mr. Wilder's regular work hours were 3:30 p.m. to 1:30 a.m., Monday through Friday. Group Leader Russell Phillips was Mr. Wilder's immediate supervisor. The workplace is located in Muscatine. Mr. Wilder resided in Muscatine at the time of the employment.

After Mr. Wilder completed the shift that ended at 1:30 a.m. on Saturday, June 24, 2017, he was next expected to appear for work at 3:30 p.m. that day. On Thursday, June 22, 2017, Mr. Wilder had volunteered to work the Saturday, overtime shift. Mr. Wilder understood that once he volunteered to work the shift, he was expected to appear for the shift unless he made timely contact with the shift supervisor to indicate he would not appear and the supervisor relieved him of the obligation to appear. Mr. Wilder also understood that if he did not appear for an overtime shift, it would be within the shift leader's discretion to determine whether Mr. Wilder would receive an attendance point in connection with the absence.

The employer has a written attendance policy that the employer provided to Mr. Wilder at the start of the employment. Pursuant to the employer's attendance policy, employees who needed to be absent from a shift were required to call the designated absence reporting line at least 30

minutes prior to the scheduled start of the shift to provide information in response to the automated prompts. Employees were required to state if their absence was covered by the Family and Medical Leave Act (FMLA), if the employee was taking a vacation day or using a "Free Pass," or if the employer was responding to some other special instruction. Under the policy, an employee would be "automatically" discharged when he reached nine attendance points during a rolling 12-month period. Mr. Wilder was familiar with the attendance policy.

Mr. Wilder did not appear for the overtime shift on June 24, 2017. Mr. Wilder did not call the designated absence reporting line. About an hour prior to the shift, Mr. Wilder called Mike Samuelson, the shift leader in charge of the overtime shift. Mr. Wilder told Mr. Samuelson that he might be absent from or late for the shift. Mr. Wilder did not state why he might be absent or late. Instead of appearing for the shift, Mr. Wilder traveled to Galesburg, Illinois. Mr. Wilder's fiancée and the couple's four-year-old and seven-year-old daughters reside in Galesburg. Mr. Wilder advises that the drive from Muscatine to Galesburg takes about an hour and 15 minutes. Mr. Wilder traveled to Galesburg to help care of his daughters. The elder daughter suffers from severe asthma. The younger daughter was suffering from the flu.

Mr. Wilder was next scheduled to work on Monday, June 26, 2017, but was absent from the shift. Mr. Wilder did not notify the employer that he would be absent.

Mr. Wilder was next scheduled to work on Tuesday, June 27, 2017, but did not appear for the shift. Mr. Wilder called the designated absence reporting line at least 30 minutes prior to the scheduled start of his shift to give notice that he would be absent from the shift. Mr. Wilder did not state why he would be absent from the shift. In his message, Mr. Wilder apologized for failing to give notice of his absence the previous day.

Mr. Wilder was next scheduled to work on Wednesday, June 28, 2017, but did not appear for the shift. Mr. Wilder called the designated absence reporting line at least 30 minutes prior to the scheduled start of his shift. At about 3:00 p.m. that day, Mr. Wilder telephoned Katina McDaniel, Member and Community Relations Generalist. When Ms. McDaniel did not answer, Mr. Wilder left a voicemail message in which he asked for a return call as soon as possible. Ms. McDaniel did not return the call. Ms. McDaniel was on vacation at the time of the call and did not receive the message. Ms. McDaniel returned to work on Monday, July 3, 2017.

At 6:56 p.m. on June 28, Russell Phillips, Mr. Wilder's immediate supervisor, sent Mr. Wilder a text message. Mr. Phillips wrote: "Hey Ron, it's Rusty, trying to get ahold of you to let you know what's going on and to let you know you're at 8.5 points tonight." Mr. Phillips did not say anything in the text message to indicate that Mr. Wilder was at that point discharged from the employment.

Mr. Wilder was next scheduled to work on Thursday, June 29, 2017, but did not appear for the shift. Mr. Wilder did not notify the employer that he would be absent. The June 29 absence put Mr. Wilder over the nine-point threshold that triggered discharge. In response to Mr. Wilder's absence on June 29, 2017, the employer discharged him for attendance pursuant to the attendance policy.

Mr. Wilder's earlier attendance history factored in the discharge decision. On January 16 and 30, 2017, Mr. Wilder was absent, but used a "Free Pass" to avoid receiving attendance points for the absences. On March 21, 2017, the employer issued a written warning to Mr. Wilder to let him know he had accrued 4.5 attendance points. That warning followed absences for personal reasons on March 16 and 20, 2017. On June 22, 2017, Mr. Wilder left work early because he was tired.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The weight evidence in the record establishes a discharge based on excessive unexcused absences. The final absence that triggered the discharge was the no-call/no-show absence on Thursday, June 29, 2017. That absence followed another no-call/no-show absence on Monday, June 26, 2017. Two no-call/no-show absences within the same work week are sufficient to establish excessive unexcused absences. However, there were earlier unexcused absences on March 16 and March 20 and June 22, 2017. In the March incidents, Mr. Wilder was absent for personal reasons. On June 22, Mr. Wilder elected to leave work early simply because he was tired.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Wilder was discharged for misconduct. Accordingly, Mr. Wilder is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Wilder must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The July 24, 2017, reference 01, decision is affirmed. The claimant was discharged on June 29, 2017 for excessive unexcused absences that constituted misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs