

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN L CARMER
Claimant

APPEAL NO. 13A-UI-00006-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TPI IOWA LLC
TPI IOWA
Employer

OC: 01/01/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Brian Carmer filed a timely appeal from the December 19, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 13, 2013. Mr. Carmer participated. Danielle Williams represented the employer. 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: Brian Carmer was employed by TPI Iowa, L.L.C., as a full-time manufacturing associate from July 2011 until November 21, 2012, when the employer discharged him for attendance. Mr. Carmer's work hours during the last month of the employment were 5:00 a.m. to 5:00 p.m. on Sunday, Monday, Tuesday and every other Saturday. Prior to going to that schedule, Mr. Carmer's work hours had been 1:00 p.m. to 9:00 p.m., Monday through Friday. The change in assigned shift took place on or around October 20, 2012. Mr. Carmer's supervisor on the old shift had been Shift Supervisor Dave Corwin. Mr. Carmer's supervisors on the new work schedule in place for the last month of the employment were Shift Leader Alex Richardson or Shift Manager Keith Frank. Under the employer's written attendance policy, if Mr. Carmer needed to be absent from or late for a shift, he was supposed to notify the Shift Supervisor or Shift Manager for that particular shift. Mr. Carmer received a copy of the employer's attendance policy at the start of his employment.

The absence that triggered the discharge occurred on November 11, 2012, when Mr. Carmer was absent and failed to follow the employer's attendance policy in reporting the absence. Mr. Carmer did not notify Shift Leader Alex Richardson or Shift Manager Keith Frank prior to the start of his shift if he needed to be absent. Mr. Carmer had instead left a voice mail message on Shift Supervisor Dave Corwin's cell phone indicating that he did not feel well. After the

November 11 absence, Mr. Carmer worked on November 12 and 13. Mr. Carmer was late for personal reasons on November 17. On November 20, 2012, Mr. Carmer was late because he lacked child care for his young son. Mr. Carmer at that time had temporary physical custody of his son. The employer discharged Mr. Carmer the next day.

In making the decision to discharge Mr. Carmer from the employment, the employer also considered several prior absences. Going back to June 14, 2012. On June 14, August 20, and October 12, 13, 18, and 19, Mr. Carmer was absent due to illness and properly notified the employer. On September 19, Mr. Carmer was absent for personal reasons and properly notified the employer. On October 14, Mr. Carmer was absent for personal reasons. Mr. Carmer had requested that day off, had been denied, but took the day anyway to return his children to their mother in Missouri. Mr. Carmer left a message for Mr. Corwin prior to his shift. On October 22, Mr. Carmer was absent for his shift, but notified Dave Corwin prior to the shift instead of contacting the shift manager or supervisor for the new shift. On October 29, Mr. Carmer clocked in a minute late because he had to wait for a train that was blocking access to the employer's property. On October 30, Mr. Carmer missed six hours of his 12-hour shift for personal reasons and properly notified the employer.

In making the decision to discharge Mr. Carmer from the employment, the employer considered several prior warnings issued to Mr. Carmer for attendance. Three were issued in November 2011. Additional warnings were issued at the end of June 2012, at the end of August 2012, and on November 3, 2012. The reprimands were based, in part, on absences that had been for illness properly reported to the employer.

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). 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 evidence in the record establishes unexcused absences on September 19, October 14, October 22, October 30, November 11, November 17 and November 20, 2012. These absences were mostly for personal reasons. One or more was for illness, but was not properly reported to the employer under the employer's policy. The remaining absences were excused absences under the applicable. All but one of the remaining absences were for illness properly

reported to the employer. On another occasion, Mr. Carmer clocked in one minute late because a train blocked access to the workplace. All of the absences occurred in the context of repeated warnings for attendance. Mr. Carmer's unexcused absences were excessive and constituted misconduct in connection with the employment.

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

DECISION:

The Agency representative's December 19, 2012, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs