

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELS, CLINT, D
Claimant

APPEAL NO. 11A-UI-00368-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE CBE GROUP INC
Employer

**OC: 10/10/10
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 5, 2011, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on February 18, 2011. Claimant participated. Brandon Medlin represented the employer and presented additional testimony through Toni Babcock and Kathy Christensen. Exhibits One through Ten and A 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: Claimant was employed as a full-time collector from May 2010 until October 11, 2010, when the employer discharged him. The final incident that triggered the discharge occurred on October 8, 2010, when the claimant returned to work late for each of the two 15-minute breaks he was allowed during the shift. The claimant did not receive a separate lunch break, but instead only received these two 15-minute breaks during a seven hour shift that started at 3:00 p.m. and ended at 10:00 p.m.. Claimant was 3 minutes late returning from the first break and 2 minutes late returning from the second break. The claimant had previously been late returning from break on August 31 (3 min.), September 8 (3 min.), September 13 (2 min.), September 27 (1 min.), September 28 (2 min.), September 30 (2 min.), October 1 (2 min.), October 5 (4 min.), and October 7 (1 min.). The supervisor had issued warnings to the claimant regarding extended breaks on August 25 and September 1. As part of these warnings, the supervisor had warned the claimant that further similar conduct could result in disciplinary action up to and including termination.

Employer considered other attendance matters in making the decision to discharge the claimant from the employment. On June 12, the claimant was absent for personal reasons. On June 1, 9, 10, and 19, and July 1, the claimant was late for personal reasons. The employer issued reprimands for attendance on June 1, 10, 15, 21, July 1.

On October 6, the claimant was late to work in connection with a doctor's appointment. Though the appointment had been scheduled for a couple months, the claimant said nothing to the employer about the appointment until noon on October 6 when he called in to say he be late for his shift that started at 3:00 p.m. the employer's policy required that the claimant notify the employer at least 30 minutes prior to scheduled start of the shift if he needed to be absent. Claimant's conduct on October 6 complied with this requirement.

In making the decision to discharge the claimant, the employer also considered 11 instances between September 2 and October 5 wherein the claimant failed either to clock in or clock out. Claimant had received proper training to do this.

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 unexcused absences on June 12, the claimant was absent for personal reasons. On June 1, 9, 10, 12, and 19, and July 1. These occurred in the context of multiple warnings for attendance. None of these constituted a current act at the time the claimant was discharged from the employment, but they do indicate a pattern of excessive unexcused absences early in the employment. The October 6, 2010 absence was based on a doctor's appointment and was properly report to the employer. It was an unexcused absence under the applicable law.

The concern about the claimant's return from scheduled breaks is in a somewhat different category than tardiness in reporting to the workplace and the absences from work place. With regard to the return from break, the claimant was present at the workplace before the break, during a break, and after the break. Between August 31 and October 8, the claimant was late returning from break 11 times. For two of these, the claimant was late by one minute. For five of these, the claimant was late by two minutes. For three of these, the claimant was late by three minutes. For one, October 5, the claimant was late by four minutes. Almost all of these late returns from break occurred in the context of reprimands that warned the claimant that he faced discharge from the employment if he continued the conduct. While anyone of these instances in isolation appears to be of minimal consequence, the pattern of conduct in the context of repeated warnings indicates that the conduct involved disregard of the employer's expectations. Likewise, the claimant's failure either to clock in or clock out 11 times during roughly the last month of the employment indicates that the conduct involved disregard of the employer's expectations.

The weight of the evidence indicates a rather consistent pattern of negligence throughout the employment. Early on, it was negligence and getting to work on time or appearing for work.

Later it was a pattern of failing to clock in or out and pattern of taking breaks that were longer than authorized. The administrative law judge, after carefully considering the evidence, concludes that the claimant's conduct evidenced a willful disregard of the employer's interests and standards to which the employer reasonably expected employees to comply.

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

DECISION:

The Agency representative's January 5, 2011, reference 02, 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

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