

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOSEPH AUSTIN**

Claimant

**APPEAL NO. 08A-UI-03443-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LABOR READY MIDWEST INC**

Employer

**OC: 03/02/08 R: 02  
Claimant: Respondent (1-R)**

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

**STATEMENT OF THE CASE:**

Labor Ready Midwest, Inc., filed a timely appeal from the March 25, 2008, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on April 22, 2008. Claimant Joseph Austin did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Angie Wheelock, Operations Specialist, 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, Two and Three into evidence.

**ISSUE:**

Whether the claimant was suspended and/or 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: Joseph Austin established his employment relationship with Labor Ready Midwest, Inc., in May 2004 and worked in multiple temporary employment assignments until he was suspended on November 27, 2007 and discharged on December 3, 2007. The employer indicates that Mr. Austin's final assignment commenced on November 27, 2007, at Crystal Distribution. Mr. Austin was scheduled to work eight hours. The assignment was intended to last more than two weeks. Three and a half hours into the assignment, Mr. Austin told the onsite supervisor that he had an appointment and left the job site. Mr. Austin did not return to the assignment before the end of his scheduled shift. Mr. Austin had not previously advised Labor Ready Midwest or Crystal Distribution that he had a personal appointment scheduled for November 27 that would take him away from the assignment. Later in the day on November 27, Labor Ready Operations Specialist Angie Wheelock spoke to Mr. Austin about his early departure. Mr. Austin said he had forgotten about the appointment and had received a telephone call that reminded him. Ms. Wheelock told Mr. Austin that he would be suspended from the employment for one week because of the absence. However, on December 3, Labor Ready Branch Manager Kim Thompson told Mr. Austin that he was discharged from his employment with Labor Ready.

Prior to the absence on November 27, Mr. Austin's most recent absence had occurred on October 15, 2007, when Mr. Austin was absent without notifying Labor Ready. Branch Manager Kim Thompson had given Mr. Austin \$5.00 to put gas in his car so that he could appear for his assignment, but Mr. Austin failed to appear nonetheless. Mr. Austin's next most recent absence had been on June 25, 2007, when Mr. Austin was absent without notifying Labor Ready.

In making the decision to discharge Mr. Austin, the employer also considered complaints the employer had received from multiple clients about Mr. Austin standing around instead of performing work. The employer indicates that it received the most recent such complaint on October 30, 2007.

## **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 administrative law judge notes inconsistencies between the information the employer provided for the fact-finding interview, the information set forth on the employer's exhibits, and the employer's testimony at the hearing. For example, the employer advised the fact finder that the claimant had quit, but testified on appeal that the claimant had been suspended and discharged. In addition, the employer's Exhibit Three suggests that Mr. Austin's final assignment was at Paragon, not Crystal Distributing. However, the employer testified the final assignment was at Crystal Distributing. These inconsistencies undermine the employer's credibility and the reliability of the employer's testimony.

The weight of the evidence in the record establishes an unexcused absence on November 27, October 15 and June 14, 2007. Given the lapse of time between the absences, the administrative law judge concludes that the evidence does not demonstrate excessive unexcused absences and, therefore, does not demonstrate misconduct in connection with the employment that would disqualify Mr. Austin for unemployment insurance benefits. Accordingly, Mr. Austin is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Austin.

The evidence in the record, the contents of the administrative file, and Mr. Austin's failure to appear for the hearing raise the question of whether Mr. Austin has been able to work and available for work since establishing the claim for benefits that was effective March 2, 2008. Those issues were not before the administrative law judge. This matter will be remanded to a claims representative so that those issues may be investigated.

**DECISION:**

The Agency representative's March 25, 2008, reference 02, decision is modified as follows. The claimant was suspended and 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 for determination of whether the claimant has been able to work and available for work since establishing the claim for benefits that was effective March 2, 2008.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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