

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES M WARREN
Claimant

APPEAL NO. 06A-UI-09768-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BRIDGESTONE/FIRESTONE NORTH
AMERICAN TIRE LLC**
Employer

OC: 09/10/06 R: 02
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

James Warren filed a timely appeal from the October 2, 2006, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was held on October 26, 2006. Mr. Warren participated. The employer did not appear for the hearing. Claimant's Exhibit A was received into evidence.

ISSUE:

Whether Mr. Warren was discharged for misconduct, based on excessive unexcused absences, that would disqualify him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: James Warren was employed by Bridgestone/Firestone as a full-time mold tech/changer from February 13, 1995 until September 13, 2006, when Human Resources Manager Bob Fuller discharged him for attendance.

The final absences that prompted the discharge occurred on July 22 and 23. On each day, Mr. Warren was absent due to illness and properly reported the absence to the employer. Mr. Warren was ill because his psychiatrist had changed his psychotropic medication prescription a week earlier and Mr. Warren was experience physical side effects of the medication. The employer's policy required Mr. Warren to call in at least one hour prior to the scheduled start of his shift each day he needed to be absent. Mr. Warren did that. Mr. Warren returned for his next scheduled shift, on July 26, and continued in the employer. The employer did not say anything to Mr. Warren about the absences and the impact of the absences on Mr. Warren's employment until August 21, when Mr. Fuller told Mr. Warren that he would need to provide a doctor's excuse by September 13 or face discharge. Mr. Warren attempted to contact his healthcare provider to get an excuse, but was unable to obtain an excuse. The psychiatrist who headed the clinic that treated Mr. Warren had been in a auto accident and the clinic had effectively closed down as a result. When Mr. Warren was unable to provide the doctor's note by the deadline set by Mr. Fuller, Mr. Fuller discharged Mr. Warren.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Warren was discharged for misconduct in connection with the employment. It does not.

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 Mr. Warren's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *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 employer failed to appear for the hearing and thereby failed to provide any evidence whatsoever to support an allegation of misconduct. The evidence in the record indicates that Mr. Warren's final absence was for illness properly reported to the employer. The absence would therefore be an excused absence under the applicable law. Since the final absences were excused, the evidence fails to provide a "current act" that might provide a basis for disqualifying Mr. Warren for benefits. The evidence further indicates that the employer waited until a month after the absences to speak with Mr. Warren about the impact of the absences on his continued employment. By that time, the absences no longer constituted "current acts" and would not disqualify Mr. Warren for benefits. See 871 IAC 24.32(8).

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

DECISION:

The Agency representative's October 2, 2006, reference 01, decision is reversed. 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