

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSHUA M BIRK

Claimant

APPEAL NO. 10A-UI-05513-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PELLA CORPORATION

Employer

OC: 01/24/10

Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Joshua Birk filed a timely appeal from the April 1, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 1, 2010. Mr. Birk participated. Jay Garner, Human Resources Representative for the Logistics Plant represented the employer. Exhibits One through Nine were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a “current act” of misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joshua Birk was employed by Pella Corporation as a full-time forklift operator from 2004 until March 5, 2010, when the employer discharged him for attendance and for incurring three corrective action letters for attendance. The final incident that prompted the discharge was Mr. Birk’s absence from work due to illness on March 3, 2010. Mr. Birk was suffering from bronchitis that prompted a doctor visit. The employer’s absence reporting policy required that Mr. Birk notify his supervisor no later than an hour after the scheduled start of his shift if he needed to be absent. Mr. Birk completed with the policy in connection with this absence by leaving a voice mail message for his supervisor prior to the scheduled start of his shift. Mr. Birk’s absence on March 3 triggered a corrective action letter that was generated on March 5. The next most recent absences that factored in the discharge were Mr. Birk’s absences during the week that included February 19, 2010. During that week, Mr. Birk had erroneously believed he was scheduled to be on furlough as part of the employer’s rotating furlough program. Mr. Birk had received a corrective action letter for attendance on December 5, 2008. Mr. Birk was laid off from December 8, 2008 to August 19, 2009. Because of the layoff, the employer deemed the December 5, 2008 to be within the “12 months” of the final corrective action. Mr. Birk received another corrective action letter for attendance on February 23, 2010.

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 that Mr. Birk's final absence on March 3, 2010 was for illness properly reported to the employer. Accordingly, the March 3 absence would be an excused absence under the applicable unemployment insurance law and cannot be used as a basis for disqualifying Mr. Birk for unemployment insurance benefits. The next most recent absence that factored into the discharge had occurred February 19, 2010. That absence no longer constituted a "current act" at the time the March 3 absence triggered the final corrective action letter and the discharge. The weight of the evidence fails to establish a "current act" of misconduct. In the absence of a "current act" of misconduct, the administrative law judge concludes that Mr. Birk was not discharged from the employment for a reason that would disqualify him for unemployment insurance benefits. Mr. Birk is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's April 1, 2010, reference 01, decision is reversed. The discharge was not based on a current act of misconduct. 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/css