

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CADE J HANSEN
Claimant

APPEAL NO. 15A-UI-12474-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GMT CORPORATION
Employer

OC: 03/22/15
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 November 3, 2015, reference 02, decision that disqualified the claimant for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that the claimant had been discharged for excessive unexcused absences. After due notice was issued, a hearing was held on December 1, 2015. The claimant participated. Kendall Kelly represented the employer and presented additional testimony through Randy Kirchhoff. Exhibits One through Five 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: The claimant was employed as a full-time CNC machinist until October 6, 2015, when the employer discharged him for attendance. The claimant's start time was 6:00 a.m. The claimant's quit time was 2:00 p.m. or 4:00 p.m. The quit time depended on the needs of the work place and could change from week to week. The claimant had worked a combination of eight and 10-hour shifts for at least a year prior to the discharge. The work hours were generally posted a week in advance through the employer's electronic scheduling system. If the claimant needed to be absent, the employer's policy required that the claimant notify the employer prior to the start of the shift.

The final absence that triggered the discharge occurred on September 30, 2015. On that day the claimant was absent due to illness, but did not report the absence until 11:00 a.m. The claimant had the ability to properly notify the employer of his need to be absent on that day.

The employer considered additional absences. The next most recent absence occurred on September 17. On that date, the claimant left at 2:00 p.m., even though he was on the schedule to work until 4:00 p.m. The claimant knew at least a day in advance that he needed to work until 4:00 p.m. The claimant left at 2:00 p.m. to collect his six-year-old child from school.

The claimant also left work early on September 16 for the same reason. The claimant noted on September 16, that the employer had scheduled work to end at 4:00 p.m. The next most recent absence occurred on September 12, 2015, when the claimant was absent from work for personal reasons. The claimant did not report the absence until 11:30 a.m. The employer considered additional, earlier absences when making the decision to discharge the claimant. The employer had provided the claimant with written notice of his accumulating absences and had warned the claimant that his employment was in jeopardy. The claimant told the employer that the 4:00 p.m. quit times did not work in light of the claimant's parental responsibilities.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 excessive unexcused absences. The claimant had at least four unexcused absences during the month of September 2015. In some instances, the claimant elected to leave work early due to a lack of child care, a matter of personal responsibility. In one instance the claimant was sick but did not comply with the employer's absence reporting policy and instead gave late notice of the absence. In another instance, the claimant was absent due to a family matter and again provided late notice of his need to be absent. The absences occurred in the context of multiple warnings for attendance.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that 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.

DECISION:

The November 3, 2015, reference 02, decision is affirmed. The claimant was discharged on October 6, 2015 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 shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs