

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TYLER J ROLING

Claimant

APPEAL NO. 13A-UI-01736-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

OC: 01/06/13

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Tyler Roling filed a timely appeal from the January 31, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 9, 2013. At the time set for the hearing, Mr. Roling was not available at the number he had provided for the hearing and did not participate. John O'Fallon of Barnett Associates represented the employer and presented testimony through Hayley Schick. Exhibits One, Two and Three 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: Tyler Roling was employed by Wells Fargo Bank North America as a full-time Loan Document Specialist 3 from 2011 until December 28, 2012, when Hayley Schick, Loan Administration Manager, and a human resources representative discharged Mr. Roling for attendance. Mr. Roling's work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday.

The final absence that triggered the discharge occurred on December 21, 2012, when Mr. Roling was absent and failed to provide notice to the employer. The employer's policy required that Mr. Roling *telephone* Ms. Schick at least 30 minutes prior to the scheduled start of his shift if he needed to be absent. Mr. Roling was aware of the policy. When Mr. Roling did not show for work on December 21, Ms. Schick made contact with Mr. Roling. Mr. Roling was at an out of state airport after having left Iowa on a family vacation. Mr. Roling had not gone through the appropriate steps to request the time off and the employer had not approved the time off. Mr. Roling was on the schedule to work during the period he advised on December 21 he would be on vacation, December 21-27. Mr. Roling offered to fly back, but Ms. Schick told him it was too late for that and that she would get back in touch with him. Mr. Roling continued on his vacation and was discharged when he attempted to return to work on December 28, 2012.

The employer considered prior absences in making the decision to discharge Mr. Roling. On March 2 and April 3, Mr. Roling was absent due to illness, but waited until 8:00 a.m. to call Ms. Schick. On April 5, Mr. Roling was late for personal reasons. On April 24, Mr. Roling took an unauthorized extended lunch break that lasted 2.5 hours. On May 29, Mr. Roling called in sick *after* 8:00 a.m. On May 30, Mr. Roling was late to work for personal reasons. August 22 and 24, Mr. Roling was late to work because he lacked transportation to work. On September 11, Mr. Roling sent Ms. Schick an email message at 8:00 a.m. indicating that he would be absent due to illness. The untimely email was improper notice under the employer's policy. The employer's policy did not recognize email as proper notice. On September 12, 2012, Mr. Roling left without authorization at 2:30 p.m. to look at a car and did not return until 3:48 p.m. Ms. Schick told Mr. Roling that was his sixth occurrence and a seventh occurrence would subject him to possible discharge from the employment.

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).

Each of the absences referenced above was an unexcused absence under the applicable law. The unexcused absences were excessive. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Roling was discharged for misconduct. Accordingly, Mr. Roling 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 Mr. Roling.

DECISION:

The Agency representative's January 31, 2013, reference 01, 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

jet/pjs