

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CODY J GLAU
Claimant

APPEAL NO. 14A-UI-04236-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDWEST PROFESSIONAL STAFFING LLC
Employer

OC: 03/02/14
Claimant: Appellant (5)

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

STATEMENT OF THE CASE:

Cody Glau filed a timely appeal from the April 17, 2014, reference 02, decision that disqualified him for benefits. After due notice was issued, a hearing was held on May 12, 2014. Mr. Glau participated. Mollie Dawson represented the employer.

ISSUES:

Whether Mr. Glau separated from the employment for a reason that disqualifies him for benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Midwest Professional Staffing, L.L.C. is a temporary employment agency. Cody Glau performed work for the employer in a single, full-time, temp-to-hire work assignment at Marsh Mercer in Urbandale. Mr. Glau started the assignment on October 7, 2013 and last performed work in the assignment on or about October 25, 2013. Tonya Flora was the Marsh Mercer supervisor who oversaw Mr. Glau work for that company. The work hours were 7:45 a.m. to 4:45 a.m., Monday through Friday. Marsh Mercer utilized a third party labor coordinator as an intermediary between Marsh Mercer and Midwest Professional Staffing, b-line. The b-line representative was Heather Darling.

If Mr. Glau needed to be absent from the assignment, Midwest Professional Staffing's written policy required that Mr. Glau notified Midwest Professional Staffing at least two hours prior to the scheduled start of his shift so that the Midwest Professional Staffing could then notify the client business. Mr. Glau had electronically signed his acknowledgement of this policy and the employer's other work rules in September 2013. The Midwest Professional Staffing office did not open until 8:00 a.m. and had no one available to answer the phone prior to that time.

On October 31, 2013, Ms. Darling notified Kim Hogan, a Staffing Manager for Midwest Professional Staffing, that Marsh Mercer was ending Mr. Glau's assignment due to attendance. Mr. Glau had been late for work due to a misunderstanding about the work hours. Mr. Glau had been absent on October 17 and 18 and had notified the employer as soon as the employer's

office opened. Mr. Glau had been late to work on October 21 for personal reasons. Mr. Glau had also been absent on October 28, 29, 30 and 31. Mr. Glau had contacted the employer's office as soon as it opened on October 28 and 29 at 8:00 a.m. to report his need to be absent due to illness. The October 28 contact included a request about health care. The October 29 contact included a request for b-line contact information. On October 30, Mr. Glau had sent an email to Ms. Hogan in mid-morning regarding his need to be absent due to illness. On October 31, Mr. Glau had made no contact with the employer regarding his need to be absent.

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.

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 is sufficient to establish unexcused absences on October 21, 30 and 31. On October 21, Mr. Glau was late for personal reasons. On October 30, Mr. Glau waited until mid-morning to send an email to the employer about his need to be absent. On October 31, Mr. Glau made no contact with the employer about his need to be absent that day. The employer has presented insufficient evidence to establish additional unexcused absences. The evidence establishes excessive unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Glau was discharged for misconduct. Accordingly, Mr. Glau 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 claims deputy's April 17, 2014, reference 02, decision is modified as follows. On October 31, 2014, 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 shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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