

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DENNIS E DAVIS
Claimant

MONTEZUMA MFG DIV OF DIEOMATIC INC
Employer

APPEAL NO. 19A-UI-07178-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/23/18
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Dennis Davis filed a timely appeal from the September 5, 2019, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Mr. Davis was discharged on August 19, 2019 for excessive unexcused absenteeism after being warned. After due notice was issued, a hearing was held on October 1, 2019. Mr. Davis did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Diana Duncan represented the employer and presented additional testimony through Matt Thomas.

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: Dennis Davis was employed by Montezuma Manufacturing, a Division of Dieomatic, Inc., as a full-time Production Operator from 2010 until August 19, 2019, when the employer discharged him from the employment for attendance. Mr. Davis's work hours were 11:30 p.m. to 7:30 a.m., Sunday evening through Friday morning. If Mr. Davis needed to be absent, the employer's attendance policy required that Mr. Davis called the workplace at least one hour prior to the scheduled start of the shift and speak to his Area Leader or the Area Leader for the earlier shift. Mr. Davis was at all relevant times aware of the absence reporting requirement.

The final absence that triggered the discharge occurred on August 6, 2019, when Mr. Davis was absent due to illness and properly notified the employer of the absence. On August 13, 2019, the employer ran the attendance report for the week that included August 6, 2019. On August 19, 2019, the employer first spoke with Mr. Davis regarding the absence and discharged him from the employment based on his attendance history over the preceding 12-month period. The next most recent absence that factored in the discharge occurred on April 10, 2019.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 a discharge for no disqualifying reason. The final absence that triggered the discharge occurred on August 6, 2019, when Mr. Davis was absent due to illness and properly reported the absence to his Area Leader. The absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Mr. Davis for unemployment insurance benefits. The absence came to the employer's attention on August 6, 2019, when Mr. Davis notified his supervisor of his need to be absent. However, the employer elected to wait until August 19, 2019, 13 days after the absence, to discuss the matter with Mr. Davis. Even if the August 6, 2019 absence had been an unexcused absence under the applicable law, the employer's unreasonable delay in discussing the matter with Mr. Davis would prevent the final absence from being a "current act" for purposes of determining Mr. Davis eligibility for unemployment insurance benefits. Because the evidence fails to establish a current act of misconduct, Mr. Davis was discharged for no disqualifying reason and is eligible for benefits provided he meets all other eligibility requirements. Because the evidence fails establish a current act of misconduct, the administrative law judge need not consider earlier absences or reprimands. The employer's account may be charged for benefits.

DECISION:

The September 5, 2019, reference 01, decision is reversed. The claimant was discharged on August 19, 2019 for no disqualifying reason. The discharge was not based on a current act. 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/rvs