

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRANDON S NISSEN

Claimant

APPEAL NO. 11A-UI-10663-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC

Employer

OC: 07/03/11

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 2, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was started on September 26, 2011 and concluded on October 4, 2011. Claimant Brandon Nissen participated. John Fiorelli of Corporate Cost Control represented the employer and presented testimony through Angie Jensen and Bruce Brown. Exhibits One through Seven and A through C 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: Brandon Nissen was employed by Hy-Vee as a part-time Italian Express clerk from February 2011 until July 8, 2011, when Bruce Brown, Italian Express Department Manager, and Angie Jensen, Human Resources Manager, discharged him for attendance. Mr. Brown was Mr. Nissen's immediate supervisor. The final absence that triggered the discharge occurred on July 2, 2011, when Mr. Nissen was absent due to illness. Mr. Nissen had tried to notify Mr. Brown the night before that he needed to be absent from work, but was not able to get through to Mr. Brown. After he had been unable to get through to Mr. Brown on the number he had for Mr. Brown's home, Mr. Nissen notified a Hy-Vee night manager that he would be absent from his morning shift. The employer's policy required that Mr. Nissen notify Mr. Brown prior to the scheduled start of his shift if he needed to be absent. After Mr. Nissen saw a doctor on July 2, he went to the workplace with a doctor's note that took him off work until a July 5 return to work date. This note covered Mr. Nissen's shift on July 3. At one point on July 2, Mr. Brown questioned Mr. Nissen about his attempts to contact Mr. Brown. Mr. Nissen asserted he had made an absurd number of attempts to reach Mr. Brown. Mr. Brown had Mr. Nissen contact his cell phone service provider from the Hy-Vee office. Mr. Nissen did that, but did not have the correct four digit access number. Mr. Nissen told Mr. Brown that he would have to wait until the cell

phone bill came to provide the numbers. Mr. Brown discharged Mr. Nissen from the employment before this could occur.

Prior to the July 2 and 3 absences, Mr. Nissen had next most recently been absent on June 29, when he left work early due to illness. Mr. Brown approved the early departure. Prior to that, the next most recent absence had been on June 1. In connection with that absence, Mr. Nissen made contact with a coworker instead of making contact with Mr. Brown prior to his shift. On June 18, Mr. Brown issued a reprimand concerning the June 1 absence.

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.

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 § 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 weight of the evidence in the record establishes that the final absences on July 2 and 3 were excused absences under the applicable law. The weight of the evidence indicates that Mr. Nissen attempted to reach Mr. Brown to let him know he would need to be absent due to illness on July 2. Mr. Nissen made multiple unsuccessful attempts to reach Mr. Brown on the evening of July 1. When he could not get through to Mr. Brown, Mr. Nissen took the reasonable step of contacting a night manager and requested that the night manager communicate the absence to Mr. Brown. Mr. Nissen cannot be faulted for defects in communication between the management staff. Mr. Nissen took reasonable steps to properly report the July 2 absence. The July 3 absence was properly reported when Mr. Nissen came to the workplace on July 2 with a doctor's excuse and spoke to Mr. Brown about his need to be off work until July 5. The next most recent absence was June 1, a month earlier. Because the final absences were excused absences under the applicable law, the evidence fails to establish a current act of misconduct. Mr. Nissen was discharged for no disqualifying reason. Accordingly, Mr. Nissen is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Nissen.

DECISION:

The Agency representative's August 2, 2011, reference 01, decision is affirmed. 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/pjs