

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DARYL M WISNIEWSKI
Claimant

APPEAL NO: 06A-UI-08413-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PAPETTI'S OF IOWA
Employer

**OC: 07/30/06 R: 01
Claimant: Appellant (2)**

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Daryl Wisniewski filed a timely appeal from the August 22, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 6, 2006. Mr. Wisniewski participated. Human Resources Representative Beverly Lawrence represented the employer.

ISSUE:

Whether Mr. Wisniewski was discharged for misconduct based on excessive unexcused absences and, therefore, is disqualified for unemployment insurance benefits. He was not.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Daryl Wisniewski was employed by Papetti's of Iowa, doing business as Michael Foods Egg Products Company, as a full-time maintenance mechanic from April 14, 2005 until July 22, 2006, when Human Resources Representative Beverly Lawrence and Maintenance Supervisor John Stuber discharged him for attendance.

The final absence that prompted the discharge occurred on July 22, 2006. On that date, Mr. Wisniewski was absent because his spouse was demonstrating erratic behavior indicative of serious mental illness. Mr. Wisniewski's spouse's erratic behavior included speaking of suicide. The employer's no-fault attendance policy required Mr. Wisniewski to notify the employer of the absence no later than half an hour after the scheduled start of his shift. The employer does not ask the reason for the absence and the employer did not present evidence at the hearing regarding the reasons for Mr. Wisniewski's absences. Mr. Wisniewski was aware of the policy and complied with the employer's notification procedure in calling in the final absence.

As of the July 22 absence, Mr. Wisniewski had exceeded the allowable attendance "occurrences" and the employer deemed the employment relationship severed. In making this decision, the employer considered Wisniewski's absences dating back to November 21, 2005. On November 21, 2005, February 27, 2006, and June 12, 2006, Mr. Wisniewski was absent and properly reported the absences to the employer. Mr. Wisniewski was absent on June 12 due to the onset of his spouse's

erratic behavior indicative of mental illness. On July 19, 2006, Mr. Wisniewski was absent without notifying the employer.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Wisniewski was discharged for misconduct in connection with the employment. It does not.

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 Mr. Wisniewski's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *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).

The greater weight of the evidence establishes that the final absence that prompted the discharge on July 22 was an excused absence under the applicable law. Despite the fact that Mr. Wisniewski did not get his spouse proper professional treatment to address apparent serious mental illness, Mr. Wisniewski's absence on that day was for illness properly reported to the employer. Accordingly, the evidence in the record fails to demonstrate a current act of misconduct that might serve as a basis for disqualifying Mr. Wisniewski for unemployment insurance benefits. See 871 IAC 24.32(8). Even if the final absence had been deemed unexcused, the evidence indicates only one prior absence, on July 19, that would be deemed unexcused under the applicable law. In other words, the evidence would not have demonstrated excessive unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Wisniewski was discharged for no disqualifying reason. Accordingly, Mr. Wisniewski is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Wisniewski.

DECISION:

The Agency representative's August 22, 2006, reference 01, decision is reversed. 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/kjw