

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ADAM L KALWISHKY**  
Claimant

**APPEAL NO. 13A-UI-08635-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LARRY'S WINDOW SERVICE INC**  
Employer

**OC: 06/30/13**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Adam Kalwishky filed a timely appeal from the July 22, 2013, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was started on September 17, 2013 and concluded on September 20, 2013. Mr. Kalwishky participated. Attorney Katie Ervin Carlson represented the employer and presented testimony through Travis Herman, Chris Dornbusch, and Carl O'Connor. The hearing in this matter was consolidated with the hearing in Appeal Number 13A-UI-08636-JT. Exhibits 1 through 18 and A through E 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: Adam Kalwishky was employed by Larry's Window Service as a full-time route manager/window washer from 2010 until July 3, 2013, when the employer discharged him for attendance and for failure to work the number of hours required to maintain full-time status. Prior to March 14, 2013, the employer allowed Mr. Kalwishky to set his own work hours, provided he worked 40 hours per week. Effective March 14, 2013, the employer imposed an 8:15 a.m. start time for Mr. Kalwishky as a result of him not maintaining a 40-hour per week work schedule. Mr. Kalwishky was then late for personal reasons on April 16, 18, 23, 26, and 29, May 9, 10, 13, 14, 16, 20, and 22, and June 5, 7, 17.

The final absence that triggered the discharge occurred on July 2, 2013. On July 1, 2013, Mr. Kalwishky properly notified the employer that he would be absent that day. Mr. Kalwishky told the employer that he had hurt himself playing softball and would be going to the doctor. If Mr. Kalwishky needed to be absent from work, the employer expected Mr. Kalwishky to call the office and call or text his supervisor prior to his scheduled start time. On July 2, 2013, Mr. Kalwishky notified the supervisor after his scheduled start time that he would be absent that

day so that he could go to the doctor. The employer decided to discharge Mr. Kalwishky after he failed to provide proper notice of the July 2, 2013 absence.

Prior to discharging Mr. Kalwishky from the employment, the employer audited Mr. Kalwishky's work hours and determined that he had failed to meet the required 40-hour minimum on several occasions.

Prior to discharging Mr. Kalwishky from the employment, the employer issued reprimands for attendance.

## **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).

The evidence in the record establishes excessive unexcused absences. The weight of the evidence indicates that Mr. Kalwishky's start time as of March 14, 2013 was 8:15 a.m. After that start time was established, Mr. Kalwishky was late for personal reasons 15 times and then failed to give the employer proper notice of his need to be absent on July 2, 2013. Even if the administrative law judge had concluded that start time was 8:30 a.m., there were still at least seven instances after March 14, 2013 wherein Mr. Kalwishky started later than 8:30 a.m. for personal reasons. The attendance issues constituted misconduct in connection with the employment. The weight of the evidence also supports that employer's assertion that Mr. Kalwishky was not consistently meeting the 40-hour per week work requirement.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Kalwishky was discharged for misconduct. Accordingly, Mr. Kalwishky 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 agency representative's July 22, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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