

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JIM M HAYES
Claimant

APPEAL NO. 08A-UI-04294-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HILLCREST FAMILY SERVICES
Employer

**OC: 04/06/08 R: 04
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Hillcrest Family Services filed a timely appeal from the April 30, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 19, 2008. Claimant Jim Hayes participated. Julie Heiderscheit, Vice President for Human Resources, represented the employer and presented additional testimony through Phil Ginter, Maintenance Manager. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five 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: Jim Hayes was employed by Hillcrest Family Services as a full-time maintenance worker from December 10, 2007 until March 20, 2008, when Phil Ginter, Maintenance Manager, and Julie Heiderscheit, Vice President for Human Resources, discharged him.

The final incident that prompted the discharge occurred on March 19, 2008, when Mr. Hayes was absent because he needed to take his girlfriend to a doctor appointment. Mr. Hayes' girlfriend had advanced lung cancer and was seriously ill. Mr. Hayes learned on short notice that the ride that had been arranged for the girlfriend was unavailable and that Mr. Hayes would have to take his girlfriend to the appointment. The girlfriend was too sick to prepare herself for the appointment and required Mr. Hayes' assistance to get ready. Mr. Hayes contacted Maintenance Manager Phil Ginter prior to the scheduled start of his shift to notify the employer of his need to be absent part of the day and the basis for the absence. Mr. Hayes reported for work after the appointment.

The employer has a written attendance policy in a handbook. Mr. Hayes received the handbook. The written attendance policy requires employees to call in at least two hours prior to the scheduled start of a shift. Mr. Ginter had not reviewed the two-hour notice in requirement

with Mr. Hayes at any point in the employment and Mr. Ginter was unaware of the two-hour notice requirement. Mr. Ginter expected Mr. Hayes to call in before the scheduled start of his shift and speak directly to Mr. Ginter. Mr. Ginter communicated this policy after Mr. Hayes' first absence on January 10, when Mr. Hayes called in before the start of his shift, but left a voice mail for Mr. Ginter, rather than speaking directly to Mr. Ginter. Mr. Hayes did not know prior to the first absence that it was unacceptable to leave a voice mail message for Mr. Ginter.

Mr. Hayes other absences were as follows. On January 29 and March 4, Mr. Hayes was absent due to illness and properly reported the absence to the employer by calling and speaking with Mr. Ginter prior to the start of his shift. On March 6, 12, and 13, Mr. Hayes was absent due to his need to care of his girlfriend or take her to doctor appointments. Mr. Ginter properly reported these absences by calling and speaking with Mr. Ginter prior to the start of his shift.

On March 14, Mr. Ginter spoke to Mr. Hayes about his absences and urged him to be mindful of the impact on his employment.

In making the decision to discharge Mr. Hayes, the employer considered three non-attendance incidents. In mid-February, Mr. Hayes had knocked a hole in a piece of drywall with a hammer while trying to fit the piece of drywall around a pipe. Mr. Hayes did not admit his involvement in the damage to the drywall when questioned by Mr. Ginter. Three days after the drywall incident, Mr. Ginter returned to the same job site to find Mr. Hayes on his cell phone. Mr. Ginter listened for five minutes and then asked Mr. Hayes whether the call was work-related. Mr. Hayes indicated it was not. Mr. Hayes then continued to speak on his cell phone. Mr. Hayes had been on the phone with his girlfriend and had been discussing her health issues. When Mr. Hayes got off the phone, Mr. Ginter confronted Mr. Hayes about being non-productive because Mr. Hayes had completed little work in three hours' time. On March 4, Mr. Ginter had directed the maintenance staff to stay off the lawn with the tractors because the soil was soft. Mr. Ginter later observed that someone had driven on the lawn and caused damage. All three maintenance workers denied responsibility for the damage. The other two employees directed blame at Mr. Hayes.

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 indicates that the final incident that prompted the discharge was the final absence on March 19. However, that absence was due to the need to care for a seriously ill loved one. In addition, Mr. Hayes had properly reported the absence and returned to work as soon as he could. The absence was an excused absence under the applicable law. The evidence in the record fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). Because the discharge was not based on a current act, the discharge would not disqualify Mr. Hayes for

unemployment insurance benefits. Mr. Hayes is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged. Because there was no current act, the administrative law judge need not consider the past acts that factored into the decision to discharge Mr. Hayes.

DECISION:

The Agency representative's April 30, 2008, 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/kjw