

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MORRIS L KADEN
Claimant

APPEAL NO. 12A-UI-04299-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 03/11/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Morris Kaden filed a timely appeal from the March 11, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 29, 2012. Mr. Kaden participated. Susan Pfeifer, human resources manager, represented the employer. Arabic-English interpreter Magdy Salama assisted with the hearing. Exhibits A and B were received into evidence.

ISSUE:

Whether Mr. Kaden separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Morris Kaden was employed by Tyson Fresh Meats, Inc. as a full-time production worker from 2006 and last performed work for the employer on October 14, 2011. Mr. Kaden is from Africa. In October 2011, Mr. Kaden was approved for two weeks' vacation so that he could travel to Africa to visit his mother, who was ill. Mr. Kaden's expected return-to-work date was October 31, 2012. Mr. Kaden arrived in Uganda on October 19, 2011. Soon thereafter, Mr. Kaden fell ill with a severe case of malaria and other infections. Mr. Kaden was admitted to the hospital on October 26, 2011 and remained hospitalized for at least 10 days. As part of his treatment, Mr. Kaden completed a 14-day cycle of antibiotics on or about November 15, 2011.

In the meantime, the employer had terminated Mr. Kaden's employment on November 2, 2011, after he had been a no-call, no-show for shifts on October 31, November 1 and November 2.

Mr. Kaden's spouse also worked for Tyson Fresh Meats and had stayed behind while Mr. Kaden went to Africa. While Mr. Kaden was hospitalized with severe malaria and other maladies, Mr. Kaden's friends in Africa contacted Mr. Kaden's wife to let her know that Mr. Kaden was sick and hospitalized. A week or two after the employer had terminated Mr. Kaden's employment, Mr. Kaden's spouse went to the personnel office and advised that Mr. Kaden could not currently return to work because he was sick.

Mr. Kaden had other health issues and received treatment for those while he was in Uganda. On February 15, 2012, the doctor cleared Mr. Kaden to return to the United States. Mr. Kaden returned

to the United States on March 2, 2012. On March 7, 2012, Mr. Kaden went to the workplace with a note from the Ugandan doctor. The employer said that Mr. Kaden no longer had employment.

REASONING AND CONCLUSIONS OF LAW:

The weight of the evidence in the record establishes that the employer discharged Mr. Kaden for attendance on November 2, 2011 after he was a no-call, no-show for shifts on October 31, November 1, and November 2.

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 a discharge 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). 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 that Mr. Kaden was absent and out of touch with the employer on October 31 through November 2, 2011 because he was in a Ugandan hospital dealing with a severe case of malaria and other maladies. Mr. Kaden did not contact the employer about his need to be absent from work those days because he did not have the ability to do so. Under the circumstances, the absences cannot be deemed unexcused absences. After the employer ended the employment, and after Mr. Kaden learned shortly thereafter that the employer had ended the employment, he was under no further obligation to contact the employer. Thus, what happened between the November 2 termination date and the March 7, 2012 contact with the employer does not decide the issue of the separation. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Kaden was discharged for no disqualifying reason. Accordingly, Mr. Kaden is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Kaden.

DECISION:

The Agency representative's March 11, 2012, 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