IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RICHARD O JONES
Claimant

THE PRINTER INC
Employer

APPEAL NO. 14A-UI-12713-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/01/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Richard Jones filed a timely appeal from the December 4, 2014, reference 05, decision that disqualified him for benefits. After due notice was issued, a hearing was held on January 8, 2015. Mr. Jones participated. Karen Michael represented the employer and presented additional testimony through Frank Hampton.

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: Richard Jones was employed by The Printer, Inc., as a bindery operator from 2011 until November 13, 2014, when the employer discharged him for attendance. Mr. Jones' usual work hours were 7:00 a.m. to 3:00 p.m. In May 2014, the employer moved Mr. Jones from a regular full-time position to a position that the employer characterizes as part-time. Mr. Jones elected to continue in the employment despite the changed conditions. Under the new conditions, the employer assigned Mr. Jones to work during its business period each month. That period usually started on or about the 12th and concluded on or about the 25th. The employer might have Mr. Jones work every day during that busy period. The employer would notify Mr. Jones the day before he was supposed to start his first workday of the month. In June and August 2014, the employer had Mr. Jones start on the 12th. In July and October 2014, the employer had Mr. Jones start on the 14th. In November 2014, the employer notified Mr. Jones on November 12, that he would need to report for work on November 13, 2014.

The final absence that triggered the discharge occurred on November 13, 2014. Without making a request for time off, Mr. Jones had elected to help move his son to California. Mr. Jones had left to drive to California on or about November 10 and arrived in California on or about November 12. On November 13, Mr. Jones responded to the message his supervisor had left on November 12 to let him know he would be expected at work on November 13. Mr. Jones advised that supervisor that he would not be returning until November 17. The

employer had work scheduled for Mr. Jones on November 13, 14, 15, and 16. Later in the day on November 13, the employer notified Mr. Jones that he was discharged from the employment for attendance.

In October 2014, Mr. Jones had been a no-call, no-show for three consecutive days while he vacationed out of state with his girlfriend. Mr. Jones had submitted a time off request to the employer, but did not check with the employer before he left to see whether the time off request was approved. The employer had not approved the time off request. The employer had not issued a reprimand to Mr. Jones for this extended absence.

The employer's policy required prior written request and supervisor approval for planned absences. Mr. Jones was aware of the policy.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

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). 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 four unexcused absences from October 21 and November 13. Three of the absences were so that Mr. Jones could go on vacation and were not approved by the employer. The final absence was so that Mr. Jones could attend to a parental responsibility and was not approved by the employer. On November 13, Mr. Jones notified the employer that he was going to be absent for three additional days without prior approval so that he could stay longer in California. Mr. Jones' approach to taking time off was unreasonable and in violation of the employer's policy. A reasonable person would understand that his employment would be in jeopardy if he decided to miss multiple consecutive work days to travel out of state without the employer's express approval of the time off. Mr. Jones did that twice. Mr. Jones' four unexcused absences are sufficient to establish excessive unexcused absences constituting misconduct in connection with the employment. Mr. Jones 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 December 4, 2014, reference 05, 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 shall not be charged for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs