

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GUSTAVE O TAMEKLOE
Claimant

APPEAL NO. 21A-UI-03387-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TSI ENTERPRISES INC
Employer

OC: 11/08/20
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 12, 2021, reference 01, decision that disqualified the claimant for benefits and that held the employer's account would not be charged for benefits, based on the deputy's conclusion that the claimant was discharged on November 1, 2020 for excessive unexcused absences after being warned. After due notice was issued, a hearing was commenced on March 25, 2021 and concluded on March 31, 2021. The claimant participated and presented additional testimony through Vivian Dosseh. Sarah Fiedler, Risk Manager, represented the employer. French-English interpreters Loren Eliakim and Immanuel Aime of CTS Language Link assisted with the hearing. Exhibits 1 through Five 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: The claimant was employed by TSI Enterprises, Inc. as a full-time, long-term contract general laborer assigned to Grain Processing Corporation (GPC). The claimant usually worked a 12.25-hour rotating shift. The shift could start at 6:45 p.m. and end at 7:00 a.m. or start at 6:45 a.m. and end at 7:00 p.m. TSI staffs an Onsite Supervisor at GPC, Katie Sederstrom. TSI Branch Manager, Charity Garrison is also assigned to the GPC account. Multiple GPC supervisors directed the claimant's day-to-day work. The claimant began his employment in August 2019 and last performed work for the employer on the morning of November 1, 2020. The GPC and TSI discharged the claimant from the employment on November 4, 2020.

The final incident that triggered the discharge occurred on the morning of November 1, 2020. The claimant has begun his shift at 6:45 p.m. the previous evening. At 6:20 a.m. on November 1, a GPC supervisor notified the claimant that he would have to stay an extra four hours beyond his 12.25 hour shift due to another employee being unable to appear for work. The claimant told the supervisor that he could not stay beyond the scheduled end of his shift.

The claimant left the workplace at the scheduled end of his shift. The GPC supervisor reported the matter to Ms. Sederstrom, who contacted the claimant. At that time, the claimant explained that he had been experiencing chest pain, had been without his heart medication, and needed to go home. GPC and TSI deemed the claimant's decision to go home at the scheduled end of his shift to be an unauthorized early departure as well as an act of insubordination and moved forward with discharging the claimant from the employment. The claimant had not previously refused to follow an employer directive.

The employer also considered discrepancy between the claimant's time reporting and his time sheets when making the decision to discharge the claimant from the employment. The claimant would have to badge in and badge out of the workplace. In addition, the claimant had to complete a written time report. The claimant regularly entered times on his time report that did not match his badge in and badge out times and that would have allowed him to be paid for more time than he actually worked if the employer had not caught the discrepancies when auditing his time reports. The most recent such incident occurred on October 30, 2020 when the claimant documented a 7:00 a.m. departure time, though he had badged out four minutes earlier. On September 29 and October 2, the claimant had documented a 7:00 a.m. departure, but left five minutes earlier. On October 3, the claimant documented a 7:00 a.m. departure, but badged out 10 minutes earlier. On October 4, the claimant documented a 7:00 a.m. departure, but badged out 15 minutes earlier. On October 18, 2020, the claimant documented a 6:45 a.m. arrival, but did not badge in until 9:34 a.m. Later that day, the claimant documented a 7:00 p.m. departure, but badged out 33 minutes earlier. On October 22, the claimant documented a 7:00 p.m. departure, but left 37 minutes earlier. On November 4, Ms. Sederstrom asked the claimant about the discrepancy in his time reporting. The claimant characterized the issue as "a mistake" and attributed it to the end of daylight savings time. However, the end of daylight savings time would not account for discrepancies.

The employer considered earlier absences when making the decision to discharge the claimant from the employment. The employer has markedly incomplete information regarding these absences.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

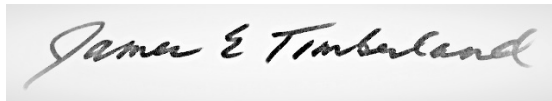
The employer presented insufficient evidence to establish either an early departure on November 1, 2020 or insubordination on that day. The claimant left at the scheduled end of his 12.25-hour shift. The employer provided an unreasonably short amount of notice regarding its expectation that the claimant remain an extra four hours. The employer unreasonably expected the claimant to work a 16.25-hour and to do so with minimal notice. The claimant reasonably left at the scheduled end of his shift. The claimant's conduct was not insubordination within the meaning of the unemployment insurance law and there was no pattern of refusal.

The claimant's padding of his work hours is a different matter. Despite the employer's failure to present testimony from persons with personal knowledge of the matters in question, the weight of the evidence establishes that the claimant on several occasions within roughly the last month of the employment falsely reported his work time in an effort to be paid for time when he was not actually performing work for the employer. This includes such conduct as recent as October 30 2020. This was intentional dishonesty, not a mistake. It demonstrated an intentional and substantial disregard for the employer's interests and constituted misconduct in connection with the employment. Accordingly, the claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

The employer presented markedly insufficient evidence to prove any unexcused absences.

DECISION:

The January 12, 2021, reference 01, decision is affirmed. The claimant was discharged on November 4, 2020 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.



James E. Timberland
Administrative Law Judge

April 12, 2021
Decision Dated and Mailed

jet/scn

NOTE TO CLAIMANT:

- This decision determines you are not eligible for regular unemployment insurance benefits under state law. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.
- If you do not qualify for regular unemployment insurance benefits under state law and are currently unemployed for reasons related to COVID-19, you may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** For more information on how to apply for PUA, go to <https://www.iowaworkforcedevelopment.gov/pua-information>. **If you do not apply for and are not approved for PUA for the affected period, you will be required to repay the benefits you have received.**