

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KYLE R DE WIT
Claimant

APPEAL NO. 12A-UI-03605-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JACOBSON STAFFING COMPANY LC
Employer

OC: 02/26/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 30, 2012, reference 01, decision that allowed benefits in connection with a February 29, 2012 separation. After due notice was issued, a hearing was held on April 25, 2012. Claimant Kyle De Wit did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Kristen Moore, Office Manager, represented the employer.

ISSUE:

Whether Mr. De Wit was discharged from the work assignment at Hach Chemical or from the employment with Jacobson Staffing Company was for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. The employer provides on-site staffing services to Hach Chemical in Ames. Kyle De Wit started a full-time temporary work assignment at Hach Chemical, through Jacobson Staffing Company, in June 2011 and continued in the assignment until February 29, 2012, at which time Hach Chemical and Jacobson Staffing Company discharged him from the assignment for attendance. Kristen Moore, Office Manager for Jacobson Staffing Company, communicated the discharge to Mr. De Wit on February 29, 2012. Mr. De Wit's work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday.

The final absence that factored into the discharge occurred on February 24, 2012, when Mr. De Wit notified Jacobson Staffing and Hach Chemical that he would be absent because he could not get his car out of his garage. On February 24, Hach Chemical notified Jacobson Staffing that the employment agency needed to start the process of finding a replacement worker. The new worker started on March 1, 2012. Mr. De Wit was allowed to continue working until February 29.

If Mr. De Wit needed to be absent from his assignment, Jacobson Staffing and Hach Chemical work rules required that he notify both companies. The work rules did not specify when

Mr. De Wit needed to notify either company. For each absence that factored into Mr. De Wit's discharge from the assignment, Mr. De Wit provided proper notice to both companies.

Additional absences factored into the decision to end Mr. De Wit's assignment. On June 28, July 7, 25 and 27, August 17, 2011, and on January 30, February 13 and 15, 2012, Mr. De Wit was absent due to illness. On October 24 and November 15, 2011, Mr. De Wit left work early due to illness. On September 9, 2011, Mr. De Wit was late getting to work for personal reasons. On January 17, 2012, Mr. De Wit was absent and cited road conditions as the basis for the absence. However, there were no travel advisories that day and Mr. De Wit was the only Jacobson Staffing employee absent from Hach Chemical that day. Mr. De Wit resided in Jewell, just a few miles from Interstate 35 and about 20 miles north of Ames, during the period and Hach Chemical is located near Interstate 35 on the east edge of Ames. On January 20, Mr. De Wit was absent and cited a car that would not start.

Mr. De Wit received a reprimand for attendance in September 2011.

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 unexcused absences on September 9, January 17, January 20, and February 24. On each of these days, Mr. De Wit was absent due to transportation issues. The evidence in the record fails to support the notion that Mr. De Wit’s absences on January 17, 20, or February 24 were due to weather conditions that made the absences necessary and beyond Mr. De Wit’s control. The administrative law judge notes that the winter of 2011-2012 was an exceptionally mild winter. Given the proximity of the final three unexcused absences, the evidence does establish excessive unexcused absences. The absences other than these four specifically cited were for illness properly reported and, therefore, excused absences under the applicable law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. De Wit was discharged for misconduct. Accordingly, Mr. De Wit 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 paid to Mr. De Wit.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the

prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's March 30, 2012, reference 01, decision is reversed. The claimant was discharged on February 29, 2012 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.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs