

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY A BIXBY
Claimant

APPEAL NO. 09A-UI-11365-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GENESIS HEALTH SYSTEM
Employer

**Original Claim: 07/12/09
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Jeffrey Bixby filed a timely appeal from the August 7, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 24, 2009. Mr. Bixby participated and presented additional testimony through Ray Weidener. Larry Roberson, Director of Human Resources, represented the employer. Exhibits A through E 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: Jeffrey Bixby was employed by Genesis Health System as a part-time security officer from 2001 until July 13, 2009, when the employer discharged him for attendance. Mr. Bixby's immediate supervisor was Carolyn Vanaglia, Supervisor of Switchboard and Security.

The final absence that triggered the discharge was an incident of tardiness on July 4, 2009. Mr. Bixby was 13 minutes late. Mr. Bixby attempted to contact the employer by telephone to indicate he would be late, but was unable make meaningful contact with the office.

Mr. Bixby would sign in and out of work by swiping an employee badge through a machine. Information about his clock-in or clock-out time would be available to the employer the same day. Ms. Vanaglia did not review Mr. Bixby's time-reporting information until July 11 or 12. Ms. Vanaglia first broached the subject of the July 4 tardiness on July 13, the same day she discharged Mr. Bixby from the employment.

Mr. Bixby had also been tardy on the following days: July 29, 2008; August 16, 2008; September 12, and 13, 2008; December 15, 2008; and June 13, 2009. Mr. Bixby had also been absent on January 17, 2009 to attend the funeral of a coworker. Mr. Bixby had taken reasonable steps to ascertain his work schedule and had reasonably relied upon representations that he was not on the schedule to work January 17.

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 weight of the evidence indicates a final incident that occurred on July 4, 2009 and would have immediately come to the attention of the employer had the employer taken reasonable steps to monitor or review Mr. Bixby's time-reporting information. The employer's decision to wait until July 11 or 12 to review the time-reporting information was unreasonable, as was the employer's failure to discuss the matter with Mr. Bixby until July 13, 2009. At that point, the conduct no longer involved a current act and could not serve as a basis for disqualifying Mr. Bixby for unemployment insurance benefits. The administrative law judge concludes that Mr. Bixby was discharged for no disqualifying reason. Accordingly, Mr. Bixby is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Bixby.

The outcome in this matter would have been the same had the administrative law judge concluded the discharge was triggered by a current act. The evidence indicates that that the next most recent instance of tardiness occurred on June 13, 2009, but prior to that there were no attendance matters until one goes back to January, to an absence that would be excused under the applicable law. One must go further back to mid-December 2008 to find another unexcused tardy. The attendance pattern during the last several months of the employment indicates that Mr. Bixby's unexcused absences were not excessive.

DECISION:

The Agency representative's August 7, 2009, 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