

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TODD A COOPER
Claimant

APPEAL NO. 19A-UI-07231-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TONY MORO COLLISION CENTER INC
Employer

OC: 08/11/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Todd Cooper filed a timely appeal from the September 5, 2019, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Mr. Cooper voluntarily quit on August 2, 2019 without good cause attributable to the employer by being absent three days without notifying the employer. After due notice was issued, a hearing was held on October 3, 2019. Mr. Cooper participated. Tony Moro represented the employer and presented additional testimony through Scott Broick and Chet Skoog.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant voluntarily quit without good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Todd Cooper was employed by Tony Moro Collision Center, Inc. as a full-time Body Tech during two distinct periods. The most recent period of employment began seven years ago. On August 4, 2019, Scott Broick, Shop Supervisor, went to Mr. Cooper's home to notify him that Mr. Moro, the business owner, was discharging him from the employment for attendance. Mr. Cooper's wage was \$25.00 per hour. Mr. Cooper's regular work week would provide him with 40 to 50 hours of work. Mr. Cooper's work days were Monday through Friday. Mr. Cooper was allowed to set the start time and end time of his shift. Mr. Cooper commuted from his home in Leon, Iowa to the workplace in Des Moines with his immediate supervisor, Scott Broick, Shop Supervisor. The commute took more than an hour each way. The two men generally began work at 5:30 a.m. and left the workplace at 4:00 p.m.

The employer had a written attendance policy that is set forth in an employee handbook. The employer provided Mr. Cooper with a copy of the handbook during the employment, but Mr. Cooper refused to sign acknowledgement of receipt of the handbook. If Mr. Cooper needed

to be absent from work, the employer's written attendance policy required Mr. Cooper to phone the workplace prior to the scheduled start of his shift and speak to someone in the workplace. Mr. Cooper was all relevant times aware of the absence reporting requirement. The written attendance policy also stated that one no-call/no-show absence would trigger a verbal warning and that a second no-call/no-show absence would trigger discharge from the employment.

After Mr. Cooper completed his shift on Tuesday, July 30, he was next scheduled to work on Wednesday, July 31, 2019. On that morning, Mr. Broick drove to Mr. Cooper's house to collect Mr. Cooper for work. At that time, Mr. Cooper stated that he had hurt his back, could hardly move, and was not going to work that day. Mr. Cooper had made no mention of an issue with his back or an injury to his back on July 30, 2019 during the long work day or the long ride home with Mr. Broick.

Mr. Cooper was next scheduled to work on Thursday, August 1 and Friday, August 2, 2019. Mr. Cooper did not report for work on either day and did not make contact with the employer on either day. On both days, Mr. Broick drove to Mr. Cooper's home at the usual time and waited 10 minutes for Mr. Cooper to come out so the pair could report for work. On each day, Mr. Cooper did not come to the door or to the car. When Mr. Cooper did not come to the car, Mr. Broick then proceeded to workplace without Mr. Cooper. At the time of these absences, Mr. Cooper was without a telephone because he had not paid his phone bill.

Though the decision to discharge Mr. Cooper was triggered by the attendance issue, Mr. Moro also considered an earlier matter from spring 2019 wherein Mr. Cooper knowingly and intentionally repaired a vehicle without installing a necessary structural support and then dishonestly asserted to a Progressive Insurance representative that he had indeed installed the structural support. The insurer subsequently barred Mr. Cooper from working on vehicle repairs covered by Progressive Insurance and temporarily barred the employer's business from performing such repairs

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).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 weight of the evidence in the record establishes a discharge based on misconduct in connection with the employment. Mr. Cooper's no-call/no-show absences on August 1 and 2,

2019 were each an unexcused absence under the applicable law. The employer provided Mr. Cooper with sufficient work hours and wages to allow Mr. Cooper to maintain phone service. Maintaining such phone service for the purpose of communicating with the employer was a matter of personal responsibility. Mr. Cooper failed to report the absences to the employer. Despite the lack of phone service, Mr. Cooper knew that Mr. Broick would be reporting to his home at the usual time on August 1 and 2, and had the ability to at least come to the door to let Mr. Broick know he would not be reporting to work on those days. The back-to-back no-call/no-show absences were sufficient to establish excessive unexcused absences. The absence on July 31, 2019 was an excused absence under the applicable law, based on Mr. Cooper's morning discussion with Mr. Brock and his statement at that time that he was unable to report for work due to his back. There is insufficient evidence in the record to rebut Mr. Cooper's assertion that he had a backache on July 31 that prevented him from reporting for work that day. The employer presented insufficient evidence to prove earlier absences that would be unexcused absences under the applicable law. The earlier non-attendance matter did not constitute a "current act" of misconduct for purposes of determining Mr. Cooper's eligibility for unemployment insurance benefits. However, the incident of intentional dishonesty negatively impacts on Mr. Cooper's credibility. Because the evidence establishes a discharge based on misconduct in connection with the employment, Mr. Cooper is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Cooper must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The September 5, 2019, reference 01, decision is affirmed. The claimant was discharged on August 4, 2019 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

Decision Dated and Mailed

jet/rvs