

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN T JAHN
Claimant

APPEAL NO. 08A-UI-08059-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ASSISTED LIVING CONCEPTS INC
Employer

**OC: 08/10/08 R: 01
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the September 2, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 28, 2008. Claimant participated and presented additional testimony through Sheila Pollard. Barb Blair, Residence Director, represented the employer. Exhibits One through Five, A through Z, and AA through NN 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 employer is an assisted living facility. Kevin Jahn was employed by Assisted Living Concepts as a part-time maintenance technician from September 6, 2006 until August 6, 2008, when Barb Blair, Residence Director, discharged him from the employment for attendance issues. Ms. Blair was Mr. Jahn's immediate supervisor. Mr. Jahn was self-employed full-time as a construction carpenter throughout the period of employment.

Effective October 2007, Mr. Jahn's established work hours were supposed to be 5:30 p.m. to 8:30 p.m., five days a week. Part of the reason for these hours was to minimize the noise or disruption to sleeping residents later in the evening and overnight. Mr. Jahn would deviate from these hours until Ms. Blair would reprimand him, then he would again deviate from the established work hours.

The employer's formal attendance notification required that employees notify the employer at least two hours before the scheduled start of their shift if they needed to be absent or late. Ms. Blair knew such advance notice was not practical, given the nature of Mr. Jahn's self-employment, and required only that Mr. Jahn notify her as soon as possible if he needed to be absent or late for a shift. Mr. Jahn was aware of this requirement, but did not follow it.

The final incident occurred August 2, when Mr. Jahn worked from 12:15 a.m. to 1:15 a.m. with authorization. The final incident of tardiness occurred on July 29, when Mr. Jahn was tardy for personal reasons and failed to notify the employer that he would be late. On July 22, 2008, Ms. Blair had spoken to Mr. Jahn for the third time about not working his assigned hours and working at times not authorized by the employer. Mr. Jahn had been tardy for personal reasons on July 7, 8, 15, 16, 17, 18, 19, and 26.

Mr. Jahn had worked at times not authorized by Ms. Blair on July 7, 11, 14, 15, 16, 17, 18, 19, 26, 29 and August 2.

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).

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).

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 in the record establishes two separate forms of misconduct in connection with the employment that disqualify Mr. Jahn for unemployment insurance benefits. The first form of misconduct was insubordination. Ms. Blair had reasonably exercised her authority by directing Mr. Jahn to work his assigned 5:30 p.m. to 8:30 p.m. shifts and to no work outside those hours without her authorization. The weight of the evidence indicates that Mr. Jahn routinely disregarded this directive and generally did so for his own convenience, not for a reason that would justify his disregard of the employer’s reasonable directive.

The weight of the evidence also establishes excessive unexcused absences. The evidence indicates that each attendance date referenced above, Mr. Jahn was tardy for personal reasons. Mr. Jahn’s tardiness was excessive.

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

DECISION:

The Agency representative's September 2, 2008, reference 01, 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 will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs