

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GREG D GOTTSCHÉ
Claimant

APPEAL NO. 16A-UI-09397-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHEYENNE CAMPING CENTER CO
Employer

**OC: 07/24/16
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Greg Gottsche filed a timely appeal from the August 16, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Gottsche was discharged on July 25, 2016 for excessive unexcused absences. After due notice was issued, a hearing was held on September 15, 2016. Mr. Gottsche participated. Tom Payne represented the employer and presented additional testimony through Warren Hipple, Justin Mann, and Ali Hebden. Exhibits One, Three, Four, Six through 10, 12 through 16, 21 through 24, 35, 39, 45, 46, 47, 49 and 50 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: Greg Gottsche was employed by Cheyenne Camping Center as a full-time service tech from 2013 until July 25, 2016, when Tom Payne, Human Resources Manager, discharged him for attendance. The employer is a recreational vehicle sales and repair business. Mr. Gottsche's duties included prepping newly purchased RVs and repairing RVs. Mr. Gottsche's immediate supervisor during the last couple months of the employment was Warren Hipple, Shop Foreman. Several other individuals had supervisory authority over Mr. Gottsche's work. These included but were not limited to Justin Mann, Quality Control Manager, Service Writer Ali Hebden, Mr. Payne and the business owners. The employer's business in peak season during the summer months and in off season during the cold weather months. Mr. Gottsche's work hours during the summer season are 8:00 a.m. to 4:30 p.m., Monday through Saturday. On Saturdays, the employer generally allows employees to leave prior to 4:30 p.m. if all work has been completed on the RVs that need to be shipped.

The employer's employee handbook contained a written attendance policy. The employer provided a handbook to Mr. Gottsche at the start of his employment. Under the policy, if

Mr. Gottsche needed to be absent from work, he was required to notify a supervisor or manager at least 30 minutes prior to the scheduled start of his shift. Under the policy, Mr. Gottsche was expected to provide advance notice of planned absences. Another section of the handbook prohibited employees from ceasing to work or leaving work before the end of the workday without approval from a supervisor or manager.

The final absence that triggered Mr. Gottsche's discharge occurred on Saturday, July 23, 2016, when Mr. Gottsche left work early without permission. Mr. Gottsche spoke to Service Writer Ali Hebden at about 2:00 p.m. Mr. Gottsche told Ms. Hebden that he was done helping with prep and that he was going home because his father was waiting for him. Ms. Hebden told Mr. Gottsche that she had a service unit that needed to be done that day and that Mr. Gottsche could leave as soon as that project was done. Mr. Gottsche expressed concern that it would take two service techs to finish the repair. Another service tech, Bruce, offered to help Mr. Gottsche with the repair. Bruce went to get the RV unit to be serviced and the necessary parts, Mr. Gottsche went to speak with other service techs. Mr. Gottsche clocked out and left without permission at 2:35 p.m. without completing the work Ms. Hebden had assigned. Mr. Gottsche was next scheduled to work on Monday, July 25, 2016. On that day, Mr. Payne questioned Mr. Gottsche about his early departure on July 23, 2016. Mr. Gottsche asserted he had worked another hour and a half after speaking with Ms. Hebden and that during that time he had performed work on a project other than the one Ms. Hebden had assigned.

In making the decision to discharge Mr. Gottsche from the employment, the employer considered prior absences and reprimands. On March 28, Mr. Gottsche had taken a day off on short notice to purchase a vehicle. On May 24, Mr. Gottsche left work early on short notice to go speak with an attorney about his pending divorce. On May 27, Mr. Gottsche left work 30 minutes early for a reason neither he nor the employer can recall. On Saturday, June 4, Mr. Gottsche left work early without permission and without completing an assigned repair project. On June 11, 2016, Mr. Gottsche was absent due to a need to attend to his injured 14-year-old son, who had suffered broken arms and a concussion in a bicycling accident. Mr. Gottsche had provided proper notice of his need to be absent. On June 13, Mr. Gottsche was absent so that he could take his son to medical appointments. Mr. Gottsche provided proper notice of his need to be gone for the appointments, but indicated he would report for work after the appointments. Mr. Gottsche had to spend longer than expected at an orthopedics clinic and was unable to report for any portion of the shift. Mr. Gottsche did not make further contact with the employer to give notice that he would be gone for his entire shift. On June 15, Mr. Gottsche was again absent due to the need to attend to his injured son and properly notified the employer of his need to be absence. On Saturday, June 18, Mr. Gottsche left at 1:00 p.m. with permission after the ship-out units were done. On June 20, Mr. Gottsche was absent so that he could take his son to the doctor. On Saturday, June 25, Mr. Gottsche left at 2:25 p.m. with permission after the ship-out units were done. On June 29, Mr. Gottsche left at 2:15 p.m. to meet with his attorney. The employer had approved the absence two days earlier. On July 6, Mr. Gottsche was off work due to a pre-approved vacation day. On July 7, Mr. Gottsche was off work on an unpaid leave so that he could participate in a custody trial concerning his children. Mr. Gottsche had requested the day off well in advance and the employer had approved the request. On July 18, Mr. Gottsche was off work due to a pre-approved vacation day.

In making the decision to discharge Mr. Gottsche from the employment, the employer considered other conduct issues. In December 2015, Mr. Mann had directed Mr. Gottsche and other service techs to keep their work areas clean. On December 30, 2015, Mr. Gottsche told Mr. Payne that he had intentionally left a mess under a trailer because he felt Mr. Mann was getting "too nitpicky" about cleaning up the shop. Mr. Gottsche dared Mr. Payne to issue a reprimand in connection with the incident. In May 2016, owner Kevin Fraser had told

Mr. Gottsche to cease working on a repair project and go assist with prepping units instead. Mr. Gottsche complied with the directive, but then never went back to complete the previously assigned repair. On Saturday, June 4, a supervisor directed Mr. Gottsche to finish the repair. Mr. Gottsche left work early that day without completing the repair and the project had to be assigned to another service tech.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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). 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). 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 establishes misconduct in connection with the employment based on excessive unexcused absences. The administrative law judge can only consider those absences that were unexcused absences under the applicable law in the determination of whether the unexcused absences were excessive. The evidence establishes that the final absence on July 23 was unexcused. The service writer had directed Mr. Gottsche to complete a particular repair before he left for the day. Mr. Gottsche elected to leave work early half an hour later without completing the assigned repair. The evidence establishes an unexcused absence on March 28, when Mr. Gottsche was absent on short notice so that he could purchase a vehicle. The evidence establishes an unexcused absence on May 24, when Mr. Gottsche was absent on short notice to go meet with his attorney. The evidence establishes an unexcused absence on June 4, when Mr. Gottsche left work early without permission and without completing an assigned repair project. The evidence fails to establish additional absences that were unexcused absences under the applicable law. These four unexcused absences occurred within a four-month period and were sufficient to establish excessive unexcused absences.

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 evidence establishes misconduct in connection with the employment based on insubordination. In December 2015, Mr. Gottsche knowingly and intentionally disregarded Mr. Mann's directive to keep work areas clean by intentionally leaving a mess under a trailer. To make matters worse, Mr. Gottsche then dared the employer to issue a reprimand based on his conduct. The employer's directive to keep work areas clean was reasonable. Mr. Gottsche's intentional violation of the directive and challenge to the employer on December 30 was unreasonable. The evidence further established an instance on June 4 and again on July 23, wherein Mr. Gottsche knowingly and intentionally failed to comply with a supervisor's directive that he finish a project prior to leaving work early. In both instances, Mr. Gottsche unreasonably disregarded the directive and left work early without permission. Mr. Gottsche's repeated unreasonable disregard of the employer's reasonable directives demonstrated a willful and wanton disregard of the employer's interests.

Because the evidence establishes a discharge based on misconduct in connection with the employment, Mr. Gottsche is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Gottsche must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The August 16, 2016, reference 01, decision is affirmed. The claimant was discharged on July 25, 2016 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten 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