

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

COLLINS C ONYIA
Claimant

APPEAL NO. 15A-UI-09195-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PER MAR SECURITY & RESEARCH CORP
Employer

OC: 07/05/15
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 6, 2015, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the discharge was not based on a current act. After due notice was issued, a hearing was started on September 3, 2015 and concluded on September 11, 2015. Claimant Collins Onyia participated. Derek Burkeybile represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One and Two into evidence.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Collins was employed by Per Mar Security & Research Corporation as a part-time, "floating," security guard from March 2015 until on or about July 6, 2015, when Ken Ockerman, General Manager, discharged him from the employment. Derek Burkeybile, Operations Manager, was Mr. Onyia's immediate supervisor. Field supervisors would also have authority over Mr. Onyia's employment.

The sole incident that factored in the discharge occurred on June 24, 2015. Mr. Onyia had accepted a temporary security assignment at a car dealership that had been burglarized the evening before. Mr. Onyia was set to start at 9:00 pm. that day and to work until 8:00 a.m. the next morning. Mr. Onyia went to the dealership before the scheduled start time and walked

around the property with a representative of the dealership. Mr. Onyia learned that the burglars had taken their time breaking into the building, had entered through an unlit area of the building perimeter, and that they had used a sledge hammer to break through a cement wall and gain access to a safe containing car titles. Mr. Onyia had second thoughts about agreeing to work the assignment because he did not think the location was safe. Mr. Onyia was especially concerned about the absence of perimeter lighting.

After Mr. Onyia toured the property, he went home, ostensibly to rest before reporting for his shift. Mr. Onyia did not report for the scheduled shift. When Mr. Onyia did not appear for the scheduled shift, the field supervisor who was to further orient Mr. Onyia to the post telephoned Mr. Onyia. Mr. Onyia asserted that his car had broken down. When the supervisor offered to come pick him up, Mr. Onyia asserted that his neighbor was already enroute to pick him up and take him home. Mr. Onyia never appeared for the shift.

On June 29, Mr. Burkeybile notified Mr. Onyia that his failure to appear for the shift was under review and could be viewed as job abandonment. At that time, Mr. Onyia mentioned his car problems and that he did not feel safe at the dealership. On or about July 6, 2015, Mr. Burkeybile notified Mr. Onyia that he was discharged.

Mr. Onyia established a claim for benefits that was effective the week that began July 5, 2015 and received benefits. Mr. Burkeybile represented the employer at the fact-finding interview.

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.

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 in the record fails to establish misconduct in connection with the employment. The evidence establishes an absence on June 24 that would be an unexcused absence under the applicable law. However, the employer asserts that only one absence factored in the discharge. That one unexcused absence was insufficient to establish excessive unexcused absences.

While a disqualifying discharge for attendance usually requires *excessive unexcused* absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). In Sallis, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence.

While the single absence inconvenienced the employer, the attenuating factors were insufficient to establish conduct that rises to the level of Sallis misconduct.

Mr. Onyia's failure to appear for the shift on June 24 was sufficient to indicate a refusal to follow the employer's directive to appear for the shift. The employer reasonably expected Mr. Onyia to appear for the assignment he had accepted. However, Mr. Onyia had a reasonable basis for declining to work at the site that he concluded was unsafe. Accordingly, there was not insubordination within the meaning of the unemployment insurance law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Onyia was discharged for no disqualifying reason. Accordingly, Mr. Onyia is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The August 6, 2015, reference 02, decision is affirmed. 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/pjs