

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CEDRIC BAILEY
Claimant

APPEAL NO. 10A-UI-17514-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WENDY'S
Employer

OC: 11/21/10
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 14, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 4, 2011. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Melissa Hunter represented the employer and presented additional testimony through Joshua Franke. The hearing in this matter was consolidated with the hearing in Appeal Number 10A-UI-17517-JTT.

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: Cedric Bailey was employed by Wendy's as a part-time crew member from June 2008 until November 8, 2010, when Melissa Hunter, General Manager, discharged him for attendance. Ms. Hunter was Mr. Bailey's supervisor. Shift Manager Joshua Franke also exercised supervisor authority over Mr. Bailey's employment. The employer's written attendance policy required that Mr. Bailey telephone the employer at least four hours prior to the scheduled start of his shift if he needed to be absent or late. The employer also expected Mr. Bailey to find a replacement worker. Mr. Bailey was aware of the attendance policy. On October 22, 2010, Mr. Bailey was 50 minutes late for personal reasons without notifying the employer. The employer issued a written reprimand. On November 4, 2010, Mr. Bailey was two hours late for personal reasons without notifying the employer. The employer issued a written reprimand. On November 7, 2010, Mr. Bailey was absent for personal reasons. Three hours *after* the scheduled start of his shift, Mr. Bailey sent a text message to Ms. Hunter's cell phone indicating he would be absent because he had to move. Ms. Hunter tried to telephone Mr. Bailey, but he did not answer his phone. Ms. Hunter sent a text message back to Mr. Bailey reminding him that he needed to find a replacement if he could not report for work. Mr. Bailey responded that he would do that. Mr. Bailey did not find a replacement or report for his shift.

On November 8, 2010, Mr. Bailey telephoned the employer to ask when he was next scheduled to work. Ms. Hunter asked Mr. Bailey what happened the previous day. Mr. Bailey said that his girlfriend had gotten kicked out of her residence. When Ms. Hunter asked Mr. Bailey why he had not answered his phone when she tried to call him, Mr. Bailey responded that he had not wanted to “mess with it.” Ms. Hunter told Mr. Bailey that the employer’s policy was that if he did not appear for work, he was deemed to have quit. But, Mr. Bailey had specifically telephoned the store to get his next work hours. Ms. Hunter discharged Mr. Bailey from the employment.

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).

Despite the employer's assertion that Mr. Bailey had voluntarily quit, the evidence clearly establishes a discharge for attendance. Each of the three absences referenced above was an unexcused absence under the applicable law. All three absences occurred between October 22 and November 7, roughly two weeks. The absences occurred in the context of repeated warnings for attendance. The unexcused absences were excessive. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Bailey was discharged for misconduct. Accordingly, Mr. Bailey 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. Bailey.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an

overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's December 14, 2010, reference 01, decision is reversed. 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.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw