

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MAX J FENTON
Claimant

APPEAL NO. 07A-UI-08755-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

X-L SPECIALIZED TRAILERS INC
Employer

**OC: 08/05/07 R: 04
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Max Fenton filed a timely appeal from the September 5, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 16, 2007 at the Dubuque Workforce Development Center. Claimant participated. The employer did not appear for the hearing or request a postponement.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Max Fenton was employed by X-L Specialized Trailers as a full-time welder from May 1, 2006 until July 27, 2007, when the employer discharged him for attendance. The final absence that prompted the discharge occurred on July 27, 2007. Mr. Fenton was a minute or two late returning from his half-hour lunch break. Mr. Fenton's tardiness in returning from his lunch break was attributable to the fact that RAGBRAI riders were traveling through Manchester in large numbers as he was traveling back to the workplace. Mr. Fenton knew that RAGBRAI would be traveling through Manchester on that date, but did not know the route they were travel. During his return trip from getting lunch, Mr. Fenton was twice delayed by bikers and police directing traffic during the RAGBRAI event.

During all but the last month of his employment, Mr. Fenton had worked at the employer's facility in Oelwein. Mr. Fenton volunteered to transfer to the employer's facility in Manchester. Mr. Fenton's first scheduled day at the Manchester facility was June 25, 2007. Mr. Fenton's start time was 6:00 a.m. Mr. Fenton arrived at the Manchester facility 15 to 20 minutes prior to his scheduled start time. Mr. Fenton was not familiar with the facility. The Oelwein supervisors had directed Mr. Fenton to seek out his new supervisors at the Manchester facility. Mr. Fenton was in the building before 6:00 a.m., but did not successfully locate the supervisors until 6:05 a.m. On another occasion in July, Mr. Fenton was five minutes late returning from lunch due to a train. The train came through Manchester at the same time every day.

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).

The employed did not participate in the hearing and, thereby, failed to present any evidence to support the assertion that Mr. Fenton was discharged for misconduct. The evidence in the record indicates that the final tardiness on July 27 was due to an unusual local event that was beyond Mr. Fenton's control. Mr. Fenton barely missed his scheduled start time after lunch. RAGBRAI traffic hindered Mr. Fenton's return to the workplace. Mr. Fenton did not know the designated route for RAGBRAI and, therefore, did not have an opportunity to plan an alternate return route to the workplace. The administrative law judge concludes that Mr. Fenton's final tardiness was an excused absence under the applicable law. Accordingly, the evidence fails to establish a "current act." See 871 IAC 24.32(8). Because there was no further act, the administrative law judge need not consider the prior absences. Nonetheless, the administrative law judge concludes there was no tardiness on June 25, 2007. The administrative law judge concludes the other instance of tardiness in July would have been an unexcused absence because the train was a predictable event and because Mr. Fenton had been working at the same facility for approximately a month when the incident occurred. The evidence would not support excessive unexcused absences.

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

DECISION:

The claims representative's September 5, 2007, reference 01, decision is reversed. 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/css