

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOEY R BURRELL
Claimant

APPEAL NO. 06A-UI-11136-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CONSTRUCTION PRODUCTS INC
Employer

**OC: 10/08/06 R: 02
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Construction Products filed a timely appeal from the November 2, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 5, 2006. Claimant Joey Burrell participated. Human Resources Administrator Lucas Gray represented the employer and presented additional testimony through Warehouse and Manufacturing Supervisor Randy Bortell. Employer's Exhibits One, Two, Three and Six were received into evidence. Employer's Exhibits Four and Five were illegible and not received into evidence. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joey Burrell was employed by Construction Products as a full-time inspector from May 16, 2005 until October 11, 2006, when Human Resources Administrator Lucas Gray and Warehouse and Manufacturing Supervisor Randy Bortell discharged him for attendance. The employer has a no fault attendance policy. The employer does not require employees to call in to notify the employer of the need to be absent and the employer does not document the reason for the absence.

The final absence that prompted the discharge occurred on September 25, 2006, when Mr. Burrell was absent due to illness. On the day of the absence, Mr. Burrell consulted with a doctor in connection with absence. Though the final absence came to the employer's attention on September 25, the employer did not discuss the absence with Mr. Burrell until October 11. Mr. Burrell had other absences from the employment. With the exception of two approved medical leaves, the employer did not document the reason for the absence or whether

Mr. Burrell notified the employer of the absence. The employer had issued warnings to Mr. Burrell as he accrued attendance points under the no fault policy.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Burrell was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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 Mr. Burrell’s absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *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 greater weight of the evidence in the record establishes that the final absence was an excused absence under the applicable law because it was due to illness and the employer had no notification requirement. Because the final absence that prompted the discharge was an excused absence, the evidence in the record fails to establish a “current act” of misconduct that might serve as a basis for disqualifying Mr. Burrell for unemployment insurance benefits. See 871 IAC 24.32(8). In addition, the evidence indicates a 16-day lapse between the absence and the employer’s contact with Mr. Burrell regarding the absence. Even if the September 25 absence had been unexcused under the applicable law, the lapse between the date the matter came to the employer’s attention and the date the employer addressed the matter with Mr. Burrell caused the absence to no longer constitute a “current act” at the time of discharge. Because there was no “current act,” the administrative law judge need not consider the prior absences. See 871 IAC 24.32(8). However, the administrative law judge notes that the employer provided insufficient evidence to establish any unexcused absences.

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

DECISION:

The Agency representative's November 2, 2006, reference 01, 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