

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOEY L NEUENKIRK**  
Claimant

**APPEAL NO. 14A-UI-01148-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OTTO COMPANIES INC  
STAR BAR & GRILL**  
Employer

**OC: 01/13/13**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Joey Neuenkirk filed a timely appeal from the January 22, 2014, reference 06, decision that denied benefits. After due notice was issued, a hearing was held on February 20, 2014. Mr. Neuenkirk participated. Melissa Otto represented the employer and presented additional testimony through Dustin Hatcher and Mark George. Exhibit A was 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: Joey Neuenkirk was employed by Star Bar & Grill as a part-time cook from February 2013 until December 12, 2013, when Melissa Otto, owner, discharged him for attendance and dishonesty. Mr. Neuenkirk was absent on December 6 and 7, 2013 without notifying the employer. On December 8, Mr. Neuenkirk contacted the employer and told the employer he had been absent without contacting the employer because he had been in jail on a probation violation. The reason for the absence that Mr. Neuenkirk provided to the employer was untrue and Mr. Neuenkirk knew it was untrue at the time he spoke with the employer. Mr. Neuenkirk told a supervisor, a coworker, and the business owner the same untruth. Mr. Neuenkirk went so far as to provide Ms. Otto with a number for his probation officer so that Ms. Otto could call the probation officer to confirm Mr. Neuenkirk's story. The next day, Ms. Otto discovered the number to the probation officer did not work and again spoke to Mr. Neuenkirk. At that time, Mr. Neuenkirk told the employer he had lied when he had said he was in jail. Mr. Neuenkirk then represented that he had been sick instead. The employer considered whether to allow Mr. Neuenkirk to return to work and decided on December 12, 2013, to discharge Mr. Neuenkirk from the employment. Mr. Neuenkirk had been absent from work for most of his shift on October 1, 2013, because he elected to take on a side-job, concrete project. Mr. Neuenkirk had been absent on June 23, 2013 and waited until two hours into his shift to notify the employer.

## 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 evidence in the record establishes two consecutive no-call, no-show absences at the end of the employment, plus intentional dishonesty in connection with those two absences. The evidence establishes two additional unexcused absences. The unexcused absences were excessive and constituted misconduct in connection with the employment. The intentional dishonesty constituted misconduct in connection with the employment. Mr. Neuenkirk 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.

**DECISION:**

The agency representative's January 22, 2014, reference 06, decision is affirmed. 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 shall not be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs