

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEONARD T LAWSON
Claimant

APPEAL NO. 16A-UI-09068-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ASSOCIATED MATERIALS LLC
Employer

OC: 07/10/16
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 9, 2016, reference 03, 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 claimant had been discharged on June 15, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on September 7, 2016. Claimant Leonard Lawson provided a telephone number for the hearing, but was not available at that number at the time set for the hearing. Marjorie Harper represented the employer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant, which record reflected that no benefits have been paid to the claimant in connection with the claim that was effective July 10, 2016. Exhibits One through Four were received into evidence.

The hearing record closed at 11:31 p.m. on September 7, 2016. The administrative law judge dismissed the employer at that time. At 11:38 p.m., Mr. Lawson contacted the Appeals Bureau regarding the hearing he had missed at 11:00 a.m. Mr. Lawson did not provide good cause to reopen the hearing record.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance 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: Leonard Lawson was employed by Associated Materials, L.L.C., as a full-time fork lift driver until June 15, 2016, when Marjorie Harper, Human Resources Manager, discharged him for attendance. If Mr. Lawson needed to be absent from work the employer's attendance policy required that he telephone the designated absence reporting number no later than two hours after the scheduled start of his shift. The employer preferred notice prior to the scheduled start of the shift. The employer reviewed the policy with Mr. Lawson at the beginning of the

employment and provided Mr. Lawson with a wallet card containing the absence reporting telephone number. The employer had an employee present from 5:00 a.m. to receive such calls. The final absence that triggered the discharge occurred on June 14, 2016, when Mr. Lawson was absent without providing notice to the employer. On March 4 and 16, Mr. Lawson had been absent for personal reasons. On June 7, 8, 9 and 13, Mr. Lawson had been absent due to transportation issues. Mr. Lawson had been late for personal reasons on May 26, 27 and 31 and June 2.

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.

The evidence in the record establishes 12 unexcused absences between March 4, 2016 and June 14, 2016. The final absence was a no-call, now show. Several of the absences were attributable to transportation issues, a matter of personal responsibility. Mr. Lawson was tardy five times for personal reasons. All of these followed two additional absences for personal reasons a couple months earlier. The pattern of excused absences demonstrated a willful disregard of the employer's interests to start the work day on time and with appropriate staff. Mr. Lawson's unexcused absences were excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Lawson was discharged for misconduct. Accordingly, Mr. Lawson is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits paid to Mr. Lawson.

Because no benefits have been paid to Mr. Lawson in connection with the claim, there is no overpayment issue to be addressed.

DECISION:

The August 9, 2016, reference 03, decision is reversed. The claimant was discharged on July 15, 2016 for misconduct in connection with the employment. 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. The claimant must meet all other eligibility requirements.

The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs