

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BENEDICT, BRIAN, L
Claimant

APPEAL NO. 12A-UI-06017-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BAGCRAFTPAPERCON II LLC
Employer

OC: 04/22/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Brian Benedict filed a timely appeal from the May 15, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 15, 2012. Claimant participated. Tina Dideriksen represented the employer.

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: Brian Benedict was employed by Bagcraftpapercon II, L.L.C., as a full-time machine press operator from 2010 until April 23, 2012, when the employer discharged him from the employment. Mr. Benedict's usual work hours were 10:00 p.m. to 6:00 a.m., Sunday evening through Friday morning. Mr. Benedict last performed work for the employer on April 19, 2012. Mr. Benedict was scheduled to work a 12-hour shift on that day, from 10:00 p.m. to 10:00 a.m. At 11:45 p.m. on April 19, Mr. Benedict's assigned machine stopped running and needed to be serviced by the employer's maintenance mechanic staff. Mr. Benedict assisted other machine operators until 6:00 a.m., at which time a supervisor directed him to empty garbage receptacles. It was common for the employer to assign employees to empty trash when there was otherwise a lack of work for the employee to do.

At 7:15 a.m. on April 20, Mr. Benedict attempted to tactfully interrupt a management meeting to let the management team know that he was going to leave at that time and take the half an attendance point he would incur under the employer's attendance policy. The employer had a "no-fault" attendance policy that assigned attendance points to absences. The management team turned their attention to Mr. Benedict. One manager asked why he was leaving. Another manager told Mr. Benedict that he was an hourly employee and would do as he was told, meaning that he needed to continue to empty the garbage. Another manager told Mr. Benedict that if went home at that time, it would not be very productive. Mr. Benedict left anyway, rather than stay to perform more garbage duties while his machine was out commission. At that point,

Mr. Benedict had already been at work over nine hours. It was clear to all parties that Mr. Benedict was just leaving early and was in no way indicating an intention to quit the employment.

Mr. Benedict was next scheduled to work on Sunday evening, April 22. A short while before the scheduled start of his shift, the employer notified Mr. Benedict not to report for the shift. The next day, the employer notified Mr. Benedict that he was discharged from the employment for insubordination and not performing duties as assigned.

Mr. Benedict's next most recent absence had been on January 17 and 18, 2012, when Mr. Benedict had been absent due to illness and properly reported the absences.

The employer considered other incidents in making the decision to discharge Mr. Benedict from the employment. On April 5, 2011, the employer issued a reprimand to Mr. Benedict for leaving work early without authorization. Mr. Benedict left work early after a supervisor became belligerent and directed profanity at Mr. Benedict. The profanity included asking Mr. Benedict why he was "so damned stupid." The supervisor's comments also included a threat of violence.

In October 2011, the employer met with Mr. Benedict to discuss that he had incurred 7.5 attendance points under the employer's eight point policy.

On January 12, 2012, the employer met with Mr. Benedict to discuss a note Mr. Benedict had submitted to the employer as part of its continuous improvement protocol. Mr. Benedict and other employees had received a safety memo that began with the question, "When was the last time you did something stupid?" Mr. Benedict and others found the memo insulting to employees and the purpose of Mr. Benedict's memo was to bring these hard feelings to management's attention.

On February 22, the employer met with Mr. Benedict to discuss a comment he had made on the production floor. Mr. Benedict had asserted on the production floor that management did not care. This was prompted by Mr. Benedict's frustration about delays in resolving safety issues with his assigned machine.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The

administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes an unexcused absence on April 20, 2012, when Mr. Benedict left work prior to the scheduled end of his 12-hour shift. The next most recent absences had been in mid-January and were due to illness. Those absences had been properly reported to the employer and were excused absences under the applicable law. The evidence establishes one additional unexcused absence in early April 2011, when Mr. Benedict left work early after a supervisor subjected him to verbal abuse that included patently offensive comments, profanity, and a threat of violence. The evidence fails to establish excessive unexcused absences.

The weight of the evidence does establish that Mr. Benedict's departure on April 20 was contrary to the employer's wishes and that employer wanted him to remain in the workplace to empty trash or perform whatever other stopgap duties the employer might find. At that point, Mr. Benedict has been working more than nine hours. During most of that time, Mr. Benedict had busied himself with assisting other press operators because his own machine had ceased functioning. The weight of the evidence indicates that Mr. Benedict performed some, but not all of the garbage emptying duties the employer wanted him to. At least one of the managers gave a response to Mr. Benedict's notice that he was leaving that indicated a heavy-handed, unreasonable and dictatorial approach Mr. Benedict. That was the comment that Mr. Benedict was an hourly employee and would do what he was told. The employer's overall approach to Mr. Benedict's tactful attempt to convey information during the management meeting suggests a level of hostility not warranted by the circumstances. The employer appears not to have considered the length of time Mr. Benedict had already been working, the fact that he had been working overnight, or the fact that he had been assisting with duties other than his usual duties for most of the shift.

While the employer's expectation that Mr. Benedict work the full 12 hours of the shift may have been reasonable, the employer's manner of reinforcing that notion was not reasonable. Given that Mr. Benedict had known in advance that he was scheduled to work the 12-hour shift, his expectation that he should be allowed to leave the shift early was not reasonable. The unreasonableness of his decision is mitigated somewhat by the employer's own no-fault attendance policy. While there was unreasonable expectations and conduct on both sides, the weight of the evidence indicates that the employer position was the more unreasonable under the circumstances. Under the circumstances, the administrative law judge cannot find Mr. Benedict's conduct to have been in willful and wanton disregard of the employer's interests.

Nor do the prior incidents the employer took into consideration indicate misconduct on the part of Mr. Benedict. They do however reflect the employer's heavy handed approach to Mr. Benedict. The supervisor's conduct that prompted Mr. Benedict's early departure in April 2011 would have been enough to justify a quit at that time for good cause attributable to the employer. While that absence was unexcused, it was not insubordination, because the supervisor's conduct had been unreasonable and Mr. Benedict response, leaving early, was reasonable under circumstances. The January memo pointing out the employer's use of offensive language in a memo did not constitute misconduct. The February expression of frustration on production floor about whether management cared about the safety of its workers, in the context of delays in resolving safety issues, reflected poor judgment on Mr. Benedict's part, but did not constitute misconduct.

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

DECISION:

The Agency representative's May 15, 2012, 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