

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEREMIAH J KOGEL

Claimant

APPEAL NO. 09A-UI-06276-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL MEAT SOLUTIONS CORP

Employer

Original Claim: 12/07/08

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Jeremiah Kogel filed a timely appeal from the April 13, 2009, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on May 19, 2009. Mr. Kogel participated. Rachel Watkinson, Human Resources Associate, represented the employer.

ISSUES:

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

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jeremiah Kogel was employed by Cargill Meat Solutions as a full-time production worker from January 14, 2009 until March 6, 2009, when Jordan Webber, Assistant Human Resources Manager, discharged him during a probationary period of employment.

On March 6, 2009, Mr. Webber summoned Mr. Kogel to a meeting for the purpose of discharging him from the employment. Mr. Kogel had been absent on January 23 and February 17 to assist his pregnant girlfriend with childcare and housekeeping. Mr. Kogel had followed the proper call-in procedure and had called in at least 30 minutes prior to the scheduled start of his shift, as required by the employer's policy. During the March 6 meeting, Mr. Kogel reminded the employer that he had told them at the start of his employment that his girlfriend was pregnant and that he might need time to help her. Mr. Webber moved on to two performance reviews conducted on February 3 and 24. During the earlier review, a trainer and a supervisor concluded that Mr. Kogel's performance was below average. During the second review, the trainer concluded that Mr. Kogel was performing well enough to get by, but seemed to give less than full every third or fourth time the trainer worked with Mr. Kogel.

Mr. Kogel had gone to the nurse twice during his employment with concerns about pain in his wrists. Within a couple days of his discharge, the employer had transferred Mr. Kogel from the ham boning area to a general work area.

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 fails to establish a "current act." See 871 IAC 24.32(8). The evidence indicates that the most recent absence was on February 17. The most recent performance review that factored into the discharge was on February 24. The employer did not advise Mr. Kogel that his employment was in jeopardy because of these two incidents until the meeting on March 6. The delay in addressing the matters with Mr. Kogel caused them to no longer constitute "current acts."

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

Because the evidence fails to establish current acts, the administrative law judge need not further consider whether Mr. Kogel's conduct was misconduct. But, the evidence indicates the absences were for matters of personal responsibility, childcare, and housekeeping. These would be unexcused absences under the applicable law, but no excessive unexcused absences. The evidence regarding the performance reviews fails to indicate misconduct, but instead merely indicates that Mr. Kogel did not perform to the satisfaction of the employer. Thus, even if the evidence had established "current acts," the evidence would still not have established misconduct in connection with the employment that would disqualify Mr. Kogel for unemployment insurance benefits.

DECISION:

The Agency representative's April 13, 2009, reference 02, 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/kjw