

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN LOFTIN
Claimant

APPEAL NO. 13A-UI-08048-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PACKERS SANITATION SERVICES INC
Employer

OC: 06/09/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated July 1, 2013, reference 01, which denied benefits finding the claimant was discharged for repeated tardiness in reporting to work after being warned. After due notice was provided, a telephone hearing was held on August 14, 2013. Claimant participated. The employer participated by Mr. Eric Jackson, Site Manager, Waterloo/Tyson Facility.

ISSUE:

The issue is whether the evidence in the record establishes misconduct sufficient to warrant a denial of unemployment insurance benefits.

FINDINGS OF FACT:

Brian Loftin was employed by Packers Sanitation Services, Inc. from May 3, 2012 until June 14, 2013 when he was discharged from employment. Mr. Loftin was employed as a full-time laborer and was scheduled to work Monday through Friday, 6:30 a.m. until 3:00 p.m. Claimant's immediate supervisor was Randy Schrader.

Mr. Loftin was discharged on June 14, 2013 because the employer considered him to have been excessively tardy in reporting for work. Mr. Loftin was last tardy on June 6, 2013 when he arrived to work 15 minutes late. The claimant had been experiencing transportation difficulty and had explained his transportation issues to his supervisor. The supervisor told Mr. Loftin that his late arrivals would be "ok" provided that he call in each time to inform the supervisor. Mr. Loftin had called in on June 6, 2013 to indicate that he was running late because he had secured a ride with another worker and the worker was going to arrive shortly after the 6:30 a.m. beginning time.

Mr. Loftin had received a warning from the company on June 6, 2013 for excessive tardiness. At the time of his discharge the claimant had accumulated eight instances of tardiness while in the employ of the company. Company policy provides that employees are subject to discharge if they accumulate four instances of tardiness.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the claimant was discharged under disqualifying conditions for a current act of misconduct.

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 insurance benefits. Conduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct 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 be fairly inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In this matter the claimant testified under oath that his most recent instances of tardiness had been excused by his direct supervisor and that he was not discharged until a substantial period of time had elapsed after his final instance of reporting to work tardy. Based upon the evidence in the record the administrative law judge concludes that the claimant had been tardy in reporting to work on eight occasions during the course of his employment and a majority of the tardies had taken place in a one-week period due to unexpected transportation problems. Mr. Loftin had properly notified his employer of each impending tardiness and his tardiness had been excused by his supervisor. There being no direct evidence to the contrary, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing the claimant was discharged for intentional, disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated July 1, 2013, reference 01, is reversed. Claimant was discharged under nondisqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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