

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RUBBEN D JACKMAN
Claimant

APPEAL NO. 14A-UI-05019-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JACOBSON STAFFING COMPANY LC
Employer

OC: 04/20/14
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 8, 2014, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on June 3, 2014. Claimant participated. Jeff Dotson represented the employer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged for benefits already paid or for future benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jacobson Staffing Company is a temporary employment firm. Rubben Jackman performed work for Jacobson in a long-term, full-time work assignment at Titan Tire Distribution in Des Moines. The assignment started in June 2012. The employer and Titan discharged Mr. Jackman from the assignment on April 20, 2014 for attendance. The final absence that triggered the discharge occurred on April 19, 2014, when Mr. Jackman was absent from work because he overslept. The employer and Titan considered absences dating back to July 2013 when making the decision to discharge Mr. Jackman from the assignment. Mr. Jackman had been tardy for personal reasons on July 18, August 19, and October 30, 2013. Mr. Jackman had been tardy for personal reasons on January 7, 17, 21, and 23, and on February 14 and 27, 2014. The

employer had issued warnings for attendance in January and February 2014. Mr. Jackman knew that if he reached six attendance points in a rolling 12-month period that this would subject him to being discharged from the assignment. Mr. Jackman had an additional late arrival on February 5, 2014, but that was attributable to a motor vehicle accident and inclement weather. Mr. Jackman had notified the employer as soon as possible that he would be late getting to work that day.

On January 20, Mr. Jackman contacted Jacobson Staffing to confirm that he had been discharged from the assignment and to ask the employer whether the employer had any additional work for him. The employer confirmed the discharge. The employer had no additional work for Mr. Jackman at that time. Mr. Jackman has a criminal history that makes it more difficult for the employer to place him in assignments.

Mr. Jackman established a claim for unemployment insurance benefits it was effective April 20, 2014 and so far has received \$2,499.00 in benefits for the period of April 20, 2014 through June 7, 2014.

On May 7, 2014, and Iowa workforce development claims deputy conducted a telephonic fact-finding interview to determine the effect of the discharge on Mr. Jackman's eligibility for benefits and the employer's liability for benefits. The employer's participation in the fact-finding interview was limited to the presence of Troy Davis, account representative from Thomas & Thorngren, Inc. Mr. Davis had no information about the employment for separation from employment. The employer had a supervisor who was supposed to participate in fact-finding interview, but who was not available for the fact-finding interview. The claimant did not participate in the fact-finding interview.

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.

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 that Mr. Jackman was discharged from the assignment for misconduct based on excessive unexcused absences. Mr. Jackman had been absent or

tardy for personal reasons on 10 occasions between July 2013 and April 19, 2014. Mr. Jackman had been warned in January and February 2014 that his employment was in jeopardy. The absence on February 5, 2014, based on the car accident and inclement weather, was the only absence that was an excused absence under the applicable law and is not included the 10 unexcused absences referenced above. Mr. Jackman 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 unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$2,499.00 in benefits for the period of April 20, 2014 through June 7, 2014. Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits. The employer's account will not be charged for benefits for the period on or after June 8, 2014.

DECISION:

The claims deputy's May 8, 2014, reference 01, decision is reversed. 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 claimant was overpaid \$2,499.00 in benefits for the period of April 20, 2014 through June 7, 2014. The claimant is not required to repay the overpayment. The employer's account may be charged for the overpaid benefits. The employer's account will not be charged for benefits for the period on or after June 8, 2014.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css