

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VIENGHAM CHANSISOURATH
Claimant

APPEAL NO. 16A-UI-12409-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCU-MOLD LLC
ACCUMOLD
Employer

OC: 10/23/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Viengkham Chansisourath filed a timely appeal from the November 14, 2016, reference 03, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on an agency conclusion that Mr. Chansisourath was discharged on October 24, 2016 for excessive unexcused absences. After due notice was issued, a hearing was held on December 7, 2016. Mr. Chansisourath participated. Michelle Price represented the employer and presented additional testimony through Zach Boyer.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Viengkham Chansisourath was employed by Accumold as a full-time production operator from May 2016 until October 24, 2016, when the employer discharged him for attendance. Mr. Chansisourath's work hours were 6:00 a.m. to 6:30 p.m., Friday, Saturday and Sunday. Mr. Chansisourath's immediate supervisor was Production Supervisor Matt Cleverly. If Mr. Chansisourath needed to be absent from work, the employer's written attendance policy required that Mr. Chansisourath call the designated absence reporting number at least two hours prior to the scheduled start of his shift. The call in number was provided to Mr. Chansisourath at the start of the employment and was on his employee ID badge. Mr. Chansisourath was aware of the absence reporting requirements.

Mr. Chansisourath's attendance issues began in June 2016 and continued through October 23, 2016. Mr. Chansisourath was late for personal reasons on June 19, July 24, July 30 and October 8, 2016. On July 24, 2016, Mr. Chansisourath clocked out early without authorization. On August 28, Mr. Chansisourath was absent for a reason that neither he nor the employer documented or can recall. Neither party recalls when Mr. Chansisourath provided notice of that absence. On October 14, Mr. Chansisourath was absent due to illness, but did not contact the employer until 44 minutes prior to the scheduled start of the shift. On September 18, 2016, Mr. Cleverly issued a written reprimand to Mr. Chansisourath for attendance. On October 21,

2016, Mr. Cleverly issued a second written warning to Mr. Chansisourath for attendance and warned him that the next step in the progressive discipline process was termination of the employment.

The final absence that triggered the discharge occurred on October 23, 2016. Mr. Chansisourath did not report the absence to the employer. At 6:28 a.m., Mr. Cleverly sent a text message to Mr. Chansisourath telling him, "You better get in here." At 8:07 a.m., Mr. Chansisourath sent a responsive message: "Sorry. Won't make it. Stay cool. Nice to meet you." The employer then discharged Mr. Chansisourath in response to this absence.

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 a discharge 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 Mr. Chansisourath that the conduct subjected Mr. Chansisourath 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 misconduct in connection with the employment based on excessive unexcused absences. The weight of the evidence in the record establishes that all but one of the absences that factored in the discharge was an excused absence under the applicable law. The employer presented insufficient evidence to establish an unexcused absence on August 28, 2016. The other absences involved tardiness for personal reasons, an unauthorized early departure, an absence due to illness but improperly reported to the employer, and the final absence. The weight of the evidence indicates that the final absence was an absence for personal reasons without proper notice to the employer. The several absences during the short employment occurred in the context of two reprimands for attendance. The final absence occurred just two days after the final reprimand that included a warning that employment was in jeopardy.

Because the evidence in the record establishes a discharged for misconduct in connection with the employment, Mr. Chansisourath is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Chansisourath must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The November 14, 2016, reference 03, decision is affirmed. The claimant was discharged for misconduct in connection with the employment based on excessive unexcused absences. The claimant is disqualified for unemployment benefits until he has worked in and 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs