

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ADAM G DENNING
Claimant

APPEAL NO: 18A-UI-08079-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

US ERECTORS INC
Employer

**OC: 01/21/18
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Adam G. Denning, the claimant, filed a timely appeal from a representative's unemployment insurance decision dated July 24, 2018, (reference 02) which denied benefits, finding that the claimant was discharged from work on February 26, 2018, for excessive, unexcused absenteeism after being warned. After due notice was provided, a telephone hearing was held on August 17, 2018. Claimant participated. Although duly notified, the employer did not participate.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The findings of facts are based solely on the claimant's testimony during the appeal hearing in this matter, as the employer did not participate. The administrative law judge finds: Adam G. Denning was employed by US Erectors, Inc. most recently from May 22, 2017 until February 26, 2018, when the employer was not willing to have him remain as an employee because Mr. Denning had been temporarily removed from a union apprentice training class because of tardiness. On the morning of February 26, 2018, Mr. Denning contacted Mr. Pat McVay, a company field superintendent, to request permission to be one and one half hours late because of a problem with his apprentice training class. Mr. Denning had been removed from the training class due to attendance but felt that his removal was unjustified, and wished to discuss the matter with his business agent at the union hall. Mr. Denning was given permission to be late for work that day by the superintendent and the superintendent instructed the claimant to call back when he had more information. After Mr. Denning was told by the business representative that he had been removed from the training class, he called Mr. McVay back as agreed. The claimant testified that he was told that at that time, there was no further work available because of the training issue.

Mr. Denning testified that there is no provision under company and union rules, his removal from the union training program does not bar him from continuing to perform his duties and his

current level of work as an iron worker. Mr. Denning asserts that he could have continued working for US Erectors, Inc., but the employer, for a good reason, chose not to allow him to. Mr. Denning denied under oath being excessively tardy or failing to report without providing notification to the employer. Mr. Denning asserts that he had only been absent from work a total of eight to ten days during his approximate three years of employment with the company.

It is the claimant's further position that he was not tardy in reporting to work, because the employer required employee's to be on the job 15 minutes before the scheduled beginning time, and he should not be considered tardy because the company does not pay employees for the time before their shift begins. Claimant denies receiving anything more than a generalized statement from the superintendent to be at work 15 minutes early.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that the claimant was discharged from employment for work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

Iowa Admin. Code r. 871-24.32(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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 808 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee.

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 whether absenteeism is excessive necessarily requires considers 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, lack of childcare, and oversleeping are considered unexcused. Absences related to illness or other good cause reasons are considered excused, abide by the employer's policy regarding notifying of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

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 this matter, Mr. Denning testified that he did not violate the company's attendance policy by being excessively absent or tardy and that he had called in to his superintendent on his final day prior to the beginning of the work shift and had received permission to report to work late that day. The claimant further testified that he was subsequently discharged from employment because he was not eligible to continue in the union training program. He testified the employer was unjustified in terminating him because removal from the training program does not prevent him from continuing to work at the pay and level that he had already obtained, until training can later be resumed. Mr. Denning believes that he was discharged from his employment with US Erectors, Inc. only because the union had suggested that he should no longer be employed with the company.

Based upon the evidence in the record, and the application, the administrative law judge concludes the employer has not met it's burden of proof to establish the claimant was discharged for a disqualifying reason. Accordingly, the claimant is eligible for benefits, providing that he meets all other eligibility requirements of Iowa law.

DECISION:

The representative's unemployment insurance decision dated July 24, 2018, reference 02 is reversed. Claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

tn/scn