

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DENNIS D FAVOR

Claimant

APPEAL NO. 12A-UI-02457-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICAN COLOR GRAPHICS INC

Employer

OC: 01/22/12

Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 28, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 28, 2012. Claimant Dennis Fabor participated. Marty Langel, human resources manager, represented the employer. Exhibits One through Five were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dennis Fabor was employed by American Color Graphics as a full-time press assistant from February 2010 until December 1, 2011, when the employer discharged him for attendance. Mr. Fabor's work hours were midnight to noon Thursday, Friday, Saturday, and every other Sunday. Mr. Fabor lived in Belle Plaine and the workplace was 15 miles away in Marengo.

The final absence that triggered the discharge occurred on Thursday, November 24, 2011, when Mr. Fabor was absent and failed to notify the employer of the absence. This date corresponded to Thanksgiving. The employer had appropriately posted the schedule and appropriately indicated that Mr. Fabor was scheduled to work that day. The notation on the schedule that indicated Mr. Fabor was scheduled to work on Thanksgiving was same notation the employer had used to schedule Mr. Fabor to work on prior holidays. Mr. Fabor returned to work on November 25. On December 1, the employer questioned Mr. Fabor about the November 24 absence and Mr. Fabor provided no explanation for the absence at that time.

In making the decision to end Mr. Fabor's employment, the employer considered prior absences. On January 21, 2011, Mr. Fabor was late getting to work after his vehicle overheated on the way to work. Mr. Fabor did not have a cell phone and did not give the employer any notice that he would be late. On September 16 and 17, Mr. Fabor was absent due to illness and properly reported the absence to the employer. On October 11, Mr. Fabor

was absent for a mandatory meeting because he lacked a babysitter for his children. Notice of the mandatory meeting had been posted in the workplace. On November 8, Mr. Fabor was absent and did not notify the employer. Mr. Fabor had traveled with his family to Waterloo, got into a disagreement with his spouse, and his spouse left him stranded.

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).

In light of Mr. Fabor's work schedule and the holiday, the employer did not unreasonably delay by waiting seven days, from November 24 to December 1 to discuss the November 24 absence with Mr. Fabor. The evidence establishes a current act.

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 weight of the evidence in the record establishes a no-call, no-show absence on November 24, 2011. The weight of the evidence indicates that Mr. Fabor had proper notice of the shift. The absence was an unexcused absence under the applicable law. The evidence establishes another no-call, no-show absence on November 8, 2012. On that day, Mr. Fabor elected to travel out of town for leisure, further away from the workplace, and then for personal reasons did not report for work or notify the employer he would be absent. The two no-call, no-show absences fell within 16 days of one another. On October 11, Mr. Fabor missed a mandatory meeting because he lacked childcare. The weight of the evidence indicates that he had proper notice of the meeting. These three unexcused absences were sufficient to establish excessive unexcused absences and misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Fabor was discharged for misconduct. Accordingly, Mr. Fabor 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 employer's account shall not be charged for benefits paid to Mr. Fabor.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer

will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's February 28, 2012, 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 employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw