

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DENNIS R DAMMANN**  
Claimant

**APPEAL NO. 14A-UI-06136-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ECONOMY COATING SYSTEMS INC**  
Employer

**OC: 05/11/14**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Dennis Dammann filed a timely appeal from the June 3, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on July 8, 2014. Mr. Dammann participated. Duane Sampson represented the employer. Exhibit A was 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 Dammann was employed by Economy Coating Systems, Inc., as a full-time grip blast, from January 2013 until May 12, 2014 when the employer discharged him for attendance. Mr. Dammann worked various shifts as needed to meet the employer's needs. If Mr. Dammann needed to be absent from the employment, the employer's attendance policy required that he notify the employer prior to the scheduled start of his shift by contacting the designated telephone number and leaving a message on the employer's answering machine. Mr. Dammann was aware of the policy and always provided timely notice of his need to be absent. The employer's decision to end the employment was based on Mr. Dammann exceeding the allowable number of attendance points under the employer's no-fault attendance policy. The employer tracked attendance points on a rolling 12-month basis. The employer issued a warning to Mr. Dammann after each attendance "occurrence" to let him know where he stood on accrual of attendance points.

The final absence that triggered the discharge occurred on May 9, 2014. On that day, Mr. Dammann was scheduled to work at 2:30 p.m. Mr. Dammann was absent because his fiancée was ill. That morning, Mr. Dammann had taken his fiancée to an urgent care facility in Clinton. The urgent care facility transferred his fiancée to Mercy Hospital. At 3:21 p.m. Mr. Dammann's fiancée underwent an appendectomy. Mr. Dammann remained at the hospital until two hours after the surgery. Mr. Dammann had the couple's two infant children in his care.

When Mr. Dammann left the hospital, he took his infants home and remained with them. Mr. Dammann's closest relatives lived 40 minutes away. Mr. Dammann had no one else to care for his children on such short notice.

The employer considered absences dating back to May 13, 2013 in making the decision to discharge Mr. Dammann from the employment. The next most recent absence that factored in the discharge occurred on March 13, 2014 when Mr. Dammann was absent because he had not completed a repair to his family's vehicle.

The additional prior absences were as follows. On May 13, 2013 the claimant was late for work for personal reasons. On July 2, 2013 the claimant left early for a dental appointment. On August 2, 2013 the claimant left work for a short while to take the family's vehicle to his fiancée. On October 16, 2013 the claimant was late to work for personal reasons. On November 1, 2013 the claimant was absent because he needed to accompany his fiancée to the local hospital in connection with pregnancy complications. On December 4, 2013 the claimant was absent because he needed to take his fiancée to the University of Iowa Hospitals and Clinics due to complications in her pregnancy. On January 21, 2014 the claimant was absent because he and his fiancée needed to take their newborn child for a medical checkup in Iowa City. On January 29, 2014 the claimant left work early because one of his children had been in an accident. On February 20, 2014 the claimant arrived late for work due to illness. On March 3, 2014 the claimant left work early due to illness.

#### **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 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 final absence that triggered the discharge was due to the claimant's fiancée's serious medical issue that required his presence and assistance. The absence was an excused absence under the applicable law. Because the final absence was an excused absence under the applicable law, it cannot be used as a basis for disqualifying the claimant for benefits.

Because the final absence was an excused absence under the applicable law, the evidence establishes no current act of misconduct and, therefore, there can be no disqualification for benefits based on the separation from the employment. Because the final absence was an excused absence under the applicable law, the administrative law judge need not consider the prior absences or whether they were unexcused absences under the applicable law. The administrative law judge would note that the only prior absences that were unexcused absences under the law are the absences on May 13, August 2, October 16, and March 13. In the absence of a current act of misconduct, those prior absences cannot serve as a basis for disqualifying the claimant for benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Dammann was discharged for no disqualifying reason. Accordingly, Mr. Dammann is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The claims deputy's June 3, 2014, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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