

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KIEL J KIWALA**  
Claimant

**APPEAL NO. 08A-UI-05961-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TEXAS ROADHOUSE HOLDINGS LLC**  
Employer

**OC: 05/18/08 R: 04  
Claimant: Respondent (4)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.5(3)(a) – Work Refusal  
Iowa Code Section 96.4(3) – Able & Available

**STATEMENT OF THE CASE:**

Texas Roadhouse Holdings filed a timely appeal from the June 17, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 15, 2008. Claimant Kiel Kiwala participated. Brian Erkenbright, Kitchen Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which records indicate that no benefits have been disbursed to the claimant in connection with the claimant established on May 18, 2008.

**ISSUES:**

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

Whether the claimant refused an offer of suitable work without good cause.

Whether the claimant has been able to work and available for work since he established his claim for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Kiel Kiwala was employed by Texas Roadhouse restaurant in Davenport from April 4, 2007 until March 17, 2008, when General Manager Matt Johnson discharged him. Mr. Kiwala worked as a dishwasher and salad cook. Mr. Kiwala worked full-time hours until late 2007 or early 2008, when he reduced his hours to 20-25 per week. Mr. Kiwala's reduction in work hours corresponded with his release from supervised probation and a related work release program. Mr. Kiwala's reduction in work hours was also related to beginning other full-time employment. Mr. Kiwala continued his employment at Texas Roadhouse after he commenced the other full-time employment.

At approximately 8:30 a.m. on March 17, 2008, Mr. Kiwala punched the door frame of his residence entryway and broke his wrist. One or more of Mr. Kiwala's bones had pierced the skin of his arm. Mr. Kiwala was scheduled to work at Texas Roadhouse at 10:00 a.m. Mr. Kiwala appeared for work, but was unable to work. Mr. Kiwala was having difficulty standing. Mr. Kiwala spoke to a manager on duty, then spoke to Service Manager Tim Terhune, and then spoke with General Manager Matt Johnson. Mr. Kiwala told the employer that he needed to go to the emergency room. Mr. Johnson told Mr. Kiwala that he needed to find a replacement to cover his shift or he would be discharged from the employment. Mr. Kiwala attempted to locate a replacement, but could not. Mr. Kiwala reported this to Mr. Johnson and reiterated that he needed to go to the emergency room. Mr. Johnson reiterated that Mr. Kiwala was discharged from the employment if he left without finding a replacement. Mr. Kiwala left the workplace and sought medical treatment. A coworker transported Mr. Kiwala to the emergency room.

After Mr. Kiwala left the emergency room, he returned to the workplace to collect his car. The swelling in Mr. Kiwala's arm had prevented the emergency room staff from putting a hard cast on his arm. Instead, Mr. Kiwala wore a "soft" cast. When Mr. Kiwala returned to the workplace, he spoke with Service Manager Tim Terhune. Mr. Terhune confirmed that Mr. Johnson had terminated Mr. Kiwala's employment.

At the time of Mr. Kiwala's emergency room visit, the emergency room staff told Mr. Kiwala that it would be six to eight weeks before he could perform work and that he would then only be able to perform light duty. The injury was to Mr. Kiwala's right wrist. Mr. Kiwala is right-handed. Mr. Kiwala wore the "soft" cast for two weeks. Mr. Kiwala's arm was then placed in a hard cast. The cast involved Mr. Kiwala's fingers, butted up against his elbow, and effectively immobilized his right arm. Eventually Mr. Kiwala received a somewhat smaller cast. The second hard cast was removed on June 2 or 3. Mr. Kiwala's arm continued to be weak. Mr. Kiwala could neither lift a gallon of milk nor shake hands with his right hand. Mr. Kiwala can neither perform heavy lifting nor repetitive movements with his right arm. Mr. Kiwala has continued under the care of an orthopedist and most recent saw the orthopedist on July 7, 2008. At that time, the doctor indicated that the injury to Mr. Kiwala's wrist had not yet healed. Mr. Kiwala continues to experience pain. Mr. Kiwala is scheduled to return to his doctor in the near future for a review of his work restrictions and a determination of whether he can be released to work without restrictions.

In mid-May, Mr. Kiwala contacted Texas Roadhouse Kitchen Manager Brian Erkenbright about returning to the employment. Mr. Erkenbright offered Mr. Kiwala two dishwashing shifts per week. This amounted to 10-12 hours per week. Mr. Kiwala concluded he could not physically perform the work. Mr. Kiwala indicated that he would get back to Mr. Erkenbright, but did not follow through.

On or about June 16, Mr. Kiwala commenced full-time work for Buckland Construction. Mr. Kiwala has been cutting boards, fetching tools, and performing cleaning duties.

#### **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).

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).

A single unexcused absence does not constitute misconduct. Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

The evidence in the record establishes that the employer discharged Mr. Kiwala on March 17 in response to what the employer perceived as an unexcused absence. However, the evidence indicates that the absence was due to injury and was properly reported to the employer. The employer's expectation that Mr. Kiwala find his replacement was, under the circumstances, unreasonable. The absence was an excused absence under the applicable law. Because the absence that prompted the discharge was an excused absence, the evidence fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). Even if the absence on March 17 had been an unexcused absence, the evidence establishes no other unexcused absences and, therefore, no misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Kiwala was discharged for no disqualifying reason. Accordingly, Mr. Kiwala would be eligible for benefits, provided he met all other eligibility requirements. The employer's account may be charged for benefits paid to Mr. Kiwala.

If a person fails, without good cause, either to apply for available suitable work or to accept suitable work when offered, the person is disqualified for benefits until the person has worked in and been paid wages for insured work equal to ten times the person's weekly benefit amount, provided the person is otherwise eligible. Iowa Code section 96.5(3).

The evidence fails to establish that the employer's offer of employment occurred while Mr. Kiwala had a pending claim for unemployment insurance benefits. See 871 IAC 24.24(8) (The offer and refusal must both occur while the claim for benefits is in effect.) The evidence indicates that the employer's offer of employment in mid-May was not an offer of suitable work. The evidence indicates that the employer offered Mr. Kiwala only 10-12 hours per week, when Mr. Kiwala had been working 20-25 hours per week before the injury and discharge. The evidence indicates that Mr. Kiwala was physically incapable of performing the offered work. In addition to work not being suitable, Mr. Kiwala's tacit refusal of the work was for good cause, given his inability to perform the work.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept

suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a and (2) provide:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The greater weight of the evidence indicates that Mr. Kiwala was unable to work from the time he established his claim in May at least until he commenced his work for Buckland Construction on or about June 16, 2008. The evidence indicates that Mr. Kiwala's dominant arm was in a cast until June 2 or 3. The evidence indicates that the arm was immediately thereafter unusable. The weight of the evidence indicates that the affected wrist has not fully healed. Mr. Kiwala has provided no medical documentation to support his assertion that he has been released to work with limited restrictions. The evidence indicates instead that Mr. Kiwala continues under the care of an orthopedist, who is monitoring the injury to determine whether further intervention is necessary. The administrative law judge concludes that Mr. Kiwala has not met the work ability and availability requirements of Iowa Code section 96.4(3) since he established his claim for benefits. Even if the administrative law judge concluded Mr. Kiwala met the work ability requirements, given his employment at Buckland Construction, the administrative law judge concludes that that full-time employment prevents Mr. Kiwala from meeting the work availability requirements of Iowa Code section 96.4(3). Mr. Kiwala has been ineligible for unemployment insurance benefits since he established his claim and continues to be ineligible for benefits.

**DECISION:**

The Agency representative's June 17, 2008, reference 01, decision is modified as follows. The claimant was discharged for no disqualifying reason. The claimant did not refuse a suitable offer of employment. The claimant would be eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant. The claimant has not met the able to work and available for requirements of Iowa Code section 96.4(3) since establishing his claim for benefits. For this reason, the claimant is ineligible for benefits effective May 18, 2008.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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