

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

JOSHUA DOGBA YASSAH
Claimant

APPEAL NO. 22A-UI-16281-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BALANCE AUTISM
Employer

**OC: 07/10/22
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

On August 17, 2022, Joshua Dogba Yassah (claimant) filed a timely appeal from the August 11, 2022 (reference 04) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on July 12, 2022 for excessive unexcused absences. After due notice was issued, a hearing was held on September 15, 2022. Claimant participated. Mary Stoltenberg, Human Resources Director, represented the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Joshua Dogba Yassah (claimant) was employed by Balance Autism as a full-time, salaried Program Manager from November 2021 until July 12, 2022, when the employer discharged him from the employment. The employer provides home and community based services to clients with autism. The claimant's duties included supervising 15 staff members and facilitating 24-hour care for seven significantly disabled autistic clients. The claimant typically maintained a Monday through Friday, 8:00 a.m. to 5:00 p.m. work schedule. The claimant was expected to be available as needed at other times and was responsible for weekend on-call duties on a rotating basis. The claimant performed some of his work in an office and performed some of the work in the field, including at clients' residences. Taylor Aukes, Program Director, was the claimant's immediate supervisor.

The employer's decision to discharge the claimant was based primarily on attendance issues. Though Mary Stoltenberg, Human Resources Director, participated in the decision to discharge the claimant from the employment, she was not involved in investigating or addressing attendance or other issues with the claimant and lacks personal knowledge regarding the matters that factored in the discharge.

Under the employer's written attendance policy, the claimant was required to notify his supervisor two hours prior to the start of his shift if he needed to be absent. The claimant was aware of the notice requirement and was responsible for enforcing the policy amongst his subordinates.

The final absence that triggered the discharge occurred on Friday, July 8, 2022. On Tuesday, July 5, 2022, the claimant submitted an electronic written request to be off work on July 6, 7 and 8, 2022. The claimant submitted the time-off request through the employer's Paycom payroll communication system pursuant to the employer's established time-off request procedure. The employer approved the claimant's request to be off work July 6 and 7, but denied the claimant's request to be absent on July 8, 2022. The employer communicated its response to the time off request via the same Paycom system the claimant used to request the time off. After the claimant submitted his time-off request, had asked his supervisor in passing whether the supervisor had addressed his time-off request and the supervisor stated he had addressed it. The claimant did not review the employer's response to his time-off request. The claimant assumed he was approved to be off work all three of the days he had requested. Upon his return to work on Monday, July 11, the claimant reviewed the employer's Paycom response to the time-off request and saw he had only been approved off for July 6 and 7. The employer deemed the claimant being unavailable to assist clients on August 8 an aggravating factor.

The employer asserts the claimant was also absent for the weekend on-call rotation that started at 5:00 p.m. on Friday, July 8, 2022 and that ended at 8:00 a.m. on Monday, July 11, 2022. The claimant denies he was scheduled for the weekend on-call shift in question and asserts he had instead been on-call the previous weekend. The weight of the evidence indicates the claimant was not scheduled to work the weekend on-call shift that started on July 8, 2022.

The employer asserts the claimant submitted a time report that indicated he worked on July 1, 2022, but that the claimant was absent that date. The claimant asserts he used paid time off (PTO) due to a lack of child care. The claimant also asserts he had an agreement with his supervisor whereby he could work from home and report the time as PTO.

The employer asserts the claimant submitted a time report that indicated he worked on June 29, 2022, but that the claimant later admitted he had not been at work that day. The claimant asserts he was at work that day.

The employer asserts the next most recent absence that factored in the discharge occurred on June 17, 2022. The employer asserts the claimant did not appear for a staff meeting and did not give notice he would be absent from the meeting. The claimant denies there was a staff meeting set for June 17, 2022. The claimant asserts he was in Texas for a funeral on that day and that he had appropriately notified his supervisor he needed to travel to Texas with his children on June 17.

The employer asserted, and later retracted the assertion, that the claimant was absent without notice on June 9, 2022. The employer asserts the claimant was supposed to transport a client to a medical appointment on that day. The employer initially asserted that when the employer first discussed the absence with the claimant, the claimant asserted he had taken the client to the appointment, but that the claimant later conceded he had merely been absent from work that day. The claimant asserts he was not absent on June 9, that he was at work on that day, and that his time card reflects he was at work that day.

The employer asserts the claimant engaged in other conduct during the last months of the employment that factored in the discharge decision. The employer asserts the claimant had

agreed to transport a client to a psychiatric appointment on June 15, 2022, but failed to take the claimant to the appointment. The claimant was at work on the date in question. The claimant asserts the circumstances surrounding the client not going to the medical appointment were more complex than the employer acknowledges and that the client refused to go to the appointment.

The employer asserts the claimant agreed to take a client to a medical appointment on April 27, 2022 so the client could refill a medication, but that the claimant failed to take the client to the appointment. The employer asserts the failure to take the client to the appointment resulted in the client needing to be transported to the emergency room and in the client needing to be hospitalized for six days. The claimant asserts the circumstance were more complex than the employer acknowledges, that the claimant tried to take the client to the appointment, and that the client refused to go to the medication refill appointment.

Prior to discharging the claimant from the employment, the claimant's supervisor discussed performance concerns with the claimant, but issued no reprimands.

REASONING AND CONCLUSIONS OF LAW:

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). The Iowa Legislature has recently codified the definition of misconduct and has listed specific conduct deemed misconduct in connection with the employment. See Iowa Code section 96.5(2)(d).

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 Iowa Administrative Code rule 871-24.32(4).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's

appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

Both parties' testimony shifted at times during the hearing. For example, the claimant initially denied he was scheduled to work on July 8, 2022. The claimant asserted his supervisor told him he was approved to be off July 6 through July 8. The claimant then testified he saw on July 11, 2022 that he had been scheduled to work on July 8, 2022. The employer initially asserted the claimant was absent without notice on June 9, 2022. The employer asserted that when the employer first discussed the absence with the claimant, the claimant initially asserted he had taken a client to the appointment, but that the claimant later conceded he had merely been absent from work that day. After the claimant's testimony, the employer conceded the claimant had indeed been at work on June 9, 2022. The shift in the employer's testimony appears to arise from the employer witness' lack of personal knowledge regarding the matters in question. The parties' testimony was consistent in its failure to inspire confidence in their shared enterprise.

The weight of the evidence establishes a discharge for no disqualifying reason. The evidence establishes a single unexcused absence on July 8, 2022, when the claimant was absent for personal reasons and without the employer's approval. The evidence indicates the claimant carelessly assumed the employer had approved an absence for that date. The weight of the evidence does not prove any other absences that would be unexcused absences under the applicable law. The employer witness lacked personal knowledge regarding the circumstances surrounding the additional alleged absences. The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to rebut the claimant's testimony regarding the additional alleged unexcused absences. The employer likewise presented insufficient evidence, and insufficiently direct and satisfactory evidence, to rebut the claimant's testimony regarding the employer's sundry allegations of misconduct. Again, the employer witness lacked personal knowledge of the matters in question and failed to meet its burden of proving misconduct. The employer had the ability to present testimony from persons with personal knowledge of the matters that factored in the discharge, but elected not to present such evidence. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The August 11, 2022 (reference 04) decision is reversed. The claimant was discharged on July 12, 2022 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.



James E. Timberland
Administrative Law Judge

October 7, 2022
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.