

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**BRICE A MCELFISH**  
Claimant

**APPEAL NO. 20A-UI-03285-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GRAPETREE MEDICAL STAFFING INC**  
Employer

**OC: 03/15/20**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 16, 2020, reference 01, decision that allowed benefits to the claimant provided he met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on March 3, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on May 12, 2020. Claimant Brice McElfish did not provide a telephone number for the appeal hearing and did not participate. Zachary Myer, Human Resources Specialist, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO and KPYX) and received Exhibits 1 through 7 into evidence. The materials associated with the April 8, 2020 fact-finding interview were not available to the administrative law judge at the time of the appeal hearing.

**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: GrapeTree Medical Staffing, Inc. is a temporary employment agency. Claimant Brice McElfish established his employment with GrapeTree in June 16, 2019 and performed work for GrapeTree in a series of one-day work assignments. Emily Markham, Staffing Specialist, was Mr. McElfish's primary point of contact at GrapeTree. Mr. McElfish's supervisor in any particular temporary work assignment would be the client's charge nurse on duty or the client's director of nursing. Mr. McElfish most recently performed work for GrapeTree on February 23, 2020 and completed a one-day assignment that day. On March 3, 2020, the employer notified Mr. McElfish that he was discharged from the employment.

On February 25, 2020, Mr. McElfish was scheduled to work a one-day assignment that he had previously accepted. The hours of the assignment were 3:00 p.m. to 11:00 p.m. At 1:40 p.m. on February 25, Mr. McElfish notified Ms. Markham that he would be absent from the

assignment. Mr. McElfish told Ms. Markham that his son was ill with RSV (respiratory syncytial virus), that he had taken his son to the emergency room, that he might need to take his son back to the emergency room, and that he did not feel comfortable leaving his wife alone and with no vehicle. Mr. McElfish told Ms. Markham that he had obtained a note from his son's doctor. Mr. McElfish told Ms. Markham that he did not want to lose his job, but that he could not risk losing his family. The employer had no reason to disbelieve Mr. McElfish's statement of his circumstances.

The employer has a written attendance policy set forth in a Field Staff Guide that the employer provided to Mr. McElfish before he started the employment. The written policy states, "If you are unable to attend your scheduled shift, you must contact GrapeTree Medical Staffing, LLC a minimum of twelve (12) hours prior to your shift time." The Field Staff Guide also includes an illness policy that states as follows:

Employees that are sick or cannot work a scheduled shift must notify your Staffing Specialist as soon as possible. As much notice as possible must be given so that arrangements can be made to fill the shift. A physician's note may be requested of absences related to illness. Although unexpected incidents and illnesses occur, repeatedly canceling shifts affects the employee's credibility of scheduling shifts. Clients have the right to deny anyone from returning at any time and for any reason.

Though the employer witness asserts the employer requires a minimum of two hours' notice of an absence, neither the written policy nor the earlier reprimands issued to Mr. McElfish reference a two-hour notice requirement. The Field Staff Guide includes a "Self Cancellation" policy that states, "More than two (2) unexcused self-cancellations or absences within a twelve (12) month rolling period will result in disciplinary action. Six (6) unexcused self-cancellations or absences will result in involuntary termination. The Field Staff Guide includes an "Attendance Concerns" provision that includes the following: "An absence may be considered excused if GrapeTree Medical Staffing, LLC is provided documentation for the missed shift within three (3) business days. ... Receipt of documentation does not guarantee an excused shift." The Field Staff Guide includes a "Booking Fees" provision that indicates employee who cancels a shift will be charged a "booking fee" of \$50.00 to \$200.00.

The next most recent absence that factored in the discharge occurred on December 6, 2019 when Mr. McElfish was absent due to illness for a 2:00 p.m. to 10:30 p.m. shift and notified the employer at 12:58 p.m. Mr. McElfish had also been absent the previous day due to illness and had notified the employer at 12:43 p.m. that he would be absent from his 2:00 p.m. to 10:30 p.m. shift.

The employer considered earlier absences when making the decision to discharge Mr. McElfish from the employment. On September 11, 2019, Mr. McElfish left work two hours early after receiving notice that his uncle had passed away. Mr. McElfish provided proper notice to the employer. Under the employer's policy, that absence would have been excused if Mr. McElfish had produced an obituary documenting his uncle's passing, but Mr. McElfish did not provide documentation in support of the absence. ON November 5, 2019, Mr. McElfish left work early due to illness and properly notified the employer. On October 2, 2019, Mr. McElfish was absent due to illness for an overnight shift scheduled to start at 10:45 p.m. Mr. McElfish provided notice at 9:30 a.m., more than 12 hours prior to the shift. On October 12, 2019, Mr. McElfish was absent due to transportation issues from an overnight shift scheduled to start at 10:45 p.m. Mr. McElfish provided notice at 8:27 p.m. On October 16, 2019, Mr. McElfish was absent due to illness from an overnight shift scheduled to start at 10:45 p.m. Mr. McElfish provided notice at

8:10 p.m. The employer issued warnings to Mr. McElfish for attendance on October 18, 2019 and December 6, 2019.

**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 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).

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.

The weight of the evidence in the record establishes a discharge for no disqualifying reason. The weight of the evidence does not support the employer's assertion that the employer had communicated to Mr. McElfish a requirement that he give at least two hours' notice of his need to be absent. The employer witness did not convey such information to the claimant. The employer's written policy did not include such a requirement. The attendance-related warnings the employer issued to the claimant did not include such a warning. The employer's Field Staff Guide included ostensibly conflicting policies regarding the amount of notice the employer required in connection with an absence. The policy initially states that the employer requires 12 hours' notice, which in many circumstances would be an unreasonable requirement, including the circumstances of Mr. McElfish's final absence. The employer's policy also includes a requirement that employees give notice of an absence due to illness "as soon as possible." The policy appears to address the employees own absence, rather than the absence to care for an ill dependent child. The weight of the evidence in the record establishes a final absence that was an excused absence under the applicable law. The weight of the evidence establishes that the absence was indeed due to the need to facilitate proper medical care for his sick, dependent child, something beyond Mr. McElfish's control and something he would have both a moral and legal duty to attend to. Mr. McElfish provided the employer with an hour and 20 minutes' notice, reasonable notice under the circumstances. The next most recent absences that factored in the discharge occurred in early December 2019 and were not "current acts" at the time of the discharge. The evidence fails to establish a current act of misconduct. In the absence of a current act, there would be no basis for disqualifying the claimant for unemployment insurance benefits. In the absence of a current act, the administrative law judge need not consider the earlier absences or reprimands. Mr. McElfish is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

**DECISION:**

The April 16, 2020, reference 01, decision is affirmed. The claimant was discharged on March 3, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

A rectangular box containing a handwritten signature in cursive script that reads "James E. Timberland".

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James E. Timberland  
Administrative Law Judge

May 19, 2020  
Decision Dated and Mailed

jet/scn