

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JODY L BRASHER
Claimant

APPEAL NO. 15A-UI-10312-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**STELLAR MANAGEMENT GROUP V INC
QSI**
Employer

OC: 08/16/15
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 8, 2015, reference 01, decision that that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on August 4, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on September 29, 2015. Claimant Jodi Brasher participated. Susan Ashlock represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five into evidence.

ISSUES:

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

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jody Brasher was employed by Stellar Management Group V, Inc., doing business as QSI, as a full-time sanitation worker from September 2014 until August 5, 2015, when the employer discharged him for attendance. Mr. Brasher's usual work hours were 10:30 p.m. to anywhere from 5:00 a.m. to 6:30 a.m., Monday through Friday. Brittany Johnson was QSI Plant Manager and Mr. Brasher's supervisor. The final absence that triggered the discharge occurred on August 3, 2015, when Mr. Brasher left work early due to illness. Mr. Brasher complied with the employer's absence notification requirement by speaking to Ms. Johnson and a department supervisor before he left work. The next most recent absence that factored in the discharge occurred on May 14, 2015, when Mr. Brasher was absent due to illness and properly reported the absence to the employer. The employer considered three additional earlier absences when making the decision to discharge Mr. Brasher from the employment. All three of the additional

absences were due to Mr. Brasher's live-in girlfriend's epileptic incidents and each was properly reported to the employer. If Mr. Brasher needed to be absent, the employer required he provide at least two hours' notice to the plant manager or, if that person was not available, to the human resources manager. The employer issued two reprimands to Mr. Brasher for attendance prior to discharging him from the employment.

Mr. Brasher established a claim for benefits that was effective August 16, 2015. Mr. Brasher has received \$1,686.00 in gross benefits in connection with the claim. A portion of those benefits has been credited against a prior overpayment.

On September 4, 2015, a Workforce Development claims deputy held a fact-finding interview to address Mr. Brasher's separation from the employment. Ms. Ashlock represented the employer at that proceeding.

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).

The administrative law judge notes that the employer did not present testimony from persons with firsthand, personal knowledge of the absences that factored in the discharge. The employer had the ability to present such testimony, but elected not to.

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 evidence in the record establishes a final absence on August 3, 2015 that was due to bonafide illness, was properly reported to the employer and, therefore, was an excused absence under the applicable law. The next most recent absence occurred two and a half months earlier. Because the final absence that triggered the discharge was an excused absence under the applicable law, the evidence fails to establish a current act of misconduct. Because the evidence fails to establish a current act of misconduct, the administrative law judge concludes that Mr. Brasher was discharged for no disqualifying reason. Mr. Brasher is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits paid to Mr. Brasher.

DECISION:

The September 8, 2015, reference 01, decision is affirmed. The claimant was discharged on August 5, 2015 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css