IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRIAN J TAYLOR
Claimant

THE AMERICAN BOTTLING COMPANY
Employer

APPEAL NO. 17A-UI-00218-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/11/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Brian Taylor filed a timely appeal from the December 29, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Taylor was discharged on December 8, 2016 for excessive unexcused absences. After due notice was issued, a hearing was started on January 26, 2017 and completed on February 1, 2017. Mr. Taylor participated. Stephanie Dixon represented the employer and presented additional testimony through Robert Emry. Exhibits 1 through 11 and A were 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: Brian Taylor was employed by The American Bottling Company as a full-time cleaner from 2014 until December 8, 2016, when Bob Emry, Quality Manager, discharged him from the employment for attendance. Mr. Taylor's immediate supervisor was Aric Heckart, Sanitation Supervisor. Mr. Taylor's work hours were 10:30 p.m. to 7:00 a.m., Monday evening through Saturday morning. The Friday hours sometimes shifted to 6:00 p.m. to 2:00 a.m. The employer sometimes added voluntary or mandatory overtime weekend shifts. If Mr. Taylor needed to be absent, the employer's attendance policy required that the telephone his supervisor at least 15 minutes prior to the scheduled start of the shift and either speak to the supervisor or leave a voicemail message for the supervisor. Mr. Taylor was familiar with the absence reporting policy.

The final absence that triggered the discharge occurred in connection with an overtime shift scheduled to start at 10:30 p.m. on Saturday, December 3, 2016. Prior to Thursday, December 1, 2016, the posted overtime notice indicated that scheduled overtime shift was voluntary. On Thursday, December 1, 2016, Mr. Taylor saw that his name has been added to the employees working the overtime shift. Mr. Taylor spoke to Mr. Heckart and learned that his participation in the overtime shift was now mandatory. Mr. Taylor told Mr. Heckart that he could not appear for his shift because he had to care for his young child while his wife worked. Mr. Heckart sent an email message to Mr. Emry regarding Mr. Taylor's statement that he was

unavailable to work the overtime shift. Mr. Emry responded to Mr. Heckart that he needed all employees on hand for the overtime shift in light of an upcoming workplace audit. While Mr. Taylor asserts that Mr. Heckart told him thereafter that he did not need to worry and did not need to appear for the overtime shift, the weight of the evidence indicates otherwise. Mr. Taylor did not appear for the December 3, 2016 shift and did not follow the absence reporting procedure in regard to that absence. When Mr. Taylor did not appear for the shift, the employer contacted him during the shift, reiterated that the shift was mandatory, and told him he would receive an attendance point in connection with his absence. Mr. Taylor returned to work on December 5, 2016. At that time, Mr. Heckart issued an attendance Report/Request to Mr. Taylor regarding his absence from the overtime shift. The form documented a no-call/no-show absence on December 3, 2016 and included the following statement from Mr. Heckart: "Brian was told and schedule was posted for work on Saturday. Brian said when it was posted that he wasn't going to show. He didn't call in though." The statement appeared to indicate that the problem had not been that Mr. Taylor did not show for the shift, but instead that Mr. Taylor had not followed the call-in in procedure to report the absence. Mr. Emry subsequently discharged Mr. Taylor from the employment on December 8, 2016.

The employer considered prior absences in assigning attendance points and in making the decision to discharge Mr. Taylor from the employment. Pursuant to the employer's attendance policy, the employer considered Mr. Taylor's absences during the 12 months that preceded the absence on December 3, 2016. On December 10, 2015, February 8, 2016 and March 21, 2016, Mr. Taylor was absent due to illness and properly reported the absences. On March 2, 2016, Mr. Taylor was absent, properly reported the absence and provided as his reason for being absent only that he was tired and did not want to come to work. On April 4, 2016 and October 20, 2016, Mr. Taylor was late for work because he overslept.

Each time Mr. Taylor was absent or late, the employer would provide him with an attendance Report/Request that documented the absence. Mr. Taylor received on such report in December 2015, two in March 2016, one in April 2016, one on October 21, 2016, and the final one on December 5, 2016.

The employer had issued formal reprimands to Mr. Taylor in connection with his attendance issues. On December 10, 2015, the employer issued a reprimand to let Mr. Taylor know he had accumulated 5.5 attendance points in the rolling 12-month period. Six attendance points would subject Mr. Taylor to discharge under the employer's attendance policy. On February 8 and March 1, 2016, the employer issued reprimands to Mr. Taylor to let him know that he had accumulated four attendance points in the rolling 12-month period. On March 21, 2016, the employer issued a reprimand to Mr. Taylor to let him know he had accumulated five attendance points in the rolling 12-month period. On October 20, 2016, the employer again issued a reprimand to let Mr. Taylor know he had accumulated five attendance points in the rolling 12-month period. Both the March 21 and October 20 reprimands warned Mr. Taylor that his employment was in jeopardy.

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 weight of the evidence establishes a final unexcused absence on December 3, 2016. The employer had properly notified Mr. Taylor of the Saturday overtime shift. The weight of the evidence does not support Mr. Taylor's assertion that Mr. Heckart had excused him from appearing for the shift. Mr. Taylor did not appear for the shift and did not properly report an absence.

The evidence in the record establishes unexcused absences on March 2, April 8, and October 20, 2016. The latter two absences were instances of tardiness based on Mr. Taylor oversleeping. The earliest of the three absences was unexcused because it was based on Mr. Taylor being tired, rather than bonafide illness. The absences on December 10, 2015, February 8, and March21, 2016 were each excused absences under the applicable because they were based on bonafide illness and were properly reported to the employer.

Mr. Taylor's unexcused absences occurred in the context or multiple warnings for attendance, included the two final warnings wherein the employer the put Mr. Taylor on notice that his employment was in jeopardy.

The weight of the evidence establishes misconduct in connection with the employment, based on excessive unexcused absences. Accordingly, Mr. Taylor is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Taylor must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The December 29, 2016, reference 01, decision is affirmed. The claimant was discharged on December 8, 2016 for misconduct in connection with the employment based on excessive unexcused absences. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/rvs