

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MATTHEW SHEPHERD**  
Claimant

**APPEAL NO. 16A-UI-11657-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ATN CONSTRUCTION INC**  
Employer

**OC: 10/09/16  
Claimant: Appellant (5)**

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

**STATEMENT OF THE CASE:**

Matthew Shepherd filed a timely appeal from the October 24, 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. Shepherd had voluntarily quit on September 28, 2016 by failing to report to work for three days in a row and not notifying the employer of the reason. After due notice was issued, a hearing was held on November 10, 2016. Mr. Shepherd participated in the hearing and presented additional testimony through Katrina Robinder and Vickie Hensley. Annette Snyder represented the employer. Exhibits A through D were received into evidence.

**ISSUE:**

Whether Mr. Shepherd separated from the employment for a reason that disqualifies him for benefits or that relieves the employer of liability for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Matthew Shepherd was employed by ATN Construction, Inc., d/b/a 33 Carpenters Construction, Inc., as a full-time Claims Specialist from February 2016 until September 28, 2016, when the employer discharged him from the employment. The employer's business involves identifying storm-damaged areas, soliciting construction repair work from affected property owners, entering into repair contracts with the affected property owner, facilitating property damage insurance claims, and subcontracting the repair work to third-party construction contractors. The business is owned and operated by Austin and Kim Nelson, husband and wife. Kim Nelson is President and Austin Nelson is Vice President. Mr. Nelson was Matthew Shepherd's immediate supervisor, though Mr. Shepherd interacted with both Mr. and Mrs. Nelson.

Mr. Shepherd's assigned duties included meeting with homeowners, facilitating storm-related property damage inspections, facilitating the property owner's initial contact with the insurance company, meeting with the insurance adjustor, assisting the customer in product and color selection, executing the repair contract with the property owner, collecting the repair deposit payment, documenting his actions, and forwarding appropriate information to the employer's

office in Bettendorf. Mr. Shepherd would then monitor the progress of repair projects for problems.

Mr. Shepherd was allowed to set his own work hours, but was expected to maintain daily contact with the employer by telephone call or text message. Mr. Shepherd generally worked 10:00 a.m. to 5:00 or 6:00 p.m., Monday through Saturday. Mr. Shepherd also worked on some Sundays. The employer lacked a formal policy regarding reporting absences, but expected Mr. Shepherd to provide notice if he was unavailable to perform work.

Mr. Shepherd was a high-producing claims specialist. As of September 2016, Mr. Shepherd had 105 active customers. Mr. Shepherd's compensation included a weekly base salary and a sales commission. As of September 23, 2016, the employer had paid Mr. Shepherd \$116,712.20 in year-to-date sales commissions and a \$2,100.00 bonus in addition to \$19,384.50 in base salary.

Mr. Shepherd was also a mentally unstable person. Mr. Shepherd's mental instability stems from Post-Traumatic Stress Disorder (PTSD) aggravated by substance abuse issues. Mr. Shepherd's instability at times negatively impacted the employer's business operations. This occurred when Mr. Shepherd would fail to maintain the required contact with the employer and the employer would then have to scramble to piece together the status of Mr. Shepherd's work activities.

The employer contracts with a third-party human resources administrator, Annette Snyder. Ms. Snyder runs her own human resources consulting business. In July 2016, the employer enlisted Ms. Snyder's assistance in addressing issues in Mr. Shepherd's employment. Ms. Snyder first made contact with Mr. Shepherd on or about August 11, when she spoke with Mr. Shepherd by telephone about his recent multiple-day absence from work. Ms. Snyder called Mr. Shepherd twice that day. The calls were close in time. Mr. Shepherd's mood and demeanor were markedly different during the first and second call. During the first call, Mr. Shepherd was agitated and focused on some matter involving his fiancée. At one point during the first call, Ms. Snyder spoke with the fiancée, Katrina Robinder. During that contact, Ms. Robinder spoke in a circumspect and subdued manner that indicated she was doing her utmost not to provoke Mr. Shepherd. When Ms. Snyder called the second time, Mr. Shepherd's affect had completely changed. At that time, Mr. Snyder acknowledged that he had substance abuse issues and that he had previously participated in substance abuse treatment. Mr. Snyder indicated that he was willing to participate in such treatment again. When Ms. Snyder inquired about which substances were at issue, Mr. Shepherd responded, "All of them." At no time during the contact on or about August 11, did Ms. Robinder or Mr. Shepherd reference PTSD.

In August, the employer wished to retain Mr. Shepherd as an employee and wanted him to get whatever treatment he needed. Ms. Snyder drafted a Letter of Understanding as a formal communication from Kim Nelson to Mr. Shepherd. The document is dated August 15, 2016. The document states as follows:

RE: 30-day Unpaid Leave of Absence

We understand that you have been dealing with personal demons lately and appreciate the difficulties you face in getting things under control. However, your substance abuse issues have been affecting your work, and we no longer feel that we can allow you to continue with us under these circumstances.

We are offering you with a 30-day unpaid leave of absence to deal with these issues, as long as you actively seek and participate in a treatment program and comply with the following terms and conditions:

1. Cooperate and comply with all rules, requirements and recommendations of the program.
2. Allow us to monitor your cooperation and compliance with the program by authorizing our HR Consultant, Annette Snyder, to speak with program staff at any time throughout the 30 days.
3. Successfully complete the program and provide us with proof of such.
4. Obtain clearance from the program to return to work.

As a resident of Illinois, you have an excellent resource of where to begin through the Rock Island County Council on Addictions (RICCA) at 1607 John Deere Rd in East Moline, (309) 792-0292.

You should be aware that if you violate any term or condition listed above, or if after 30 days, you remain unable to return to work, we will take further disciplinary action, up to and including termination.

We will give you time to consider this offer, but need to receive your notarized signature accepting this offer by tomorrow, Tuesday, August 16th at 12:00 noon. Please be aware that if you choose not to accept this offer by the deadline, then you will be subject to further action, up to and including termination of the employment. We simply cannot continue to work with you in your current condition.

Our hope is that you will take advantage of this opportunity to get healthy and return to work with a renewed positive outlook on life.

Mr. Shepherd signed the Letter of Understanding on August 16, 2016 before a notary public to indicate that he "ACKNOWLEDGED AND AGREED" to the document. Mr. Shepherd thereafter entered a substance abuse treatment program.

After Ms. Snyder had contact with Mr. Shepherd on or about August 11, she next had contact with Mr. Shepherd while he was in the treatment program. Pursuant to the Letter of Understanding, Ms. Snyder contacted the treatment provider to see whether Mr. Shepherd was participating in the treatment program. In response to that inquiry, Mr. Shepherd called Ms. Snyder and accused her of violating the HIPAA law. Ms. Snyder clarified that she did not want to know about Mr. Shepherd's particular demons, but just wanted him to be healthy and did not want him to return to the employment until he was ready.

On September 6, 2016, Mr. Shepherd was ready to return to work and the employer was anxious to have him return to work. Kim Nelson spoke with Mr. Shepherd that day. Ms. Snyder drafted a second Letter of Understanding, dated September 6, 2016, as a formal communication from Kim Nelson to Mr. Shepherd: That document stated as follows:

This is intended to confirm our discussion today regarding the expectations for your return to work. Our goal is to clarify our mutual understanding so we can move forward in a positive direction.

As agreed, prior to your return to work on Thursday, 9/8/16, we will set a meeting to discuss the following:

1. What commission you are currently entitled to and the amount to be deposited into your account by the next payday Friday.
2. What payments have been received since you began your leave of absence.
3. The activities on your projects since you began your leave of absence.
4. The current status of your projects and the strategy for prioritizing the work, including final items to be completed, punch list items and problem repairs.
5. The proper completion of forms with accurate information necessary to execute the closure of projects, due at Monday morning meetings without exception.
6. How to finalize projects, prepare invoices and conduct collections.

During this time, you may not solicit new business until we determine to our satisfaction that we have a full handle on the projects currently in place.

Once your return to work, we have the following expectations for your continued employment:

Follow-through with and successfully complete the treatment program as required, continuing to allow Annette Snyder to follow-up and monitor your progress.

Provide truthful and accurate information in all business dealings, including any information related to customer files.

Comply with all company policies and procedures.

Attend all Monday Morning sales meeting [sic] with Kim and/or Austin to go over the previous week's activities.

Mr. Shepherd and Mrs. Nelson each signed the Letter of Understanding on September 6, 2016. Mr. Shepherd returned to work on September 8, 2016 and continued to perform his assigned duties through Saturday, September 24, 2016.

The employer next expected Mr. Shepherd to work on Monday, September 26, 2016. Mr. Shepherd did not perform work that day or the next and did not make contact with the employer that day to indicate he would not be at work. Within the preceding two days, Mr. Shepherd's truck had caught on fire and Ms. Robinder had suffered a miscarriage. Mr. Shepherd had notified the employer of both matters. Mr. Shepherd had met with a customer on September 24 despite the incident with truck.

On September 28, Mr. Shepherd was ready to return to work. On that day, Mr. Shepherd corresponded by text message with Mr. Nelson. Mr. Nelson initiated the contact at 9:45 a.m. by

asking a question about a particular customer. Mr. Shepherd sent the following text message in response:

I broke our agreement with the HR lady. I understand my consequences. Can't seem to put 2 weeks together right now. I'm very sorry I have continued to let the team down. I will get the condos bought today. And check my jobs. I will set up a time to have Jan sign the contract. No matter what I love Ya Brother.

I was on my way to the Meeting in Rock Island on Sunday Evening and never made it. I can't trust myself to go anywhere alone.

Mr. Nelson notified Mr. Shepherd not to report for work until further notice. Mr. Nelson asserted that Mr. Shepherd had used a controlled substance and would not be of any use to the employer for a week.

### **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 employer had the burden of proof in this matter, but elected not to present testimony from Kim Nelson or Austin Nelson. Despite the absence of such testimony, the weight of the evidence establishes excessive unexcused absences. On Monday, September 26 and Tuesday, September 27, Mr. Shepherd was absent from a regular work day without providing any notice to the employer. The weight of the evidence establishes that Mr. Shepherd did indeed have an ongoing substance abuse issue and that the two final consecutive absences were related to substance abuse issues. The evidence that supports the conclusion that the absences were substance abuse related includes Mr. Shepherd's text message in Exhibit D and the Letters of Understanding in Exhibits B and C. The weight of the evidence establishes additional substance use related unexcused absences during the second week of August 2016. The nature of Mr. Shepherd's work made his absence without notice to employer especially harmful to the employer's business. The pattern of such absences demonstrated a willful and wanton disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Shepherd was discharged for misconduct. Accordingly, Mr. Shepherd 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. Shepherd must meet all other eligibility requirements. The employer's account will not be charged.

**DECISION:**

The October 24, 2016, reference 01, decision is modified as follows. The claimant was discharged on September 28, 2016 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been 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 will not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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