

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JACOB N DEMPSEY
Claimant

APPEAL NO. 18A-UI-02011-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KERRY INC
Employer

OC: 01/14/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Jacob Dempsey filed a timely appeal from the February 2, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Dempsey was discharged for on January 5, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on March 9, 2018. Mr. Dempsey participated. Annie Marple represented the employer. Exhibits 1 through 7 were received into evidence.

ISSUE:

Whether Mr. Dempsey 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: Jacob Dempsey was employed by Kerry, Inc. as a full-time Production Operator from July 2017 and last performed work for the employer on January 4, 2018. From the start of the employment until December 22, 2017, Mr. Dempsey was assigned to the second shift, 7:00 p.m. to 7:00 a.m., Monday through Friday. Effective Tuesday, December 26, 2017, Mr. Dempsey was assigned to the first shift, 7:00 a.m. to 7:00 p.m., Monday through Friday. Mr. Dempsey's supervisor on the second shift was Production Supervisor Dan Payne. Mr. Dempsey's supervisors on the first shift were Production Supervisors Dawn Rolison and Chris Kayser, though Mr. Kayser was on vacation during Mr. Dempsey's brief period on the first shift. Mr. Dempsey resides in Waterloo. The workplace was about 45 miles away in Fredericksburg.

Mr. Dempsey's separation from the employment was based on attendance. On November 9, 10, 14, 15 and 30 and on December 1, 2017, Mr. Dempsey was absent due to illness. On November 18, 2017, Mr. Dempsey was absent for personal reasons. Mr. Dempsey properly reported all of the absences to the employer.

The employer's written attendance policy required that Mr. Dempsey call the designated absence reporting line at least 90 minutes prior to the scheduled start of his shift and leave a

message in response to the automated prompts. The prompts included a prompt to state the reason for the absence. The employer's attendance policy did not distinguish between absences due to illness and other absences. The employer reviewed the attendance policy with Mr. Dempsey as part of the orientation process at the start of his employment and Mr. Dempsey was familiar with the absence reporting policy. The attendance policy was also part of the collective bargaining agreement that covered Mr. Dempsey's employment.

On December 5, 2017, Annie Marple, Human Resources Manager, met with Mr. Dempsey in response to the above-mentioned absences. At that time, the employer issued four separate written reprimands to Mr. Dempsey based on the absences. As part of that meeting, the employer had Mr. Dempsey sign a "Last Chance Settlement Agreement." The last chance agreement stated that Mr. Dempsey would be discharged if he failed to maintain perfect attendance between December 5, 2017 and June 5, 2018.

On Friday, January 5, 2018, Mr. Dempsey was absent from the employment. Mr. Dempsey was about a third of the way into his commute when his vehicle lost power. Mr. Dempsey later learned that his car needed a new battery. Mr. Dempsey had purchased the preowned vehicle, a 2005 Kia Sorento, in April 2017 and did not know the age of battery. Mr. Dempsey called the automated absence reporting line at about 6:30 a.m. to give notice of the absence. Mr. Dempsey did not hear back from the employer in response to his call. Mr. Dempsey's uncle collected Mr. Dempsey at about 8:30 a.m. Mr. Dempsey correctly assumed, based on the last change agreement, that he was discharged from the employment in light of the absence. Mr. Dempsey elected to focus on getting his vehicle back to Waterloo and elected not to report to the workplace that day. Based on that absence and the last chance agreement, Ms. Marple and Ms. Rolison determined that Mr. Dempsey would be discharged from the employment. Early the following week, Mr. Dempsey attempted to contact Ms. Marple. It took a couple days for Mr. Dempsey to be able to speak directly with Ms. Marple. At that time, Ms. Marple affirmed that the employer had terminated the employment due to attendance.

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). 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.

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.*

The weight of the evidence in the record establishes a discharge for no disqualifying reason. The weight of the evidence establishes a final absence that was attributable to a transportation issue that involved unforeseen and unforeseeable circumstances. Based on the fairly brief ownership of the vehicle, a reasonable person might not have given much thought to the age of the vehicle's battery until there was a problem. Unfortunately for Mr. Dempsey, the problem arose when he was a substantial distance into his morning commute and at a time when he was subject to a last chance agreement. The weight of the evidence establishes that Mr. Dempsey gave reasonable notice to the employer by calling the designated absence reporting line. Because the weight of the evidence establishes a final absence based on circumstances beyond Mr. Dempsey's control, the administrative law judge concludes that final absence was an excused absence under the applicable law. In reaching this conclusion, the administrative law judge determined that Mr. Dempsey's testimony concerning the basis for and circumstances surrounding the final absence was more reliable than Ms. Marple's testimony concerning the same matter. In connection with the employment, Mr. Dempsey had only his own affairs to attend to and recollect, whereas Ms. Marple, as Human Resources Manager, has the affairs of all the company's employees to attend to. Mr. Dempsey testified with specificity regarding the circumstances of the final absence. Ms. Marple came to the appeal hearing with insufficient relevant and material documentation of the particulars of the absences that factored in the discharge and repeatedly indicated that she would need to refer to such documentation to obtain the particulars. Based on the determination that the final absence was an excused absence, the administrative law judge concludes that the discharge was for no disqualifying reason.

Even if the administrative law judge had ruled that the final absence was an unexcused absence under the applicable law, the evidence in the record does not establish excessive unexcused absences. The evidence establishes seven prior absences that factored in the discharge. Six of those prior absences were due to illness and were properly reported to the employer. Accordingly, those six absences were excused absences under the applicable law. That leaves the prior absence on November 18, 2017 as an absence due to a personal, non-illness related reason, and therefore an unexcused absence under the applicable law. Accordingly, even if the administrative law judge had ruled that the final absence was an unexcused absence, the evidence would establish only two unexcused absences that were a month and a half apart and would not establish excessive unexcused absences.

Because the administrative law judge concludes that Mr. Dempsey was discharged for no disqualifying reason, Mr. Dempsey is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The February 2, 2018, reference 01, decision is reversed. The claimant was discharged effective January 5, 2018 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/rvs