

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DANIEL R KALER
Claimant

NORTHWEST IOWA HOSPITAL CORP
Employer

APPEAL NO. 24A-UI-04678-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/21/24
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

On May 14, 2024, Daniel Kaler (claimant) filed a timely appeal from the May 9, 2024 (reference 01) decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion the claimant was discharged on December 18, 2024 for excessive unexcused absenteeism after being warned. After due notice was issued, a hearing was held on May 30, 2024. Claimant participated. Brendon Bybee represented the employer. Claimant's Exhibits 1 through 9 and employer's Exhibits A, C, D and E were received into evidence. Employer's Exhibits B, F and G were not relevant and were not admitted into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Daniel Kaler (claimant) was employed by Northwest Iowa Hospital Corporation as a full-time dish washer from September 2023 until December 18, 2023, when the employer discharged him from the employment for attendance. The claimant's shift started at 6:00 a.m. and ended at 2:30 p.m. The claimant's scheduled work days varied. Manager Jzar Templin was the claimant's immediate supervisor. The claimant performed his work duties in a hospital kitchen. Under the employer's attendance policy, the claimant's accrual of 12 attendance points subjected the claimant to discharge from the employment for attendance.

If the claimant needed to be absent or late for work, the employer expected notice 24 hours prior to the scheduled start of the shift when possible. The employer required the claimant to send a message to the supervisor through an absence reporting software application. If the supervisor did not respond to that notice, the claimant was required to contact the supervisor by other means. The employer reviewed the absence reporting requirement with the claimant at the start of the employment. The employer adds additional requirements for employees to

follow if they want to avoid accruing attendance points in connection with absences. That process requires the employee to contact a third-party administrator and submit documentation for the third-party administrator to consider in determining whether the absence would be covered under the Family and Medical Leave Act (FMLA).

The final absence that triggered the discharge occurred on December 16, 2023, when the claimant was absent due to a transportation issue. The claimant could not get his car to start. The claimant resided in Sioux City, about four to five miles from the workplace in Sioux City. On December 13, 2023, the claimant had noted the onset of issues with his car starting. The claimant did not make alternative arrangements to get to work. The claimant cites the early start time as the reason for not making alternative transportation arrangements. The claimant used the absence reporting application to notify the supervisor of the absence.

The employer considered several earlier absences when making the decision to discharge the claimant from the employment. The next most recent absence occurred on December 13, 2023, when the claimant was late due to the same transportation issue. The claimant notified the supervisor of his need to be late for work. The claimant could not get his car to start. The claimant caught a ride with his mother but reported to work after the scheduled start of the shift.

Earlier absences that factored in the discharge were as follows.

On September 15 and 21, 2023, the claimant missed work due to a work-related injury to his foot. On September 15, the claimant properly notified the supervisor that his toe hurt and that he would not be in. The claimant saw a doctor that day. The doctor advised the claimant to stay off work that day but released the claimant to return to work the next day. On September 21, the claimant pondered whether his foot was well enough for him to return to work. The claimant ultimately decided not to report for work but waited until almost three hours after the scheduled start of the shift to notify the employer that he would be absent.

On September 24, 2023, the claimant left work 21 minutes early and without completing his assigned duties. The claimant unreasonably and erroneously thought it was okay to leave once he had his work done. The claimant neglected to collect 30 to 40 meal trays that he was supposed to collect.

On October 3, 2023, the claimant was late for work due to a transportation issue. The claimant could not get his car to start. The claimant's supervisor collected the claimant from home and transported the claimant to the workplace.

On October 8, 9 and 10, 2023, the claimant was absent due to illness and with proper notice to the employer. The claimant missed the entire shifts on the first two days. On October 10, the claimant reported for work at the scheduled start of the shift but left at 7:18 a.m. because he was still too sick to work.

On Sunday, October 22, 2023, the claimant was absent from a scheduled shift. On Thursday, October 19, the claimant submitted a request to use accrued Paid Time Off (PTO). The claimant submitted the request through the employer's attendance software application. The claimant received an email message indicating that the absence was approved. The approval referenced the claimant's supervisor's name. The claimant had not previously used PTO and did not know that he was also required to speak directly to the supervisor to request the day off. The claimant learned there was an issue with the absence when he returned to work after the absence date. The claimant's supervisor acknowledged that the matter arose from a good faith

misunderstanding and that the approval process was confusing, but told the claimant he would be assessed two attendance points in lieu of immediate discharge from the employment.

The claimant left work early on October 31 and November 1, 2023 with proper notice to the supervisor and due to pain in his arm. The claimant left work early on November 1 to attend as doctor appointment, as instructed by the employer's employee health personnel, who had instructed the claimant not to return until he was evaluated by an orthopedist and released to return to work. The employer advises that leaving work to be treated by a doctor would not prevent the claimant from being assessed an attendance point and would subject the claimant to the requirement to submit medical documentation to the third-party administrator for determination of whether the absence would be covered under FMLA.

On November 7, 2023, the claimant was absent due to an issue with transportation. The claimant was experiencing unspecified "car troubles."

On November 29, 2023, the claimant was absent due to illness. The claimant had pink eye, a contagious bacterial infection. The claimant properly notified the employer. The claimant went to the doctor. The doctor prescribed an antibiotic and advised the claimant not to report for work until 24 hours after starting the antibiotic, to avoid spreading the illness in the hospital setting. The employer unreasonably asserts the claimant should have appeared for work despite the communicable illness and cites the hospital's use of face masks and face shields to hinder the spread of communicable illness.

The discharge from the employment followed three written warnings for attendance. The first two warnings were issued in October 2023 and the third was issued in November 2023.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...
(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...
(9) Excessive unexcused tardiness or absenteeism.

...

See also Iowa Admin. Code r. 871-24.32(1)(a) (duplicating the text of the statute).

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 Iowa Administrative Code rule 87124.32(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. 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 87124.32(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 discharge for misconduct in connection with the employment, based on excessive unexcused absences. The evidence establishes unexcused absences related to transportation, a matter of personal responsibility, on October 3, November 7, December 13, and December 16, 2023. The four transportation related absences were enough to establish excessive unexcused absences in connection with the brief employment. The evidence establishes an additional unexcused absence on September 21, 2023, when the claimant provided late notice of his need to be absent due to the purported hurt toe. The evidence establishes an additional unexcused absence on September 24, 2023, when the claimant left work early without authorization and without completing assigned duties. The claimant's excessive unexcused absences occurred in the context of multiple warnings for attendance.

The remainder of the absences the employer considered in making the discharge decision were excused absences under the applicable law and cannot be considered against the claimant when determining this eligibility for unemployment insurance benefits. These include the absences due to illness and properly reported to the employer on September 15, October 8, 9, 10 and 31, and on November 1 and 29, 2023. The employer policy requiring additional FMLA approval through the third-party administrator cannot serve as a basis for converting these absences the law deemed excused absences into unexcused absences. The evidence establishes an additional excused absence on October 22, 2023. The absence on that date was attributable to the employer's poor communication of the PTO policy and the confusing approval procedure, both of which led the claimant to reasonably conclude the employer approved the absence in advance of the absence date.

Based on the excessive unexcused absences, the claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The May 9, 2024 (reference 01) decision is AFFIRMED. The claimant was discharged on December 18, 2024 for misconduct in connection with the employment. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 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

June 6, 2024
Decision Dated and Mailed

JET/jkb

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.