

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

WILLIAM H DEMOSS
Claimant

APPEAL NO. 19A-UI-00251-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 12/09/18
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 31, 2018, reference 01, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on September 27, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on January 25, 2019. Claimant William DeMoss did not comply with the hearing notice instruction to register a telephone number for the hearing and did not participate. Robert Cooper represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO), which record reflects that not benefits have been disbursed to the claimant in connection with the December 9, 2018 original claim.

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: William DeMoss was employed by Casey's Marketing Company as a full-time Store Employee (clerk) from 2016 until September 28, 2018, when the employer discharged him for attendance. Mr. DeMoss worked at the Casey's store located on Northeast 14th Street in Des Moines. Mr. DeMoss' usual shift start time fell between 7:00 a.m. and 9:00 a.m. Mr. DeMoss' usual shift end time fell between 3:00 p.m. and 5:00 p.m. Steven Day was Store Manager at that location, but was away from the workplace on medical leave from July 2018 through the end of the Mr. DeMoss' employment. Robert Cooper is Store Manager at another Casey's store located on East 14th Street in Des Moines and functioned as Store Manager at the Northeast 14th Street store in Mr. Day's absence. If Mr. DeMoss needed to be absent from work, the employer's attendance policy required that he notify his supervisor as far in advance as possible so that the supervisor had time to find another employee to cover the shift. Mr. DeMoss was at all relevant times aware of the attendance policy and the absence reporting requirement. Mr. DeMoss was at all relevant times aware that Mr. Cooper was the acting Store Manager for

the Northeast 14th store during Mr. Day's absence. Though Mr. Cooper remained stationed at his assigned store and only spent a few hours per week at the Northeast 14th Street store, his contact information was posted at the Northeast 14th Street store. The employer has designated Northeast 14th Street store employee Karen Cobine as Acting Assistant Manager at that location.

The final absence that triggered the discharge occurred on September 27, 2018. On that day, Mr. DeMoss contacted the Northeast 14th Street store at 7:00 a.m. and told the cashier on duty that he would be absent due to illness from his shift that was supposed to start at 7:00 a.m. Mr. DeMoss did not notify Mr. Cooper or Ms. Cobine of his need to be absent. When Ms. Cobine learned of the late notice provided to the cashier, she notified Mr. Cooper of the event. Mr. Cooper notified Mr. DeMoss the next day that he was discharged from the employment.

Mr. DeMoss' absence on September 27, 2018 follows absences on September 24 and 26, 2018. In connection with the absence on September 24, Mr. DeMoss had notified the cashier, not a supervisor. The employer witness has no further information regarding the September 24 absence. On September 26, Mr. DeMoss was scheduled to work from 3:00 p.m. to 11:00 p.m. Mr. DeMoss arrived late at 3:11 p.m. without having provided notice that he would be late. Mr. DeMoss then left at 4:51 p.m. due to purported illness, but without providing notice to a supervisor.

In making the decision to discharge Mr. DeMoss from the employment, the employer also considered no-call/no-show absences on January 1, February 21 and May 15, 2018 and two absences in March 2018 for which the employer lacks information other than the absence dates.

In 2018, the employer issued written warnings to Mr. DeMoss regarding attendance. These were issued on February 23, March 16 and May 17, 2018. The second and third reprimand warned Mr. DeMoss that the employment could be terminated if the conduct continued.

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).

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 discharge for misconduct in connection with the employment based on excessive unexcused absences. The weight of the evidence establishes three unexcused absences in rapid succession during the last few days of the employment. On September 24, 2018, Mr. DeMoss elected to notify a cashier, rather than comply with the requirement that he notify a supervisor of his need to be absent. On September 26, 2018, Mr. DeMoss was late without notice to the employer and then left work early without notifying a supervisor. On September 27, 2018, Mr. DeMoss provided late notice of his need to be absent

and elected to notify a cashier, rather than comply with the requirement that he notify a supervisor of his need to be absent. The three unexcused absences in rapid succession were enough to indicate a willful disregard of the employer's interests and establish misconduct in connection with the employment. These unexcused absences occurred in the context of multiple warnings for attendance and three prior no-call/no-show unexcused absences. Mr. DeMoss is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. DeMoss must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

Because no benefits have been disbursed in connection with the claim, there is no overpayment of benefits to address.

DECISION:

The December 31, 2018, reference 01, decision is reversed. The claimant was discharged on for misconduct in connection with the employment. The discharge was effective September 28, 2018. The claimant is disqualified for unemployment 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs