

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CODARYL L BUTLER
Claimant

APPEAL NO. 13A-UI-13327-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LETICA CORPORATION
Employer

OC: 11/03/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Codaryl Butler filed a timely appeal from the November 26, 2013, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on December 20, 2013. Mr. Butler participated. Jennifer Wagner, Human Resources Manager, represented the employer. Exhibits One through Six 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: Codaryl Butler was employed by Letica Corporation as a full-time packer/handler from July 30, 2013 until October 23, 2013, when Jennifer Wagner, Human Resources Manager, discharged him for attendance. Mr. Butler's immediate supervisor was Kenton Hitchcock. Mr. Butler's usual work hours were Wednesday, 1:00 a.m. to 7:00 a.m., and Wednesday evening through Saturday morning, 7:00 p.m. to 7:00 a.m. If Mr. Butler needed to be absent from work, the employer's written attendance policy required that he notify the employer at least one hour prior to the scheduled start of the shift. The employer's work rules also required new employees within their 90-day probationary period to maintain perfect attendance. The employer provided Mr. Butler with a copy of the written work rules at the start of his employment.

The final absence that triggered the discharge occurred on Tuesday, October 22, 2013, when Mr. Butler overslept and missed the 1:00 a.m. he had been scheduled to work that day. Mr. Butler contacted his supervisor at 3:30 a.m. The supervisor told Mr. Butler he was not needed for the shift and to come in to speak to Ms. Wagner the following day. Mr. Butler appeared for the meeting the following day and was discharged from the employment.

In making the decision to discharge Mr. Butler from the employment, the employer also considered two earlier absences. On Wednesday, August 7, 2013, Mr. Butler was absent from a 1:00 a.m. shift that he did not know he was scheduled to work. It was Mr. Butler's first week in

the employment and he was confused about his work schedule. The work schedules and the names of the employees assigned to their schedules was posted near the entry to the employer's facility, near the time clock Mr. Butler would have to use. When Mr. Butler spoke to Mr. Hitchcock about the incident, Mr. Hitchcock told Mr. Butler that the employer had many new employees who experienced the same confusion about the work schedule and that Mr. Hitchcock would speak to Ms. Wagner about waiving any penalty for the missed shift. Mr. Butler was not issued a reprimand in connection with the August 7 absence. However, Mr. Hitchcock reported back to Mr. Butler that Ms. Wagner would not waive consideration of the absence. On August 15, 2013, Mr. Butler arrived at 9:25 p.m. for his 7:00 p.m. shift due to transportation issues.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

871 IAC 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.

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 evidence in the record establishes established unexcused absences on August 7, August 15, and October 22, 2013. The first absence was due to the employer's unique scheduling system and Mr. Butler's confusion about the work schedule. Mr. Butler's status as a brand new employee and the unusual work schedule were mitigating factors in connection with that absence. Mr. Butler's immediate supervisor appears to have acknowledged the mitigating circumstances at the time of the discussion with Mr. Butler about that absence. On August 15, the unexcused absence was due to transportation issues, a matter of personal responsibility. The October 22 absence was due to oversleeping, a matter of personal responsibility. The second most recent unexcused absence was more than two months prior to the final absence that triggered the discharge. That factor argues against there being a willful or wanton disregard of the employer's interests. Under the particular circumstances of this case, the administrative cannot find that Mr. Butler's unexcused absences to be excessive unless the administrative law judge adopts an unduly harsh application of the law to the facts in evidence. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Butler was discharged for no disqualifying reason. Accordingly, Mr. Butler is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's November 26, 2013, reference 02, decision is reversed. The claimant was discharged 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/pjs