

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

BRADLEY A NELSON
Claimant

HY-VEE INC
Employer

APPEAL NO. 23A-UI-03544-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/05/23
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

On April 4, 2023, the employer filed a timely appeal from the March 27, 2023 (reference 01) decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on February 8, 2023 for no disqualifying reason. After due notice was issued, a hearing was held on May 16, 2023. Bradley Nelson (claimant) participated. Frankie Patterson of Corporate Cost Control represented the employer and presented testimony through Stacie Aneweer and David Hopp. Employer Exhibits 1 through 16 were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record reflects no benefits have been paid to the claimant in connection with the claim.

ISSUE:

Whether the claimant was laid off, was discharged for misconduct in connection with the employment, or voluntarily quit without good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Bradley Nelson (claimant) was employed by Hy-Vee as a full-time Product Specialist at the Marshalltown Hy-Vee store. The claimant began the employment in 2016 and last performed work for the employer on February 8, 2023. The claimant was generally scheduled to start work at 6:00 a.m. On Wednesdays, the claimant would be scheduled to work as early as 2:00 a.m., to assist with implementing the new weekly ad. The claimant generally worked Monday through Friday. The claimant was scheduled to work some Saturdays.

The claimant has a history of alcohol abuse that impacted the claimant's attendance and work performance. On December 19, 2022, the claimant and the employer signed a memorandum of mutually understanding that the employer characterizes as a last-chance agreement. The document states:

Brad Nelson, this letter is in reference to the events that have occurred since Saturday November 19th in relation to my ability to perform my job duties.

As discussed with David Hopp and Stacie Aneweer on Wednesday December 14 you are seeking continued treatment for both alcohol abuse and mental health issues but wanting to return to work.

It was agreed that you would return to work on Monday December 19, 2022 with your schedule being varied to accommodate your treatment plan for the next few weeks. Any changes to these times will be communicated with David Hopp as they change going forward so that we can make sure they fit the needs of Hy-Vee as well.

Any further relapses in alcohol abuse will be grounds for termination.

On February 8, 2023, the claimant left work early, ostensibly due to illness. Prior to leaving the workplace on February 8, 2023, the claimant spoke with his supervisor, Josh Torcha, Product Specialist, to give notice of his need to leave work early. Mr. Torcha approved the early departure.

The claimant was next scheduled to work on February 9, 2023 at 6:00 a.m. The claimant did not appear for work and did not notify the employer of his need to be absent. The employer's policy required that the claimant call the store at least two-hours prior to the scheduled start of the shift and speak with a manager regarding his need to be absent from work. The employer provided the claimant with policy materials at the start of the employment that included the absence reporting requirements. The claimant was at all relevant times aware of the absence reporting requirements. If the claimant called before a manager was available, the claimant was expected to call again when a manager became available. When the claimant did not appear for work on February 9, Mr. Torcha sent a text message to the claimant at 6:54 a.m. The claimant replied at 7:13 a.m., "I am not going to be I'm [in] Sorry." The claimant did not provide a reason for the absence.

The claimant was not scheduled to work on Friday, February 10, 2023, but called the store to give notice of his need to be absent that date. The schedule in question had been posted on January 27, 2023. The claimant advises that he was confused about his scheduled work days. The employer posted the claimant's weekly schedule 10 days prior to the scheduled work week.

The claimant was next scheduled to work at 6:00 a.m. on Saturday, February 11, 2023. When the claimant did not report to work or give notice of his need to be absent, Stacie Aneweer, Human Resources Generalist, sent a text message to the claimant at 8:25 a.m., asking whether the claimant was still sick. At 12:25 p.m., the claimant sent a text message stating he did not think he was scheduled to work that day because he had worked the prior Saturday. The schedule in question has been posted on January 27, 2023.

The claimant was next scheduled to work on Monday February 13, 2023. At 5:55 a.m., the claimant called the store and spoke with Ms. Aneweer. Before Ms. Aneweer identified herself, the claimant stated that he would not be coming to work that day. Ms. Aneweer then identified herself. Ms. Aneweer asked why the claimant was not coming to work that day. The claimant replied, "It's complicated." Ms. Aneweer asked the claimant if he could come to the store to meet with her and Jason Fifer, Store Manager. The claimant stated it was not a good day to do that. Ms. Aneweer agreed it was not a good day meet, due to the need to prepare the store for Valentine's Day. The claimant and Ms. Aneweer agreed to meet at 8:30 a.m. on Wednesday, February 15, 2023. Though the claimant was on the schedule to work on February 14, 2023, Ms. Aneweer and the claimant mutually understood that the claimant would not be reporting for that shift and would instead report for the meeting on February 15, 2023.

The claimant did not report for the meeting set for Wednesday, February 15, 2023. Later that day, the claimant's sister or daughter called the store and spoke with Mr. Fifer. The caller told Mr. Fifer that they were trying to get the claimant admitted or committed for alcohol abuse

detoxification. The employer treated the claimant's absence from the meeting as an unexcused absence from the employment.

The claimant was next on the schedule to work Thursday, February 16 and Friday, February 17, 2023. The claimant was absent from both shifts and did not make contact with the employer regarding a need to be absent from those shifts.

At some unspecified point after the claimant ceased reporting for work in February 2023, the claimant contacted the employer to discuss his employment status. Neither the employer nor the claimant can say with any certainty when the claimant next contacted the employer. The employer did not document the subsequent contact. The claimant advises he has limited recollection.

The employer elected to end the employment following the claimant's absence from the February 15, 2023 meeting and scheduled shifts on February 16 and 17, 2023.

The claimant established an original claim for benefits that was effective March 5, 2023. The claimant has not received benefits in connection with the claim.

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.

...

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

- a. For the purposes of this rule, “misconduct” is defined as 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 a 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.
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The employer has the burden of proof in a discharge 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 Iowa Admin. Code r.871-24.32(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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 discharge followed several consecutive unexcused absences. On February 9 and February 11, 2023, the claimant was absent without notifying the employer, in violation of the absence reporting policy. On February 13, 2023, the claimant provided late notice of his need to be absent. On February 15, 2023, the claimant was absent from the agreed-upon meeting without notice to the employer. The claimant was then absent on February 16 and 17, 2023 without notifying the employer. The evidence indicates that most or all of these absences involved the claimant's abuse of alcohol. The weight of the evidence fails to establish the claimant was incapable of providing proper notice in connection with any of the absences. The claimant's unexcused absences were excess and constituted misconduct in connection with the employment.

The claimant's consecutive no-call, no-show absences on February 15, 16 and 17, 2023 could, in the alternative, be deemed a voluntary quit.

Iowa Code section 96.5(1) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992).

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. ... The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

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.

Because the claimant has received no benefits, there is not overpayment to address.

DECISION:

The March 27, 2023 (reference 01) decision is REVERSED. The claimant was discharged for misconduct in connection with the employment. The discharge was effective February 17, 2023. In the alternative, the claimant voluntarily quit without good cause attributable to the employer by being absent three consecutive days without notice to the employer. 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.

A handwritten signature in cursive script that reads "James E. Timberland". The signature is written in dark ink on a light-colored, slightly textured background.

James E. Timberland
Administrative Law Judge

May 22, 2023
Decision Dated and Mailed

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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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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.