

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**MIKE P BROWN**  
Claimant

**APPEAL NO. 18A-UI-08436-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FULL STEAM STAFFING NJ LLC**  
Employer

**OC: 07/15/18**  
**Claimant: Respondent (5)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the August 6, 2018, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant separated from the employment on February 7, 2018 for good cause attributable to the employer. After due notice was issued, a hearing was held on August 29, 2018. Claimant Mike Brown did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Kevin Pender represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record reflects that no benefits have been disbursed to the claimant in connection with the July 15, 2018 original claim for benefits. Exhibits 1 through 4 were received into evidence.

**ISSUE:**

Whether Mr. Brown separated from the employment for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer of liability for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Full Steam Staffing NJ, L.L.C. contracts with Scotts Manufacturing Company to provide full-time seasonal employees. The contract season runs from October to June or July of the following year. Full Steam is located onsite at the Scotts facility in Fort Madison. Mike Brown was employed by Full Steam Staffing as a full-time, seasonal laborer from October 2017 until February 6, 2018, when Kevin Pender, Full Steam Staffing Onsite Coordinator, discharged him from the employment for attendance. Mr. Brown's work hours alternated in two-week increments. During one two-week period, Mr. Brown's work hours were 6:00 a.m. to 2:30 p.m. During the next two-week period, Mr. Brown's work hours were 2:00 p.m. to 10:30 p.m. The work days were Monday through Friday. Mr. Pender was Mr. Brown's supervisor on behalf of Full Steam Staffing. Scotts Production Supervisor Cliff Dodson also supervised Mr. Brown's employment.

If Mr. Brown needed to be absent in connection with a planned absence, Full Steam required that Mr. Brown complete a written time-off request. If Mr. Brown needed to be absent due to an

unplanned absence such as illness, Full Steam required that Mr. Brown telephone Full Steam prior to the scheduled start of the shift. Mr. Brown was aware of the absence reporting requirement.

The final absence the triggered the discharge occurred on February 6, 2018, when Mr. Brown was absent due to injury he suffered in a fall at home. Mr. Brown properly notified the employer of his need to be absent from the February 6, 2018 shift.

The employer considered earlier absences and reprimands when making the decision to discharge Mr. Brown from the assignment and from the employment. On November 16, 2017, Mr. Brown was late for personal reasons. On December 7, 2017, Mr. Brown was absent because he lacked gasoline to get to work. There was no agreement for the employer to provide Mr. Brown with transportation to work. On December 8, 2017, Mr. Brown was absent due to illness and properly reported the absence. On December 18, 2017, Mr. Brown left work early due to illness and properly notified the employer. On January 5, 2018, Mr. Brown was absent due a purported lack of the required steel-toed shoes. Mr. Brown had previously possessed the required shoes. On January 31, 2018, Mr. Brown was absent due to illness and properly notified the employer.

During the employment, Mr. Pender issued four reprimands to Mr. Brown for attendance. These were issued on December 19, 2017 and on January 8, January 19, and February 1, 2018.

#### **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 a non-disqualifying reason. The final absence that triggered the discharge was due to injury and was properly reported to the employer. Accordingly, the absence was an excused absence under the applicable law and cannot serve as the basis for a finding of misconduct or disqualifying Mr. Brown for unemployment insurance benefits. See Iowa Administrative Code rule 871-24.32(7). The next most recent absence, on January 31, 2018, was due to illness and was properly reported to the employer. That absence was an excused absence under the applicable law. The next most recent absence, regarding the lack of steel-toed shoes, occurred more than a month before the discharge and would not constitute a current act for purposes of adjudicating unemployment

insurance benefit eligibility and liability. Because the evidence in the record does not establish a current act of misconduct, Mr. Brown is eligible for benefits, provided he is otherwise eligible and the employer's account may be charged for benefits. See Iowa Administrative Code rule 871-24.32(8). Because the evidence does not establish a current act of misconduct, the administrative law judge need not further consider whether the earlier absences were excused or unexcused.

**DECISION:**

The August 6, 2018, reference 02, decision is modified as follows. The claimant was discharged on February 6, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs