

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

SHATANI D BUCK

Claimant

APPEAL NO. 18A-UI-11585-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 10/21/18

Claimant: Respondent (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 19, 2018, reference 02, decision that held the claimant was eligible for benefits provided he met all other eligibility requirement and the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged for no disqualifying reason. After due notice was issued, a hearing was held on December 14, 2018. Claimant Shatani Buck participated. Tanya Muller represented the employer and presented additional testimony through Christopher San Souci. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 7 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay 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: Shatani Buck was employed by Casey's Marketing Company as a part-time kitchen clerk at the employer's store in Riverside, Iowa from July 2018 until October 15, 2018, when Tanya Muller, Store Manager, discharged him from the employment for attendance. If Mr. Buck needed to be absent from work, the employer's written attendance policy required that he notify a manager or supervisor as far in advance of the absence as possible. The attendance policy was included in the handbook the employer had Mr. Buck acknowledge at the start of the employment and that the employer made available to Mr. Buck through an online ADP portal. The employer also

maintained a hard copy employee handbook at the store for employees to review as needed. Ms. Muller interpreted the prior notice requirement to mean that Mr. Buck needed to notify her of his need to be absent prior to the scheduled start of his shift. Ms. Muller reminded Mr. Buck about this requirement in connection with his absences.

The final absence that triggered the discharge occurred on October 14, 2018. On that day, Mr. Buck was scheduled to work from 8:00 a.m. to 5:00 p.m. The work schedule that was posted in the store and also available online at the ADP portal reflected the scheduled shift. At 7:30 a.m., Mr. Buck telephoned Ms. Muller and asked when he was next scheduled to work. Ms. Muller told Mr. Buck that he was scheduled to work that day from 8:00 a.m. to 5:00 p.m. Mr. Buck made no mention during the call of a need to be absent from the shift. Mr. Buck did not report for the shift and did not give notice of a need to be absent from any part of the shift. When Mr. Buck reported for work on October 15, 2018, Ms. Muller asked Mr. Buck why he had been absent on October 14. Mr. Buck asserted that he had not felt well. Ms. Muller noted that Mr. Buck had not mentioned being ill during the October 14 telephone call. Ms. Muller then proceeded with discharging Mr. Buck from the employment.

Ms. Muller considered additional, earlier absences when making the decision to discharge Mr. Buck from the employment. On August 25, Mr. Muller was absent due to illness and notified Ms. Buck prior to the scheduled start of his shift. Mr. Buck sought medical evaluation and provided Ms. Muller with a medical note upon his return to the work. On September 15, 2018, Mr. Buck was scheduled to work from 5:00 p.m. to 8:00 p.m. During his shift on September 14, Mr. Buck had not been feeling well. During the September 14 shift, Mr. Buck told the assistant manager that he would probably not be coming to work the next day. Ms. Buck did not follow up on September 15 with notice that he would indeed be absent from the September 15 shift. On September 24, 2018, Ms. Muller spoke to Mr. Buck regarding the absence and issued a written reprimand to Mr. Buck. On September 27, Mr. Buck was scheduled to work from 8:00 a.m. to 5:00 p.m., was absent due to illness, but did not notify the employer of his need to be absent. When Mr. Buck did not appear for the shift, Ms. Muller telephoned Mr. Buck's cell phone at 8:30 a.m. Mr. Buck was at that time at a medical clinic and answered his phone. Ms. Muller directed Mr. Buck to provide a medical note regarding the absence and Mr. Buck complied.

Mr. Buck established an original claim for benefits that was effective October 21, 2018 and received \$2,322.00 in unemployment insurance benefits for the period between October 21, 2018 and December 22, 2018.

On November 16, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Buck's separation from the employment. Zontael McCaan of Equifax provided a verbal statement to the deputy, but lacked personal knowledge concerning Mr. Buck's employment or separation from the employment. Ms. McCaan provided dates of employment and referenced a final no-call/no-show absence on October 14, 2018. Ms. McCaan told the deputy she had no information concerning other absences that may have factored in the discharge. ADP/Equifax had provided a copy of the attendance policy for the fact-finding interview, along with ADP materials that provided no particulars concerning the basis for the discharge. Mr. Buck provided a verbal statement to the deputy that included an intentionally misleading assertion that he had received no prior reprimands and that included a somewhat misleading statement that he had spoken to Ms. Muller prior to the start of the shift. The statement about contact gave the impression that Mr. Buck had notified Ms. Muller of his need to be absent on October 14, when he had given no such notice.

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 weight of the evidence establishes a discharge for misconduct in connection with the employment. The October 14, 2018 final absence that triggered the discharge was an unexcused absence under the applicable law. Mr. Buck contacted Ms. Muller prior to the scheduled start of the shift, received confirmation that he was indeed scheduled to work that day, made no mention of a need to be absent, and then failed to report for the shift or provide notice that he would be absent from the shift. Mr. Buck's next most recent absence on September 27 was also an unexcused absence under the applicable law. The weight of the evidence establishes that Mr. Buck was able on that day to provide proper notice of his need to be absent due to illness, but elected not to provide the required notice. Both of the above absences occurred in the context of the September 24 written reprimand for attendance. The September 15 absence was also an unexcused absence under the applicable law. Mr. Buck's mention on September 14 that he "probably" would not report for work the following day did not constitute proper notice that he would in fact be absent from the shift. These three unexcused absences were excessive. The August 25, 2018 absence was an excused absence under the applicable law. In that instance, Mr. Buck was absent due to illness and properly notified Ms. Muller. Because the evidence establishes a discharge for misconduct in connection with the employment, Mr. Buck 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. Buck must meet all other eligibility requirements.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Buck received \$2,322.00 in unemployment insurance benefits for the period between October 21, 2018 and December 22, 2018, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Buck received constitute an overpayment of benefits.

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews. 24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

Neither the cursory statement provided by Ms. McCann nor the cursory documentation ADP/Equifax submitted for the fact-finding, nor the two in combination, satisfied the participation requirement. Ms. McCann lacked personal knowledge. The employer had not provided a name or number for a person with personal knowledge. Ms. McCann spoke only to the final absence. On the other hand, Mr. Buck's verbal statement to the deputy included intentionally misleading information. For this reason, Mr. Buck must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to Mr. Buck.

DECISION:

The November 19, 2018, reference 02, decision is reversed. The claimant was discharged on October 15, 2018 for misconduct in connection with the employment. 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 claimant is overpaid \$2,322.00 in unemployment insurance benefits for the period between October 21, 2018 and December 22, 2018. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs