

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KYLE D PLOWMAN**  
Claimant

**APPEAL NO. 15A-UI-03637-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**A T C INC**  
Employer

**OC: 03/08/15**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the March 20, 2015, reference 01, decision that 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 an Agency conclusion that the claimant had been discharged on February 24, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on May 26, 2015. Claimant Kyle Plowman participated. Josh Philipp represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits Two through Six into evidence.

**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: ATC, Inc., is an auto and truck repair business. Kyle Plowman was employed by ATC as a full-time mechanic from August 2014 until February 24, 2015, when Josh Philipp, General Manager, discharged him from the employment. Mr. Plowman was assigned to the second shift. The work hours on the second shift were 5:00 p.m. to 1:30 a.m., Monday through Friday. Mr. Plowman's supervisors included shop foreman Shannon Kies and service manager John Houdyshell.

The final incident that triggered the discharge occurred during Mr. Plowman's shift on February 23, 2015, when Mr. Kies discovered Mr. Plowman asleep inside a customer's truck.

Mr. Plowman had pulled into a service bay to start a repair. Mr. Kies had directed Mr. Plowman to listen for a particular engine sound. Mr. Plowman was inside the truck listening for the sound when he dozed off. Mr. Plowman dozed off at about 6:40 a.m. and was discovered by Mr. Kies about an hour later. Though the door of the truck was locked, Mr. Plowman did not knowingly lock the doors. The employer sent Mr. Plowman home at that time and discharged him the next day. Three weeks earlier, Mr. Plowman had been diagnosed with bipolar disorder and with a seizure disorder. Mr. Plowman's doctor had prescribed carbamazepine and had warned Mr. Plowman not to operate heavy machinery while taking the medication because a side effect of the medication was drowsiness. Mr. Plowman had told the employer about his diagnoses, medication and the doctor's warning not to operate heavy equipment. Mr. Plowman's nodding off on February 23, 2015 was caused by the powerful psychotropic medication. On February 6, Mr. Kies had found Mr. Plowman leaning against a tool box and had concluded that Mr. Plowman was sleeping at that time. Mr. Plowman denies that he was sleeping on that prior occasion and asserts that he merely had his head down due to a bad toothache. The employer issued a reprimand in connection with the February 6 incident. The employer's handbook prohibited sleeping while on duty, but the employer had not provided the handbook to Mr. Plowman.

The employer considered other matters when making the decision to discharge Mr. Plowman from the employment. On January 15, 2015, the employer reprimanded Mr. Plowman for documenting that he had appropriately checked the light on a customer's vehicle. The employer issued the reprimand after the customer was pulled over for nonfunctioning turn signals and brake lights. Also on January 15, the employer reprimanded Mr. Plowman for documenting that he had performed all assigned duties in connection with performing preventive maintenance, when he had not actually performed a couple of the assigned tasks. In December, Mr. Plowman had been absent because his vehicle would not start. Mr. Plowman properly notified the employer, but the employer deemed it unacceptable for Mr. Plowman, a mechanic, to miss a full day of work, due to the issue. The employer also deemed it unacceptable for Mr. Plowman not to have an alternative means to get to work. On February 20, 2015, Mr. Plowman had been absent due to illness and had notified by the employer by text message. The employer deemed the text message an unacceptable form of notice.

Mr. Plowman established a claim for benefits that was effective March 8, 2015 and received benefits. The employer participated in the fact-finding interview.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code § 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.

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). 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).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See Hurtado v. IDJS, 393 N.W.2d 309 (Iowa 1986). In Hurtado, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

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 in the record establishes that Mr. Plowman did not intentionally sleep at work on February 23, 2015, but instead unintentionally dozed off due to the effects of a power prescription medication. Because the conduct was not volitional, it cannot be deemed misconduct in connection with the employment.

The next most recent incident that factored in the discharge was the absence due to illness on February 20, 2015, when Mr. Plowman sent a text message to the employer, rather than telephoning the employer. Mr. Plowman knew, based on prior absences, that he was required to telephone the employer if he needed to be absent. Accordingly, the February 20, 2015 was an unexcused absence under the applicable law. The other absence that factored in the discharge occurred in mid-December 2014 and was based on a lack of transportation. That absence also was an unexcused absence under the applicable law. The evidence fails to establish any more unexcused absences. There were mitigating circumstances attending both absences. The two unexcused absences, two months apart, were not sufficient to establish excessive unexcused absences. The evidence in the record is insufficient to establish that Mr. Plowman was sleeping on February 6, 2015. The employer failed to present sufficient evidence to rebut Mr. Plowman's testimony that he was not in fact sleeping on that occasion. The evidence establishes two incidents in January wherein Mr. Plowman intentionally cut corners when performing service on a customer's vehicle. Each incident involved negligence on the part of Mr. Plowman.

Because the final incident that triggered the discharge, the sleeping incident on February 23, 2015 did not involve misconduct and because the evidence did establish excessive unexcused absences, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The March 20, 2015, reference 01, decision is affirmed. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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