IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CODY L SCHELLHORN
Claimant

PACKERS SANITATION SERVICES INC
Employer

APPEAL NO. 11A-UI-16190-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/13/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Cody Schellhorn filed a timely appeal from the December 15 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 19, 2012. Mr. Schellhorn participated and presented additional testimony through Monique McFarland. Dave McLaughlin represented the employer. Exhibit A was received into evidence. The hearing in this matter was consolidated with the hearing in Appeal Number 11A-UI-16191-JTT.

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: The employer provides commercial cleaning services at the Tyson plant in Waterloo. Cody Schellhorn was employed by Kaiser Contract Cleaning Specialists, Inc., a/k/a Packers Sanitation Services, Inc., as a full-time laborer from November 2010 until November 14, 2011, when Dave McLaughlin, Site Manager, discharged him for attendance. Mr. Schellhorn's immediate supervisor was Terrell Johnson, Area Supervisor.

The final absence that triggered the discharge occurred on November 14, 2011. Mr. Schellhorn was also absent from work on January 25, March 2 and 29, April 12 and 27, May 9, 10, 11, 12, 13 and 17, June 7 and 13, July 6, August 2, 24 and 26, September 9, 10, 12, 13, 14, 16 and 17, October 11, 28 and 29, and November 11. Mr. Schellhorn had been diagnosed with Methicillin-resistant Staphylococcus aureus (MRSA), a contagious disease. Most of Mr. Schellhorn's absences were related to the MRSA. Mr. Schellhorn provided medical documentation to the employer concerning his diagnosis. Mr. Schellhorn somehow passed the disease on to his children, which resulted in additional absences from work to address their medical needs. Mr. Schellhorn was dealing with a foot issue that prompted medical appointments but that did not prevent him from working outside of time needed for medical appointments.

The employer had a written absence notification policy that required Mr. Schellhorn to notify his supervisor at least 30 minutes prior to scheduled start of his shift if he needed to be absent. Mr. Schellhorn was aware of the written policy. Mr. Schellhorn stopped calling in his absences at some point in September. No one told him to stop notifying the employer on those days when he needed to be absent. No one told him it would be okay to stop notifying the employer of his absences.

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 weight of the evidence establishes unexcused absences on October 11, 28 and 29, and November 11. On each of those days, Mr. Schellhorn was absent without notifying the employer in violation of the employer's attendance policy. Mr. Schellhorn's unexcused absences were excessive and constituted misconduct in connection with the employment. Mr. Schellhorn is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Schellhorn.

DECISION:

The Agency representative's December 15 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment

benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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