

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ANTHONY L PACK
Claimant

APPEAL NO. 18A-UI-10715-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KUM & GO LC
Employer

OC: 09/30/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Anthony Pack filed a timely appeal from the October 26, 2018, reference 03, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the deputy's conclusion that Mr. Pack was discharged on September 3, 2018 for repeated tardiness in reporting for work after being warned. After due notice was issued, a hearing was held on November 13, 2018. Dan Childs, District Supervisor, represented the employer. Mr. Pack did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate.

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: Anthony Pack was employed by Kum & Go, L.C. as a part-time sales associate from July 2, 2018 until September 3, 2018, when Cheri Foreman, General Manager, discharged him from the employment for attendance. Mr. Pack worked at the Kum & Go store located on Keo Way in Des Moines. Ms. Foreman ran that store. If Mr. Pack needed to be absent to or late for work, the employer's policy required that Mr. Pack notify the employer at least one hour prior to the scheduled start of his shift. The absence that triggered the discharge occurred on September 3, 2018, when Mr. Pack was late for work, but did not provide notice that he would be late. The employer witness, Dan Childs, District Supervisor, is unaware of Mr. Pack's scheduled start time that day. Mr. Childs is unaware of dates or details of prior alleged absences. Mr. Childs asserts that Ms. Foreman issued at least one verbal warning to Mr. Pack for attendance, but is unable to state when such warning occurred. Mr. Childs did not participate in the decision to discharge Mr. Pack from his employment. Ms. Foreman separated from Kum & Go on October 16, 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 Iowa Administrative Code rule 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 Iowa Administrative Code rule 871-24.32(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.

While a disqualifying discharge for attendance usually requires *excessive* unexcused absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See *Sallis v. Employment Appeal Board*, 437 N.W.2d 895 (Iowa 1989). In *Sallis*, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence.

The evidence in the record establishes a discharge for no disqualifying reason. The evidence in the record establishes an unexcused absence on September 3, 2018, when Mr. Pack was late for work without notifying the employer that he would be late. The evidence in the record is insufficient to establish any additional unexcused absences. There are no aggravating factors related to the September 3, 2018 absence beyond the failure to provide proper notice to the employer. That single factor would not cause the single unexcused absence to rise to the level of misconduct in connection with the employment. Mr. Pack is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 26, 2018, reference 03, decision is reversed. The claimant was discharged on September 3, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs