

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

LARRY A BUCKLEY
Claimant

APPEAL NO. 19A-UI-02904-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IMAGINE THE POSSIBILITIES INC
Employer

OC: 03/10/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Larry Buckley filed a timely appeal from the March 28, 2019, reference 01, decision that held he was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Mr. Buckley was discharged on March 13, 2019 for violation of a known company rule. After due notice was issued, a hearing was held on April 25, 2019. Mr. Buckley participated. Jeff Morris represented the employer and presented testimony through Pattijean "PJ" Gregorich-Roling and Kristen O'Toole.

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: Larry Buckley was employed by Imagine the Possibilities, Inc. as a Direct Support Professional from 2014 until March 13, 2019, when the employer discharged him from the employment. Mr. Buckley worked at a home in De Witt where four adult male disabled clients resided. Two of the clients were wheelchair bound. Two of the clients required 24-hour a day support. Mr. Buckley was responsible for ensuring the safety of the clients as well as supporting and assisting the clients with activities of daily living. Mr. Buckley's duties included accurately documenting the support and assistance services he provided to the clients per Medicaid requirements. Mr. Buckley received appropriate training, including training regarding the documentation duties.

About six months before the employment ended, Mr. Buckley transitioned from full-time to part-time status. In the part-time status, Mr. Buckley worked from 4:00 p.m. to 9:00 p.m. Monday through Thursday. In the part-time status, Mr. Buckley also worked on alternating weekends, Saturday and Sunday, from noon to 8:00 p.m. During all but the Monday shift, another staff person would also be on staff at the home during Mr. Buckley's shift. All of Mr. Buckley's breaks were paid breaks due to the fact that Mr. Buckley needed to remain available to the disabled clients as needed.

In January 2019, Kristen O'Toole joined Imagine the Possibilities, Inc. as Home and Community Based Services (HCBS) Coordinator and became Mr. Buckley's supervisor.

The incident that triggered the discharge occurred on Saturday, March 9, 2019. On that day, Mr. Buckley became rain soaked as he loaded the wheelchair-bound clients into the employer's van for an outing. Mr. Buckley became further rain-soaked when he unloaded the wheelchair-bound clients upon return to the home after the community outing. After Mr. Buckley had helped the clients back inside the home, he discussed with his coworker his desire to run home to quickly change out of his wet clothes. Mr. Buckley lived about four blocks from the workplace. Mr. Buckley went home, changed his slacks, and returned within about seven minutes of leaving. Mr. Buckley did not clock out when he left. Mr. Buckley did not initially document in his service notes that he had stepped away from serving the clients. Mr. Buckley did not notify the on-call supervisor of his need to leave the workplace to change out of wet clothes. Mr. Buckley was aware that if he needed to leave during the shift he was required to notify the on-call supervisor, clock out, and document his absence in his service notes. During Mr. Buckley's absence, one of the wheelchair-bound clients needed to use the restroom while another client was taking a shower. Mr. Buckley's female coworker told the wheelchair-bound client that he would need to wait for Mr. Buckley to return. On March 11, Team Lead Vicki Miller notified Ms. O'Toole about her conversation with the wheelchair-bound client who had to wait to use the restroom until Mr. Buckley returned from his brief absence. Ms. O'Toole then spoke to Mr. Buckley regarding the absence and his failure to clock out or document the absence in the service notes. Mr. Buckley asked how he could fix the situation. Ms. O'Toole directed him to document his absence in the service notes. Mr. Buckley promptly complied. The discharge followed on March 13, 2019. Mr. Buckley had received no prior discipline for similar conduct.

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 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 weight of the evidence in the record establishes a legitimate employer concern, but fails to establish misconduct in connection with the employment that would disqualify Mr. Buckley for unemployment insurance benefits. Mr. Buckley had an isolated lapse in judgment on March 10, 2019. Mr. Buckley needed to get out of his wet clothes. Mr. Buckley reasonably decided that most expedient thing to do was to go to his nearby home, change, and promptly return. Mr. Buckley discussed the matter with his coworker before he left and did not leave the clients entirely without care. Mr. Buckley was gone for seven minutes, meaning the wheelchair-bound client did not have to wait long for assistance with using the restroom. Mr. Buckley neglected in this brief, isolated instance to notify the on-call supervisor, to clock out, and to document the brief absence in the service notes. Mr. Buckley was not intentionally dishonest in connection with this single, brief, unexcused absence. Mr. Buckley did not willfully and wantonly disregard the interests of the employer or the interests of the clients in his care. Mr. Buckley is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The March 28, 2019, reference 01, decision is reversed. The claimant was discharged on March 13, 2019 for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs