IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

BRAD W FEINGOLD
Claimant

PRAIRIE MEADOWS RACETRACK & CASINO
Employer

APPEAL NO. 18A-UI-01910-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/14/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Brad Feingold filed a timely appeal from the February 7, 2018, reference 02, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Feingold was discharged on January 18, 2018 for wanton carelessness in performing his job. After due notice was issued, a hearing was held on March 8, 2018. Mr. Feingold participated. Pamela Anderson represented the employer.

ISSUE:

Whether Mr. Feingold 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: Brad Feingold was employed by Prairie Meadows Racetrack & Casino as a full-time TV Production Specialist from February 2017 until January 18, 2018, when the employer discharged him from the employment. Pamela Anderson, Human Resources Generalist, Michelke Wilkie, Vice President of Human Resources, and Ryan Dunn, TV Production Manager, discharged Mr. Feingold from the employment. George Yeager, TV Production Supervisor, was Mr. Feingold's immediate supervisor. Mr. Yeager reports to Mr. Dunn. Mr. Feingold's duties included various video production duties including creating promotional materials to be displayed on monitor's throughout the Prairie Meadows facility. Mr. Feingold has a bachelor's degree in radio and television broadcasting and had experience in various aspects of video production when he began the employment. The employer provided Mr. Feingold with training at the start of the employment and provided Mr. Feingold with three to five weeks of additional training in the fall of 2017.

The employer's decision to discharge Mr. Feingold form the employment was based on Mr. Feingold's work performance. The employer considered various incidents and concerns when making the decision to discharge Mr. Feingold from the employment. Mr. Feingold's health issues factored in the concerns. Mr. Feingold suffers from migraine headaches and Attention Deficit Hyperactivity Disorder (ADHD). Mr. Feingold did not disclose these issues at

that start of the employment because he did not want to draw attention to himself based on those issues.

While the employer had some concerns about Mr. Feingold's performance at various points throughout the employment, the employer did not address these with Mr. Feingold in any formal manner until October 2017, after Mr. Feingold left work early on October 17, 2017 due to a severe migraine and failed to notify a supervisor he was leaving early. At about that same time, Mr. Feingold worked on an employee service aware project that contained several errors. Mr. Feingold takes prescription medication for his migraine headaches, but had not taken any on October 17 prior to leaving work due to the severe migraine headache. Mr. Feingold had notified a coworker of his need to leave early. Mr. Feingold was aware of the requirement that he notify a supervisor. Mr. Feingold saw a doctor in connection with the early departure and the migraine headache incident and the doctor provided a note that referenced the medical appointment, the severe migraine, the need for Mr. Feingold to take his migraine medication, and the need for Mr. Feingold to have the medication with him at all times. Mr. Feingold provided the note to the employer. Mr. Yeager and Mr. Dunn spoke with Mr. Feingold on October 18, 2017 and suspended him pending a decision regarding discipline. The employer placed Mr. Feingold on a "final warning" in connection with the incident. On October 20, Pamela Anderson, Human Resources Generalist met with Mr. Feingold. Ms. Anderson advised Mr. Feingold that the employer required employees to disclose any medications they were taking. Mr. Feingold had been unaware of the requirement. Ms. Anderson requested a list of medications that Mr. Feingold was taking. Ms. Anderson asked Mr. Feingold whether he had anything he needed to disclose to the employer, meaning any health issues. Mr. Feingold referenced his migraine headaches and mentioned that he was seeing a doctor for "retention" issues. Mr. Feingold did not go into further detail. On November 15, Mr. Feingold provided the employer with a list of his prescription medications. In addition to the migraine medication, Mr. Feingold was also taking medication for depression and for ADHD. The employer's decision to issue a "final warning" to Mr. Feingold increased his fear that he would lose the employment, aggravated his medical issues, and adversely affected his work performance.

The final matters that triggered the discharge came to the employer's attention in early January 2018. On January 1, 2018, Mr. Feingold was supposed to take down a New Year's Eve promotion. Mr. Feingold took steps to remove the promotion from some of the monitors, but somehow missed removing the promotion near AG's Steakhouse. A marketing department employee noted the promotion on the monitor and reported it to the TV Production Department. On January 2, Mr. Dunn or Mr. Yeager contacted Mr. Feingold by telephone to quiz him regarding his retention of information. When Mr. Feingold was not able to access a long distance calling code quickly enough, the employer deemed this another deficiency in Mr. Feingold's performance. The employer asserts that Mr. Feingold deviated from departmental protocol on or about January 3 by archiving a production project in the wrong computer folder. Mr. Feingold had archived the material pursuant to his understanding of the department's archiving protocol. Also on January 3, Mr. Feingold had learned of a television that was not operating correctly in the "mutuals" area. Mr. Feingold discussed the issue with the mutuals employee and mentioned that the maintenance staff would need to be called. As a member of the TV Production department, Mr. Feingold was responsible for addressing such matters alone or with the assistance of the maintenance department as necessary. Though Mr. Feingold did not intend through his discussion with the mutuals employee to state that the mutuals employee needed to take further action, the employer subsequently perceived that to be the intent of the discourse.

Prior to discharging Mr. Feingold from the employment on January 18, 2018, the employer suspended Mr. Feingold on January 16. That was Mr. Feingold's first day back from a period of

approved vacation on January 8 through 15. Prior to the period of vacation, Mr. Feingold had last worked on January 5. When the employer met with Mr. Feingold on January 18, Mr. Feingold attempted to respond to the various concerns that Ms. Anderson raised at that time. However, the employer had already made the decision to end the employment and Ms. Anderson communicated that she not was open to hearing Mr. Feingold's explanations. Ms. Anderson told Mr. Feingold that the TV Production Specialist job was just not for Mr. Feingold and that it was not a good job match. Mr. Feingold had performed his work duties to the best of his ability and desired to continue in the employment.

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). 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 ordinarily 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.

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 the absence.

The evidence in the record establishes legitimate employer concerns about Mr. Feingold's work performance, but does not establish misconduct in connection with the employment. The administrative law judge notes that the employer elected not to present testimony from the persons with firsthand knowledge of most of the concerns that factored in the discharge. The employer had the ability to present such testimony. Such testimony was conspicuously absence in light of the technical, specialized nature of Mr. Feingold's work duties. The weight of the evidence in the record establishes that Mr. Feingold performed his work duties in good faith and to the best of his ability, but was unable to perform to the employer's satisfaction. That inability was based substantially on Mr. Feingold's underlying health issues that negatively impacted his ability to retain essential information. That inability did not constitute misconduct. The evidence establishes a single unexcused absence in connection with the severe migraine.

The absence was unexcused under the applicable law because Mr. Feingold failed to notify his supervisor or a manager. However, the evidence also establishes mitigating circumstances attending that absence. A reasonable person can understand and appreciate Mr. Feingold's statement that he was not in his right mind while experiencing the severe migraine headache. The employer presented insufficient evidence to establish a second unexcused absence.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Feingold was discharged for no disqualifying reason. Accordingly, Mr. Feingold is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 7, 2018, reference 02, decision is reversed. 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.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/rvs