

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

BILLY R PRATHER
Claimant

APPEAL NO. 18A-UI-05924-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY DOLLAR STORES OF IOWA LLC
Employer

OC: 05/06/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Billy Prather filed a timely appeal from the May 23, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on May 5, 2018 for misconduct in connection with the employment. After due notice was issued, a hearing was commenced on June 14, 2018 and completed on June 15, 2018. Claimant Billy Prather participated and presented additional testimony through Jacqueline Robinson. Clinton McElwee represented the employer. Exhibits 1 through 6 were received into evidence.

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: Billy Prather was employed by Family Dollar Stores of Iowa, L.L.C. as a full-time assistant manager until May 3, 2018, when Clinton McElwee, District Manager, discharged him from the employment. The employment began in 2015. Toward the end of the employment, Mr. Prather was assigned to a "micro team" of managers and could be assigned to assist at any one of the employer's retail stores in the Des Moines metropolitan area. Mr. Prather's usual work hours were 9:00 a.m. to 6:00 p.m., Monday through Friday, but he was expected to fill in as needed. Mr. Prather would receive his shift and store assignment schedule for the week on the Sunday that started the week in question.

The employer discharge decision was triggered by Mr. Prather's refusal to work a 3:00 p.m. to close shift on Wednesday, May 2, 2018. On Sunday, April 29, 2018, Mr. Prather received his schedule for the work week of April 30 through May 4. The schedule included a 9:00 a.m. to 6:00 p.m. shift on Wednesday, May 2. On Monday, April 30, Mr. McElwee determined that he needed Mr. Prather to work a 3:00 p.m. to close shift at a different store. Mr. McElwee had a store manager communicate the proposed change in May 2 shift to Mr. Prather. Mr. Prather contacted Mr. McElwee and told Mr. McElwee that he could not work a 3:00 p.m. to close shift

on May 2 because he had an appointment with the Iowa Department of Transportation in Newton on the morning of May 2. Mr. Prather had lost his driving privileges in December 2017 in response to non-payment of fines and needed to appear for the May 2 appointment in order to regain his driving privileges. Mr. Prather was staying in Perry at the time and would need to travel from Perry to Newton for the D.O.T. appointment. Mr. McElwee told Mr. Prather that the driver's license issue was not his concern and that he expected Mr. Prather to appear for the 3:00 p.m. to close shift. Mr. Prather told Mr. McElwee that he would not be appearing for the 3:00 p.m. to close shift and would be calling in an absence for the shift. When Mr. Prather did not appear for the 3:00 p.m. to close shift on May 2 and did not appear for his day shift on that date, Mr. McElwee discharged him from the employment the next day.

In making the decision to discharge Mr. Prather from the employment, Mr. McElwee also considered the fact that Mr. Prather had been operating a motor vehicle without driving privileges from December onward to deliver the employer's bank deposits to the bank. Mr. Prather had notified his supervisor of the loss of his driving privileges at the time his driving privileges were suspended and Mr. Prather had thereafter driven the bank deposits to the bank with the supervisor's knowledge that Mr. Prather lacked driving privileges.

In making the decision to discharge Mr. Prather from the employment, Mr. McElwee considered prior reprimands that had been issued to Mr. Prather for unsatisfactory work performance. Mr. McElwee cannot recall the particulars that factored in the earlier reprimands.

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.

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the

worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence establishes a discharge for no disqualifying reason. The employer reasonably directed Mr. Prather to appear for a 3:00 p.m. to close shift on May 2, 2018. The employer provided Mr. Prather with two days' notice of the need to amend his work schedule. Mr. Prather understood as a "floating" assistant manager that he was expected to fill in as needed. Mr. Prather unreasonably refused to appear for the shift. Mr. Prather could have appeared for his D.O.T. appointment on the morning of May 2 and still have appeared at 3:00 p.m. the same day to work the closing shift. The evidence does not establish a pattern of Mr. Prather unreasonably refusing reasonable employer directives.

The evidence establishes an unexcused absence on May 2, 2018, when Mr. Prather was absent for personal reasons. The evidence does not establish any other unexcused absences and, therefore, does not establish excessive unexcused absences.

The evidence fails to establish misconduct in connection with Mr. Prather's operation of his personal vehicle to take the employer's deposits to the bank. The employer had been aware of his circumstance for months and has thereby provided tacit approval of the practice.

The employer presented insufficient evidence to establish misconduct in connection with the prior written reprimands. The prior reprimands consist of boilerplate allegations without particulars or proof. The employer was unable to provide the particulars of the conduct that factored in the reprimands.

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

DECISION:

The May 23, 2018, reference 01, decision is reversed. The claimant was discharged on May 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