

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

RICHARD A HAYES
Claimant

SAFELITE SOLUTIONS LLC
Employer

APPEAL NO. 22A-UI-17629-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/04/22
Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge
Iowa Admin. Code Rule 871-24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

On October 3, 2022, the employer filed a timely appeal from the September 23, 2022 (reference 01) decision. The decision allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and held the employer's account could be charged for benefits, based on the deputy's conclusion the claimant was discharged on September 6, 2022 for attendance, but for no disqualifying reason. After due notice was issued, a hearing was held on October 26, 2022. Richard Hayes (claimant) did not comply with the hearing notice instructions to call the toll-free number at the time of the hearing and did not participate. Carrie Merrifield of Corporate Cost Control represented the employer and presented testimony through Annette Kohl and Samantha Betka. Exhibits 1 through 9 were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Richard Hayes was employed by Safelite Solutions, L.L.C. as a full-time Customer Service Representative until September 6, 2022, when the employer discharged him for attendance. The claimant performed his work from his home. The claimant began his employment in 2014. At the start of the employment, the employer provided the claimant a Supplemental Policies and Procedures Manual and had the claimant acknowledge his receipt. The manual included an attendance policy. Under the policy, if the claimant needed to be absent from work, he was required to call the automated attendance line at least two hours prior to his shift. The claimant could then choose "other" as the reason for the absence or could leave a message stating the

basis for the absence and requesting a return telephone call. If the claimant needed to leave work early, he was required to notify his supervisor. If the supervisor was not available, the claimant was required to call the automated attendance line.

The final absence that triggered the discharge occurred on August 29, 2022, when the claimant left work early due to the need to collect his child from school. The claimant properly notified his supervisor. The supervisor documented the contact, but did not document the reason why the claimant needed to collect his child from school. The supervisor is no longer with the employer. At the September 22, 2022 unemployment insurance fact-finding interview, the claimant told the Iowa Workforce Development deputy he needed to collect his child from school on August 29 because the child had a fever and there was no one else available to collect the child from school. The employer does not dispute the claimant's assertion regarding the need to collect his child from school on August 29, 2022 due to illness. However, once the claimant notified his supervisor of his need to leave, the supervisor conferred with the management team and the management team denied the request to leave early. The supervisor communicated the denial to the claimant. The claimant told the supervisor he was leaving for the stated purpose.

The employer considered the claimant's attendance during the last 12 months of the employment when making the decision to discharge the claimant from the employment. Prior to the final absence on August 29, 2022, the next most recent absence that factored in the discharge occurred on May 23, 2022. On that date and on 14 other days during the last year of the employment, the claimant gave timely notice of his need to absent, but provided "other" as the basis for the absence. The additional dates in question were September 12, 13 and 27, October 6, November 17, December 8, January 3 and 26, February 3, 14 and 23, March 1 and 7, and May 9. On April 28, 2022, the claimant left work early due to illness and with proper notice. On May 3, 2022, the claimant left work early due to a loss of Internet service and with proper notice. The claimant was required to maintain Internet service as a condition of the employment. The loss of Internet service was outside the claimant's control.

The discharge occurred in the context of several Corrective Counseling forms the employer issued to the claimant between July 15, 2021 and September 6, 2022. In addition to reprimands issued on those two dates, the employer issued Corrective Counseling documents to the claimant on December 7, January 13, March 1 and 14, and May 9 and 23. The claimant signed to acknowledge each.

Prior to discharging the claimant from the employment, the employer "refreshed" the claimant progressive discipline history as part of its decision not to discharge the claimant in connection with those earlier attendance matters.

During the last year of the employment, the claimant communicated that he had an ongoing health issue that factored in his attendance. The employer had the claimant communicate with the employer's third-party leave administrator for the purpose of determining whether the claimant was eligible for intermittent leave in connection with some or all of his absences. The claimant did not provide the necessary supporting medical documentation and the request for intermittent leave was denied.

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 Legislature recently codified the misconduct definition along with a list of types of disqualifying misconduct. See Iowa Code section 96.5(2)(d).

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 Admin. Code r.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 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.

The evidence in the record establishes a September 6, 2022 discharge for attendance, but for no disqualifying reason. The final absence on August 29, 2022 was an early departure that was based on the claimant's need to collect his child from school. The employer does not dispute the assertion the claimant made at the fact-finding interview that the child was ill. The evidence does not prove an August 29, 2022 unexcused absence within the meaning of unemployment law. The employer's decision to deny the claimant's request to leave early does not change the absence from an excused absence under the applicable law to an unexcused absence under the applicable law. Because the final absence was an excused absence under the law, and because the next most recent absence occurred three months earlier, the evidence fails to establish a current act of misconduct. Because the evidence fails to establish a current act of misconduct, the discharge does not disqualify the claimant for unemployment insurance benefits, regardless of the earlier attendance issues and pattern. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The September 23, 2022 (reference 01) decision is AFFIRMED. The claimant was discharged on September 6, 2022 for attendance, but for no disqualifying reason. The discharge was not based on a current act of misconduct. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

A handwritten signature in black ink that reads "James E. Timberland". The signature is written in a cursive, flowing style.

James E. Timberland
Administrative Law Judge

October 31, 2022
Decision Dated and Mailed

mh

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.