

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

KEVIN M CHRISTOPHERSON
Claimant

APPEAL NO. 18A-UI-06940-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUBUQUE STAMPING & MFG INC
Employer

OC: 06/03/18
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 21, 2018, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on June 5, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on July 16, 2018. Claimant Kevin Christopherson participated. Matt Spahn represented the employer and presented additional testimony through Amy Weidenbacher. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6 into evidence.

ISSUES:

Whether Mr. Christopherson was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

Whether Mr. Christopherson was overpaid unemployment insurance benefits.

Whether Mr. Christopherson must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kevin Christopherson was employed by Dubuque Stamping & Manufacturing, Inc. as a full-time Automation Tender from 2014 until June 5, 2018, when Matt Spahn, Vice President, and Amy Weidenbacher, Human Resources Administrator, discharged him from the employment for attendance. During the last several weeks of the employment, Mr. Christopherson's usual work hours were 8:00 p.m. to 7:00 a.m., Sunday evening through Friday morning.

If Mr. Christopherson needed to be absent or late for work, the employer's attendance policy required that he telephone the workplace prior to the scheduled start of his shift and speak to a

supervisor or to Amy Weidenbacher, Human Resources Administrator. Mr. Christopherson was aware of the absence reporting policy.

The incident that triggered the discharge was Mr. Christopherson's absence from the shift that started at 8:00 p.m. on Thursday, May 31, 2018 and that would have ended at 7:00 a.m. on Friday, June 1, 2018. Mr. Christopherson decided not to report for the shift because he anticipated he would be assigned to run a machine press he felt he had not been fully trained to operate. Mr. Christopherson reported his absence to the employer prior to the scheduled start of the shift, but did not provide a reason for the absence. Mr. Christopherson thought that if he reported for the shift, he would end up in an argument with the supervising foreman. Mr. Christopherson asserts that he suffers from depression and anxiety that these issues made a heated disagreement with the foreman about the machine assignment more likely to occur. Mr. Christopherson had not disclosed his mental health issues to the employer and had not requested an accommodation based on the mental health issues. Mr. Christopherson had reported for work as scheduled on May 30, 2018. During that shift, the foreman assigned Mr. Christopherson to operate a machine that Mr. Christopherson did not want to operate. Mr. Christopherson had previously performed set-up or "utility" work on the machine, but had not operated the particular machine as a machine press operator. Mr. Christopherson left that shift early because he did not want to operate the assigned machine. Mr. Christopherson had used a half day of vacation in connection with early departure from the May 30-31 shift and the employer did not count that early departure against Mr. Christopherson when making the decision to discharge him from the employment.

In making the decision to discharge Mr. Christopherson from the employment, the employer considered additional absences dating back to June 28, 2017. On that day, Mr. Christopherson was late for personal reasons.

On July 28, 2017, Mr. Christopherson was absent due to illness and properly reported the absence.

On September 8, 2017, Mr. Christopherson was absent with proper notice to the employer, but neither the employer nor Mr. Christopherson recalls the reason for the absence.

On October 13, 2017, Mr. Christopherson was absent due to illness and properly reported the absence to the employer.

On December 12, 2017, Mr. Christopherson left work early due to illness and with proper notice to the foreman.

On December 20, 2017, Mr. Christopherson overslept and provided late notice of his need to be absent. The employer documented the absence as a no-call/no-show. On December 21, 2017, Ms. Weidenbacher issued a "final" written reprimand to Mr. Christopherson for attendance.

On January 10, 2018, Mr. Christopherson was late for personal reasons. On that same day, Foreman Louis Tsacadakis and Amy Weidenbacher met with Mr. Christopherson to discuss his late arrival. At that time, they issued a verbal warning to Mr. Christopherson and told him that his next "occurrence" would result in termination of the employment.

On January 15, 2018, Mr. Christopherson left work early in connection with a family health emergency, appropriate notice to the employer and approval for the early departure.

On March 12, April 2, and May 29, 2018, Mr. Christopherson was late for work for personal reasons.

Mr. Christopherson established an original claim for unemployment insurance benefits that Iowa Workforce Development deemed effective June 3, 2018. Mr. Christopher received \$2,275.00 in benefits for the five weeks between June 17, 2018 and July 21, 2018. Dubuque Stamping & Manufacturing, Inc. is the sole base period employer for purposes of the claim. On June 20, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Christopherson's separation from the employment. Matt Spahn, Vice President, represented the employer at the fact-finding interview.

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 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.

The weight of the evidence in the record establishes a discharge based on excessive unexcused absences. The final absence for the shift that started May 31, 2018 was an unexcused absence. On that day, Mr. Christopherson was absent for personal reasons, namely that he did not want to operate the machine he expected to be assigned to and because he assumed there would be a heated exchange with the foreman regarding the machine assignment. Neither reason was sufficient to establish an excused absence under the applicable law. The evidence fails to establish a bona fide health issue that necessitated the absence on May 31. The weight of the evidence establishes additional unexcused absences on December 20, 2017, and on January 10, March 12, April 2, and May 29, 2018, on which dates Mr. Christopherson was late for personal reasons. The pattern of unexcused absences occurred in the context of employer warnings for attendance. Mr. Christopherson's pattern of excessive unexcused absences demonstrated an intentional and substantial disregard for the employer's interests. The employer reasonably expected Mr. Christopherson to show up for work and to show up on time.

Because the evidence in the record establishes a discharge for misconduct in connection with the employment, Mr. Christopherson is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Christopherson must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Christopherson received \$2,275.00 in benefits for the five weeks between June 17, 2018 and July 21, 2018, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Christopherson received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. Christopherson is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid to Mr. Christopherson.

DECISION:

The June 21, 2018, reference 01, decision is reversed. The claimant was discharged on June 5, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant is overpaid \$2,275.00 in benefits for the five weeks between June 17, 2018 and July 21, 2018. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs