

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JOHNATHAN BELL
Claimant

APPEAL NO. 20A-UI-06914-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ANNETT HOLDINGS INC
Employer

OC: 04/26/20
Claimant: Respondent (2/R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Recovery of Overpaid Benefits
Public Law 116-136, Section 2104(b) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 17, 2020, reference 01, decision that allowed benefits to the claimant provided he met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on April 16, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on July 30, 2020. Claimant Johnathan Bell participated. Jeremy Small represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 8 into evidence.

ISSUES:

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

Whether the claimant was overpaid regular benefits.

Whether the claimant was overpaid Federal Pandemic Unemployment Compensation.

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: Johnathan Bell was employed by Annett Holdings, Inc. as a full-time Dedicated Fleet Manager until April 16, 2020, when the employer discharged him for attendance. Mr. Bell began his employment in 2015 and assumed the fleet manager position in June 2019. Mr. Bell's work hours were 7:00 a.m. to 4:30 p.m., Monday through Friday. Jeremy Small, Operations Manager, was Mr. Bell's supervisor. As fleet manager, Mr. Bell was responsible for managing a fleet of 36 drivers to ensure that loads were picked and delivered as needed. Mr. Bell was responsible for communicating with the drivers via the employer's messaging system, through email, and by phone. Mr. Bell was also required to maintain appropriate communication with Mr. Small. Toward the end of Mr. Bell's employment, he had transitioned to performing his work

from home in response to the COVID-19 pandemic. The employer could track Mr. Bell's work time by when he logged into the employer's computer system.

The final absence that triggered the discharge occurred on April 16, 2020, when Mr. Bell did not start working until 9:44 a.m. The weight of the evidence indicates that Mr. Bell had overslept that morning. Mr. Small made multiple attempts to reach Mr. Bell that morning. When Mr. Small was finally able to communicate with Mr. Bell, Mr. Bell asserted that his phone had been dead so he could not communicate. Mr. Bell also asserted that he had been on and off the computer system that morning due to the system kept kicking him off. Mr. Bell had first logged onto the computer system at 9:44 a.m. Mr. Bell was required to maintain a working phone so that he could communicate with drivers and with the employer.

The April 16, 2020 late start followed at least two prior incidents wherein Mr. Bell had been late for work due to oversleeping. On November 13, 2019, Mr. Bell reported for work at 8:45 a.m. due to oversleeping. On December 4, 2019, Mr. Bell reported for work at 8:30 a.m. due to oversleeping. Mr. Small prepared a written reprimand in connection with that incident. The reprimand identifies the December 4 incident as the third oversleeping incident. The document placed Mr. Bell on probation for six months and warned him that another similar incident would trigger discharge from the employment.

Mr. Bell established an original claim for benefits that was effective April 26, 2020 and received both regular benefits and Federal Pandemic Unemployment Compensation (FPUC) benefits in connection with the claim. The regular benefits paid to Mr. Bell for the period of May 3, 2020 through August 29, 2020 totaled \$8,177.00. The FPUC benefits paid to Mr. Bell for the period of May 3, 2020 through July 25, 2020 totaled \$7,200.00. This employer is the sole base period employer in connection with the claim.

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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163

(Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The evidence in the record establishes an April 16, 2020 discharge for misconduct in connection with the employment. The weight of the evidence establishes that Mr. Bell was late for work due to oversleeping on November 13 and December 4, 2019. Mr. Bell was again late due to oversleeping on April 16, 2020. The weight of the evidence establishes that Mr. Bell was intentionally dishonest with the employer during the discussion about his late start on April 16, 2020. Mr. Bell asserted he had been working, but he did not log into the computer system until 9:44 a.m. Mr. Bell asserts on the one hand that his phone was dead while he asserts on the other hand that he had been communicating with drivers that morning. The weight of the evidence establishes that Mr. Bell had not been doing any work prior to 9:44 a.m. that morning. The excessive unexcused absences combined with the intentional dishonesty in connection with the final incident were sufficient to demonstrate intentional and substantial disregard for the interests of the employer. Mr. Bell is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Bell must meet all other eligibility requirements. The employer's account shall not be charged for benefits paid to Mr. Bell for the period beginning August 30, 2020.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied 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 employer failed to participate in the initial proceeding, the employer will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Because this decision disqualifies Mr. Bell for benefits, the \$8,177.00 in regular benefits that he received for the period of May 3, 2020 through August 29, 2020 is an overpayment of benefits. The matter of deciding whether the overpaid regular benefits should be recovered from the claimant or charged to the employer under Iowa Code § 96.3(7)(b) is remanded to the Benefits Bureau.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as “Federal Pandemic Unemployment Compensation”).

....

(f) Fraud and Overpayments

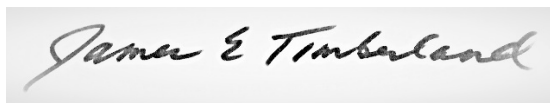
(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

Because the claimant is disqualified from receiving regular unemployment insurance (UI) benefits, the claimant is also disqualified from receiving Federal Pandemic Unemployment Compensation (FPUC). The \$7,200.00 in FPUC benefits the claimant received for the period of May 3, 2020 through July 25, 2020 constitutes an overpayment of benefits. Claimant is required to repay those benefits.

DECISION:

The June 17, 2020, reference 01, decision is reversed. The claimant was discharged on April 16, 2020 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 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits paid to Mr. Bell for the period beginning August 30, 2020. The claimant is the \$8,177.00 in regular benefits for the period of May 3, 2020 through August 29, 2020. This matter is remanded to the Benefits Bureau for determination of whether the claimant must repay the overpaid regular benefits or whether the employer's account may be charged for the overpaid benefit. The employer's account shall not be charged for benefits for the period beginning August 20, 2020. The claimant is overpaid \$7,200.00 in FPUC benefits for the period of May 3 2020 through July 25, 2020 and must repay those benefits.

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. *If this decision becomes final or if you are not eligible for Pandemic Unemployment Assistance (PUA), you will have an overpayment of benefits that you will be required to repay.* Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.



James E. Timberland
Administrative Law Judge

September 9, 2020
Decision Dated and Mailed

jet/scn