

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**BRIAN L HIVELEY**  
Claimant

**APPEAL NO. 20A-UI-03095-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SANDE CONSTRUCTION AND SUPPLY CO**  
Employer

**OC: 03/08/20**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 2, 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 March 10, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on May 7, 2020. Claimant Brian Hiveley participated. Tonya Heier represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO and KPYX).

**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: Brian Hiveley was employed by Sande Construction and Supply Company as a full-time laborer from August 2019 until March 10, 2020, when Roger Vandermatten, Superintendent, discharged him from the employment for attendance. Mr. Vandermatten was Mr. Hiveley's immediate supervisor. Mr. Hiveley's work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. If Mr. Hiveley needed to be absent or late, the employer's attendance policy required that Mr. Hiveley notify Mr. Vandermatten at least 30 minutes prior to the scheduled start of the shift. The employer accepted phone calls and text messages as proper forms of notice. Mr. Hiveley was at all relevant times aware of the attendance policy, including the absence reporting requirement.

The final absence that factored in the discharge occurred on March 10, 2020, when Mr. Hiveley was absent due to illness. At 6:30 a.m., Mr. Hiveley sent a text message to Mr. Vandermatten to let the employer know he was sick and would be going to the doctor. Mr. Vandermatten responded with a text message in which he told Mr. Hiveley to look for a new job. In other words, the text message communicated a discharge from the employment.

The employer considered several earlier absences when making the decision to discharge Mr. Hiveley from the employment. Mr. Hiveley was absent due to illness and with proper notice to the employer on February 7, February 27, and March 5, 2020. Mr. Hiveley had been late getting to work for personal reasons on February 10, February 17, February 24, March 2, and March 9, 2020. These absences were based on issues like oversleeping, needing to stop and get gas, not budgeting sufficient travel time, and dropping off children. On February 20, 2020, Mr. Hiveley left work early with permission after his parole officer moved up his meeting time at the last minute. On February 26, 2020, Mr. Hiveley was absent for what was likely a Child in Need of Assistance hearing that he knew about a month in advance, but failed to request off until 30 minutes before he was scheduled to work. On March 2, 2020, Mr. Vandermatten verbally counseled Mr. Hiveley regarding tardiness.

#### **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.

The weight of the evidence in the record establishes a discharge for no disqualifying reason. The final absence that triggered the discharge was due to illness, was properly reported to the employer, and therefore was an excused absence under the applicable law. Because the final absence was an excused absence under the applicable law, the discharge would not disqualify Mr. Hiveley for unemployment insurance benefits and that administrative law judge need not further consider the earlier absences. Mr. Hiveley is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The April 2, 2020, reference 01, decision is affirmed. The claimant was discharged on March 10, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

A rectangular box containing a handwritten signature in cursive script that reads "James E. Timberland".

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James E. Timberland  
Administrative Law Judge

May 20, 2020  
Decision Dated and Mailed

jet/scn