

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN P ATKINS
Claimant

APPEAL NO. 13A-UI-07094-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ATLANTIC BOTTLING CO
Employer

OC: 04/28/13
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 6, 2013, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on July 16, 2013. Claimant Justin Adkins participated. Mike Pappas represented the employer and presented additional testimony through Aaron Stevens. Exhibits Two, Three, Four and A were received into evidence.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Justin Atkins started his employment with Atlantic Bottling Company on April 29, 2013 and last performed work for the employer on May 1, 2013. His scheduled start time was 12:30 p.m. and he would work until all of the loading work was completed. His immediate supervisor was Warehouse Supervisor Aaron Stevens. At 10:45 a.m. on May 2, Mr. Adkins sent Mr. Stevens a text message indicating his need to be absent due to illness. The employer's written attendance policy required that Mr. Adkins *telephone* the employer and speak directly to the supervisor prior to the start of his shift if he needed to be absent. The policy was set forth in work rules Mr. Adkins had signed prior to the start of his employment and in the additional work rules the employer had provided to Mr. Adkins before he started performing work. When Mr. Stevens received Mr. Adkins' text message on May 2, he sent a responsive text that reminded Mr. Adkins that he needed to call if he needed to be absent. In addition, Mr. Stevens notified Mr. Adkins that he was discharged from the employment based on being absent during the first week of the employment. When Mr. Adkins responded by text message that he had a doctor's note, Mr. Stevens responded by text that the presence of a doctor's note might prompt him to reconsider the discharge. Mr. Adkins did not make further contact with Mr. Stevens. Mr. Adkins appeared at the workplace for the sole purpose of collecting his final paycheck.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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.

871 IAC 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.

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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly

be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

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 evidence in the record establishes a discharge for attendance that was based on a single unexcused absence. The absence was unexcused because it was not properly reported to the employer. The single unexcused absence was insufficient to establish misconduct that would disqualify Mr. Adkins for unemployment insurance benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). The separation from employment occurred at the time the supervisor notified Mr. Adkins he was discharged from the employment. Mr. Adkins was not thereafter obligated to make further contact with Mr. Stevens in attempt to get the job back. Mr. Adkins is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's June 6, 2013, reference 03, decision is affirmed. The claimant was discharged 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/css