

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

DAVID A TAYLOR
Claimant

APPEAL NO. 18A-UI-12180-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

YELLOWBOOK INC
Employer

**OC: 11/18/18
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

David Taylor filed a timely appeal from the December 11, 2018, reference 01, decision that held he was disqualified for benefits and that the employer's account would not be charged for benefits, based on the deputy's conclusion that Mr. Taylor was discharged on November 20, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on January 8, 2019. Mr. Taylor did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Maria Gaffney, Human Resources Generalist, represented the employer.

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: David Taylor was employed by Yellowbook, Inc. as a Senior Digital Services Consultant from 2015 until November 20, 2018, when the employer discharged him from the employment for attendance. The final absence that triggered the discharge occurred on November 16, 2018, when Mr. Taylor was absent due to illness and properly reported the absence by speaking with his supervisor prior to the scheduled start of his shift. Mr. Taylor had also been absent due to illness on November 15, 2018 and had properly notified the employer of his need to be absent that day. Under the employer's attendance policy, employees are provided three hours and five minutes of vacation time each pay period. If an employee's absence during the pay period exceeds that allotment, the employer deems the absence unexcused unless the absence is covered by approved leave under the Family and Medical Leave Act (FMLA). In connection with these two final absences, the employer provided Mr. Taylor with FMLA paperwork that Mr. Taylor's doctor declined to complete.

The employer considered earlier absences when making the decision to discharge Mr. Taylor from the employment. The next most recent absence that factored in the discharge occurred on October 18, 2018, when Mr. Taylor was absent due to transportation issues and properly

notified the employer. On October 22, the employer issued a Final Warning to Mr. Taylor in connection with the October 18 absence and warned that additional absences could lead to discipline including discharge from the employment. On October 3, 2018, Mr. Taylor was an hour late for work for a reason not known by the employer witness. Mr. Taylor properly notified the employer of his need to be absent. The next most recent absence that factored in the discharge occurred on September 10, 2018, when Mr. Taylor was late for work for a reason not known by the employer witness. Mr. Taylor properly notified the employer of his need to be absent. On September 24, the employer issued a written reprimand to Mr. Taylor and warned that additional absences could lead to discipline including discharge from the employment. There were additional earlier absences, the particulars of which are unknown by the employer witness. On July 26, 2018, the employer "coached" Mr. Taylor regarding his attendance. The coaching was the first step in the employer's progressive discipline rubric. On August 7, 2018, the employer issued a written reprimand to Mr. Taylor for attendance.

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 Iowa Administrative Code rule 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 Iowa Administrative Code rule 871-24.32(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 discharge for no disqualifying reason. The final two absences, those on November 15 and 16, 2018, were due to illness, were properly reported to the employer and, therefore, were excused absences under the applicable law. The employer's additional requirement that the absences be supported by FMLA documentation does not transform these excused absences into unexcused absences under the applicable law. The next most recent absence that factored in the discharge occurred about a month earlier than the final absences and would not constitute a "current act" for purposes of determining Mr. Taylor's eligibility for unemployment insurance benefits. Because the final absences were excused absences under the applicable law, and because the evidence fails to establish a current act of misconduct, the discharge from the employment would not disqualify Mr. Taylor for unemployment insurance benefits. Because the discharge was not based on a current act of misconduct, the administrative law judge need not consider the earlier reprimands or the earlier absences. Mr. Taylor is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The December 11, 2018, reference 01, decision is reversed. The claimant was discharged on November 20, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs