

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRADLEY D HARRIS
Claimant

APPEAL NO. 15A-UI-09016-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CERNER CORPORATION
Employer

OC: 07/19/15
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 August 6, 2015, 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 an Agency conclusion that the claimant was discharged on July 23, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on August 31, 2015. Claimant Bradley Harris participated. Morgan Miller represented the employer and presented additional testimony through Poly Peterson. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance 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: Bradley Harris was employed by Cerner Corporation as a full-time business operation analyst from April 2015 until July 23, 2015, when the employer discharged him for attendance. Mr. Harris became an employee of Cerner Corporation when that company's contract to provide information technology support services to Genesis Health System went into effect. Mr. Harris had been employed by Genesis up to the time that Genesis outsourced the I.T. department to Cerner. Mr. Harris' work hours at Cerner were 8:00 a.m. to 5:00 p.m., Monday through Friday. Cerner's I.T. offices were located in Bettendorf. Mr. Harris' immediate supervisor at Cerner was Scott Francis, Team Manager. Cerner's attendance policy required that Mr. Harris notify his immediate supervisor as soon as possible of his need to be absent from work. The employer

allowed such notice by telephone, email, or text message. Mr. Harris was aware of the requirement.

Mr. Harris' employment with Cerner was problematic from the start, in that the new employer did not appear to have much work for Mr. Harris to perform. Mr. Harris initially assisted with the I.T. helpdesk at Genesis' East campus. That assignment ended on May 5, 2015. A month later, Mr. Harris asked for a meeting to discuss why he had not been assigned to other duties. For the most of the employment with Cerner, Mr. Harris' duties included making rounds at the various Genesis campuses to troubleshoot computer issues.

At the beginning of July 2015, Mr. Harris began to miss a substantial amount of work. On July 1, Mr. Harris sent Mr. Francis an email message at 7:24 a.m. indicating that he was taking "personal time" that day and the next and would return on Monday, July 6, 2015. July 3 was a scheduled holiday and Mr. Harris was not scheduled to work that day. Mr. Harris took the time off because he felt there was no work for him to perform that week. Mr. Harris believed he had complied with the employer's absence notification policy.

On July 8, Mr. Harris sent Mr. Francis an email message at 7:34 a.m. indicating that he would be out of the office that day and would return on July 9. Mr. Harris indicated in his message that he would be out of town that morning, but would back after 3:00 p.m. if needed. On the morning of July 9, Mr. Harris notified Mr. Francis that he would be absent that day. On the evening of July 9, Mr. Harris sent Mr. Francis an email message indicating that he was dealing with an unexpected emergency, that he would be out for the rest of the week, and that he would return on July 13, 2015. Mr. Harris had become involved with his brother's marital and mental health issues. Mr. Harris' brother had learned that his wife had an affair. Mr. Harris' brother was threatening gun violence. Mr. Harris elected not to contact law enforcement. Mr. Harris took steps to facilitate his brother's voluntary commitment to an inpatient psychiatric facility.

On July 13, Mr. Harris returned to work and the employer met with Mr. Francis for the purpose of issuing a reprimand for attendance. At the time of the meeting the employer provided Mr. Harris with an opportunity to share any additional information about the absences and Mr. Harris declined to do so. At the time of the reprimand, the employer directed Mr. Harris to notify Mr. Francis any time he needed to perform work away from the Cerner's Bettendorf office. The employer also imposed a requirement that Mr. Harris provide at least two-weeks' notice of his need to be absent.

Mr. Harris had additional absences thereafter. The employer documented an early departure on July 20 and documented that Mr. Harris had not provided notice to the employer of his need to leave early that day. Mr. Harris asserts that he was "rounding" at other locations to let the staff at those locations know that he would not be rounding anymore. The employer documented an early departure on July 21. Mr. Harris asserts that he was instead rounding that day at Le Claire and has intended to round at another facility across the river, but had been held up in traffic. At 7:06 a.m., Mr. Harris sent an email message to Mr. Francis, indicating that he was taking PTO that day and would not be in. Mr. Harris was next scheduled to work on July 23.

When Mr. Harris appeared for work on July 23, the employer met with him to discuss the additional absences. At the time of the meeting the employer provided Mr. Harris with an opportunity to share any additional information about the absences and Mr. Harris declined to do so. The employer then discharged Mr. Harris from the employment.

Mr. Harris asserts that his July absences were based on a need to assist his brother. Mr. Harris asserts that his brother had discovered that his wife was having an affair. Mr. Harris asserts

that he needed to assist his brother with a voluntary mental health hospitalization and that on July 22, he had to travel to Des Moines to prevent his brother from traveling to Colorado to confront the other male involved in the domestic issue.

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.

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). 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.

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).

The evidence is insufficient to establish absences that would be unexcused absences under the applicable law. The employer elected not to present testimony from Mr. Harris' immediate supervisor, Mr. Francis. That testimony was conspicuously absent, especially in light of the somewhat unique circumstances attending the employment. Mr. Francis provided credible testimony that a substantial factor in his decision to take time off during July was the fact that the employer declined to provide him with work to perform. The employer has presented insufficient evidence to rebut Mr. Harris' assertion that he had complied with the established absence notification procedure. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Harris was discharged for no disqualifying reason. Accordingly, Mr. Harris is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The August 6, 2015, reference 01, 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