

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TANNER J BAKKE
Claimant

APPEAL NO. 14A-UI-01943-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STREAM INTERNATIONAL INC
Employer

OC: 01/05/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Tanner Bakke filed a timely appeal from the February 10, 2014, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 12, 2014. Mr. Bakke participated. Staci Albert represented the employer. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant (DBRO).

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 \$564.00 in benefits for the period of January 12-25, 2014.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tanner Bakke was employed by Stream International, Inc., as a full-time customer service professional from February 2012 until January 9, 2014, when Seth Door, Team Manager, and Staci Albert, Human Resources Manager, discharged him for attendance.

If Mr. Bakke needed to be absent from work, the employer's written attendance policy required that he telephone the workplace at least an hour prior to the scheduled start of his shift and speak with a manager. The policy was contained in the employee handbook that Mr. Bakke received at the start of his employment.

The final absence that triggered the discharge occurred on January 6, 2014, when Mr. Bakke was absent due to a lack of transportation and illness. Mr. Bakke had properly notified the employer of the absence. At the time of discharge on January 9, 2014, the employer solicited information to confirm the transportation basis for the discharge. During that same meeting, Mr. Bakke reiterated that the absence has also been due to illness.

The next most recent absence that factored in the discharge was Mr. Bakke's early departure on December 26, 2013. Mr. Bakke's grandmother was hospitalized at the time. During the shift Mr. Bakke's wife telephoned him at work and advised him that his grandmother might not survive the day. Mr. Bakke spoke to a supervisor before leaving the workplace. The supervisor told Mr. Bakke that he would receive an attendance point for the absence unless the employer determined it had more workers than it needed for the day. The employer assigned an attendance point to the absence. On December 27, 2013, the employer issued written reprimand to Mr. Bakke and told him that he could not miss any work in the subsequent 30 days. The final absence followed that final warning.

In making the decision to end the employment, the employer considered additional absences going back to July 17, 2013. On July 17, 22, and 24, 2013, Mr. Bakke was absent for personal reasons. On July 25, Mr. Bakke was absent due to a lack of transportation. On September 22 2013, Mr. Bakke was absent so that he could attend a wedding reception. Mr. Bakke had earlier requested September 22 and 23 off. Mr. Bakke made the request through the employer's Internet-based time off request procedure. The employer did not act on the request. Mr. Bakke knew at the time he commenced the absence that the employer had not approved the absence. Mr. Bakke contacted the workplace on the first day of the absence. The employer approved one day off because it had an excess of workers that day, but the employer did not approve the other day and assigned an attendance point. On October 2, 2013, Mr. Bakke was absent for personal reasons. On December 4, 2013, Mr. Bakke was absent due to illness and properly notified the employer.

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 administrative law judge notes that the employer did not present the most direct and satisfactory evidence. The employer's record-keeping system concerning the claimant's absences was flawed. The employer was unable to say when Mr. Bakke notified the employer of a particular absence because the employer's record-keeping system allows supervisors to delay documenting such matters until after the shift is done and does not require that the supervisor document the time the employee notified the employer of the absence. The employer's method of delayed documentation of absences also calls into question the accuracy of the information documented by the supervisor. The administrative law further notes that the

employer did not provide testimony from any of the supervisors to whom Mr. Bakke spoke when reporting his absences.

The evidence in the record establishes two reasons for the final absence. The first was a lack of transportation. Had that been the only basis for the absence, the absence would have been an unexcused absence under the applicable law. However, the absence was also due to illness. Mr. Bakke gave the employer timely notice of the absence. Because illness was a basis for the absence and because the absence was properly reported to the employer, the final absence that triggered the discharge was an excused absence under the applicable law and cannot be used as a basis for disqualifying Mr. Bakke for unemployment insurance benefits. Because the final absence was an excused absence under the applicable law, the evidence fails to establish a current act of misconduct and the administrative law judge need not consider the earlier absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Bakke was discharged for no disqualifying reason. Accordingly, Mr. Bakke is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's February 10, 2014, reference 01, decision is reversed. 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/pjs