

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**ISRAEL R MONTELONGO**  
Claimant

**US VENTURE INC**  
Employer

**APPEAL NO. 21A-UI-17742-JT-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/30/21  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the August 9, 2021, reference 01, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on May 21, 2021 for violation of a known company rule. After due notice was issued, a hearing was held on October 4, 2021. The claimant participated. The employer did not provide a telephone number for the appeal hearing and did not participate. Exhibit A was received into evidence.

**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: The claimant was employed by U.S. Venture, Inc. as a full-time, salaried Assistant Operations Manager from December 2020 until May 21, 2021, when the employer discharged him from the employment. The claimant last performed work for the employer on May 18, 2021. The claimant's core work hours were 5:00 a.m. to 1:30 p.m., Monday through Friday. The claimant generally had to work until 3:30 to 4:00 p.m. The claimant also had to work weekends or be on-call on the weekends.

At the time of the discharge, the employer referenced attendance as a basis for the discharge. On May 19 and 20, 2021, the claimant was absent due to illness and properly notified the employer by texting the Operations Manager prior to the start of the shift. On May 21, 2021, the claimant was absent to care for his sick toddler and properly notified the employer. The claimant is a single parent. The claimant's sister usually cares for the claimant's child when the claimant is at work. The claimant could not take his child to sister on May 21, 2021 due to a concern that claimant's son's illness might be passed onto his sister's children. At the time of the discharge, the employer aid the employment was not working out. The claimant had received no warnings or reprimands for attendance. The claimant was aware the employer's policy required six reprimands for attendance prior to discharge.

At the time of the discharge, the employer also referenced an alleged failure to complete random drug screens and evaluations. The employer had given the claimant a June 18, 2020 deadline to complete this work, but discharged the claimant about a month before that deadline. Many of the evaluations had been due prior to the claimant beginning his employment.

At the time of the discharge, the claimant asked to speak with the operations manager regarding the basis for the discharge. The human resources representative advised the claimant that the operations manager declined to speak with him.

### **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 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 employer did not participate in the appeal hearing and presented no evidence to meet its burden of proving a discharge based on misconduct in connection with the employment. The evidence establishes a discharge based primarily on attendance. The final absence that factored in the discharge was based on the claimant's need to care for his sick child and was properly reported to the employer. The absence was an excused absence under the applicable law. The next most recent absences were due to the claimant's illness, were properly reported to the employer, and were excused absences under the applicable law. There is no basis for a finding of misconduct based on attendance and no evidence of any other misconduct in connection with the employment. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The August 9, 2021, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

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

October 6, 2021  
Decision Dated and Mailed

jet/kmj