

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SETH M RUTLEDGE
Claimant

APPEAL NO. 19A-UI-07955-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SOLAR PLASTICS LLC
Employer

OC: 09/15/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Seth Rutledge filed a timely appeal from the October 2, 2019, reference 01, decision that held he was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Mr. Rutledge was discharged on September 16, 2019 for excessive unexcused absences. After due notice was issued, a hearing was held on October 31, 2019. Mr. Rutledge participated. Carrie Lantz represented the employer. Exhibits 1 through 7 were 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: Seth Rutledge was employed by Solar Plastics, L.L.C., as a full-time trimmer/machine operator from 2017 until September 16, 2019, when the employer discharged him for attendance. On February 4, 2019, the employer implemented a new, no-fault attendance policy. The employer reviewed the policy with Mr. Rutledge on January 31, 2019. Under the new policy, Mr. Rutledge was required to call the attendance line at least an hour before the scheduled start of his shift to give notice of his need to be absent. The supervisor would listen to the message left on the call in line and was responsible for documenting the information provided.

From December 2018 until the September 16, 2019 discharge, Mr. Rutledge was assigned to the overnight shift. The work hours for the overnight shift were 11:00 p.m. to 7:00 a.m. Mr. Rutledge's work week would start on Sunday evening and would end on Friday morning unless Mr. Rutledge worked an overtime shift on Friday evening into Saturday morning. Drew Lesthaeghe, 3rd Shift Supervisor, was Mr. Rutledge's supervisor. Two lead workers, Brian and Dennis, assisted in directing Mr. Rutledge's work.

The final absence that triggered the discharge occurred on Friday, September 13, 2019, when Mr. Rutledge was absent from the overtime shift scheduled to start at 11:00 p.m. that evening

and scheduled to end at 7:00 a.m. the next morning. On September 12, 2019, Mr. Rutledge had volunteered to work the overtime shift and Mr. Lesthaeghe approved adding the shift to Mr. Rutledge's work week. Mr. Rutledge did not report for the shift and did not give notice that he would be absent. Mr. Rutledge was absent from the shift due to a lack of child care.

The employer considered earlier absences when making the decision to discharge Mr. Rutledge from the employment. The next most recent absence that factored in the discharge occurred on March 4, 2019, when Mr. Rutledge was late for work for personal reasons. The next most recent absence occurred on February 6, 2019, when Mr. Rutledge left work early to care for a sick child. Mr. Rutledge properly notified his supervisor before leaving his shift. Mr. Rutledge had also left work early on January 25, 2019 after providing proper notice to the employer. The employer did not document the reason for the early departure and Mr. Rutledge does not recall the reason. On January 8, 2019, Mr. Rutledge was absent from a shift. The employer does not know when Mr. Rutledge reported the absence or whether he provided a reason for the absence. Mr. Rutledge cannot recall details of the absence.

The employer considered additional absences from August 2018 through October 2018 when making the decision to discharge Mr. Rutledge from the employment. On August 20, September 25, and October 19, Mr. Rutledge was absent from his shift with proper notice to the employer. On September 12, Mr. Rutledge was eight minutes late. The employer does not require notice regarding late arrivals. Neither the employer nor Mr. Rutledge is able to provide additional details concerning these four absences. On October 31, 2018, Mr. Rutledge reported for work on time, but then left shortly thereafter for the purpose of taking his child trick-or-treating. The employer had earlier denied Mr. Rutledge's request to have the time off.

The employer's decision to discharge Mr. Rutledge followed written warnings for attendance. These were issued to Mr. Rutledge on February 8, February 11 and March 5, 2019.

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 871 IAC 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 weight of the evidence in the record establishes a final unexcused absence for the voluntary overtime shift that started on September 13, 2019. The weight of the evidence establishes that

Mr. Rutledge volunteered for the shift a day earlier. The employer had approved the shift. Mr. Rutledge committed himself to work the shift, but was then a no-call/no-show for the shift. One has to go back more than seven months to find the next most recent absence that factored in the discharge. This seven-months of good attendance prior to the final unexcused absence is inconsistent with and does not support a conclusion that Mr. Rutledge's unexcused absences were excessive at the time of the final incident or discharge. The evidence establishes an additional unexcused absence on March 4, 2019, when Mr. Rutledge was late for personal reasons. The evidence in the record establishes only one other unexcused absence on October 31, 2018, when Mr. Rutledge was absent so that he could take his child trick-or-treating. The employer presented insufficient evidence to prove that any of the other absences that factored in the discharge were unexcused absences under the applicable law. The three unexcused absences, spaced far apart, are not sufficient to establish excessive unexcused absences. Mr. Rutledge is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The October 2, 2019, reference 01, decision is reversed. The claimant was discharged on September 16, 2019 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/scn