

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRANDON T PRITCHARD
Claimant

APPEAL NO. 18A-UI-08849-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TWIN CITY TANNING WATERLOO LLC
Employer

OC: 07/15/18
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 1, 2018, 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 the Benefits Bureau deputy's conclusion that the claimant was discharged on July 16, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on September 10, 2018. Claimant Brandon Pritchard participated. Jim Grove represented the employer and presented additional testimony through Kris McCarthy. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 19 into evidence.

ISSUES:

Whether Mr. Pritchard was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

Whether Mr. Pritchard was overpaid unemployment insurance benefits.

Whether Mr. Pritchard must repay overpaid 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: Brandon Pritchard was employed by Twin City Tanning as a full-time laborer in the collagen department from September 2017 until July 16, 2018, when Rusty Truitt, Plant Foreman, discharged him for attendance. Mr. Pritchard's production shift usually started at 8:00 a.m. and ended when the day's production was finished, usually between 4:30 and 5:00 p.m. Mr. Pritchard was at all relevant times aware that he was required to arrive at work sufficiently before 8:00 a.m. to get clocked in, to get changed into his work uniform, to don his personal protective equipment, and to get to his work area by the production start time. Mr. Pritchard's usual work days were Monday through Friday. The employer also required occasional Saturday work. Production

Manager Raphael Perez was Mr. Pritchard's immediate supervisor. If Mr. Pritchard needed to be absent from work or late for work, the employer's attendance policy required that Mr. Pritchard call the workplace at least 30 minutes before the scheduled start of his shift and speak with the receptionist, Melanie Menuey. Ms. Menuey would then document the absence. Ms. Menuey reviewed the absence reporting requirement with Mr. Pritchard at the start of his employment.

The final absence that triggered the discharge occurred on Wednesday, July 11, 2018. Between 6:40 a.m. and 7:00 a.m., Mr. Pritchard called the workplace and told Ms. Menuey that he would be late because he had run out of gas on the way to work. On July 10, Mr. Pritchard had told Mr. Perez that he did not know whether he would have enough gas in his car to get to work on July 11. Mr. Pritchard lacked money for gas. Mr. Pritchard lived 15 miles from the workplace. Despite having the concern on July 10, Mr. Pritchard did not take steps to arrange alternative transportation. Mr. Pritchard did not appear for any part of his shift on July 11, 2018. After his call to Ms. Menuey, Mr. Pritchard determined that he should seek a medical evaluation for back pain he was experiencing. Mr. Pritchard did not contact the employer to let the employer know that he would not be appearing for any part of the shift. The employer prepared a termination document that day for presentation to Mr. Pritchard when he next appeared for work.

Though the employer decided on July 11 to discharge Mr. Pritchard from the employment, Mr. Pritchard's subsequent absences delayed the employer's opportunity to meet with Mr. Pritchard to communicate the discharge. Following the July 11 absence, Mr. Pritchard was next scheduled to work on Thursday, July 12, 2018. On that morning, Mr. Pritchard initially called the workplace between 6:30 and 6:40 a.m., but no one answered. Mr. Pritchard called back at 7:00 a.m. and spoke to Ms. Menuey to let her know that he had seen a doctor for back pain, that the doctor had said he needed to be off work for a few days, that he was supposed to return to the doctor on July 13, and that he would return to work with a doctor's excuse. Mr. Pritchard was unaware that the employer expected him to call each day of the multiple-day absence. Mr. Pritchard was next on the schedule to work on Friday and Saturday, July 13 and 14, but did not report for work or make contact with the employer on those days. Mr. Pritchard was next scheduled to work on Monday, July 16. On July 16, Mr. Pritchard got to work on time. Mr. Pritchard brought with him a medical excuse, dated July 13, 2018, that indicated he had been seen on July 13, was unable to work from July 11 through July 14, and could return to work on the next scheduled work day after July 14. Upon his arrival for work, Mr. Pritchard took his note to Ms. Menuey. Ms. Menuey did not take the note and instead directed Mr. Pritchard to wait in the break room. Mr. Truitt then met with Mr. Pritchard to discharge Mr. Pritchard from the employment for attendance. Mr. Pritchard delivered his medical excuse to Mr. Truitt. Mr. Truitt told Mr. Pritchard that the employer needed him to be present for production and that the employer had given him ample opportunity to correct the attendance issues. Mr. Pritchard signed the termination document, said that he would like to return to the employment in the future, and left the workplace at the end of the meeting.

The employer considered earlier absences, dating back to December 27, 2017, when making the decision to discharge Mr. Pritchard from the employment. On December 27, Mr. Pritchard was late for work because his child care provider showed up late. On February 8, Mr. Pritchard was late for work because he lacked a vehicle and his ride was late. There was no agreement between the employer and Mr. Pritchard for the employer to provide Mr. Pritchard with transportation to work. On March 3, 10, and 12, Mr. Pritchard was late for work due to child care issues. Also on March 12, Mr. Pritchard left work early due to illness after providing proper notice to Mr. Perez and receiving approval to leave. On March 21, Mr. Pritchard clocked in at 8:00 a.m., too late to get to his work area in time for the start of production. On March 30,

Mr. Pritchard was late for work due to childcare issues. On April 2, Mr. Pritchard was absent from work due to injury. Mr. Pritchard was a passenger in a vehicle driven by his brother when the vehicle was in an accident. Mr. Pritchard notified Ms. Menuey at 7:30 a.m. that he would be absent from his 8:00 a.m. shift. Mr. Pritchard received a medical evaluation for a twisted ankle. On May 22, Mr. Pritchard was absent from work because he needed to take his child to the emergency room. Mr. Pritchard properly notified the employer of the family emergency and his need to be absent from work. On May 31, Mr. Pritchard was 24 minutes late, due to a freight train that blocked his route to the workplace. The train track in question was located within 100 feet of the workplace, on what Mr. Pritchard deemed the fast route to the workplace. Mr. Pritchard was aware that trains regularly moved through that stretch of track. Mr. Pritchard was aware of an alternate route that would allow him avoid the train. On May 31, Mr. Pritchard had a cell phone with him, but did not use the cell phone to let the employer know he would be late due to the train. Mr. Pritchard asserts that he did not call the employer because cell phone signal is poor near the workplace. On June 1, 2018, Mr. Pritchard was again late due to a train. Mr. Pritchard did not notify the employer that he would be late. On June 5, Mr. Pritchard clocked in at 8:00 a.m., but arrived at the production floor two minutes after the scheduled start of production. On that day, Jim Grove, the business owner, spoke with Mr. Pritchard regarding the attendance issues. Mr. Grove asked Mr. Pritchard why he was coming late to work or otherwise missing work. Mr. Pritchard told Mr. Grove that he had ongoing babysitter and transportation issues. Mr. Grove offered Mr. Pritchard time off to get his affairs in order and told Mr. Pritchard to take the time he needed. Mr. Pritchard then left work early that day with Mr. Grove's permission. Mr. Pritchard returned to work on June 13. After Mr. Pritchard returned to work, his next absence occurred on July 9, when Mr. Pritchard was late due to a flat tire he discovered on his way to work. Mr. Pritchard provided timely notice to Ms. Menuey of his need to be late. It ended up taking Mr. Pritchard much longer to resolve the tire issue than he expected. Mr. Pritchard clocked in at 10:30 a.m. for his 8:00 a.m. shift.

The employer issued several warnings to Mr. Pritchard regarding his attendance prior to discharging him from the employment. These included "verbal warnings" Mr. Pritchard signed to acknowledge on January 3, February 14, March 5, and March 14. The employer prepared additional warnings on March 21, March 30, April 2, May 31, June 1, June 5, July 9, and July 12 but did not sign these warnings or present them to Mr. Pritchard for his signature.

Mr. Pritchard established a claim for benefits that was effective July 15, 2018. Iowa Workforce Development set Mr. Pritchard's weekly benefit amount at \$347.00. Mr. Pritchard received weekly benefits in that amount for the weeks that ended July 21, July 28, August 4, August 11, September 1, and September 8, 2018. Mr. Pritchard received benefits totaling \$2,082.00 for these six weeks between July 15, 2018 and September 8, 2018. Twin City Tanning is a base period employer for purposes of the claim. On July 30, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Pritchard's separation from the employer. Kris McCarthy, Controller, represented the employer at the fact-finding interview.

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). 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 weight of the evidence in the record establishes a discharge for misconduct in connection with the employment due to excessive unexcused absences. The evidence establishes that it was the absence on July 11, 2018 that triggered the decision the employer made that day to discharge Mr. Pritchard from the employment and that triggered the discharge documentation the employer prepared that day for presentation to Mr. Pritchard upon his return to work. The absence on July 11 was an unexcused absence under the applicable law. The absence was first and foremost due to Mr. Pritchard's failure to make reasonable and adequate arrangements to get to work on time despite his prior knowledge that he likely would not have enough gas in his car to get to work in his car. Secondly, the absence for the remainder of the shift was unexcused, despite Mr. Pritchard's decision to use that time to seek medical evaluation of his back issues, because Mr. Pritchard did not provide notice to the employer that he would be absent the remainder of the day. The weight of the evidence establishes additional unexcused absences due to a lack of childcare, a matter of personal responsibility, on December 27 and on March 3, 10, 12 and 30. The weight of the evidence establishes an additional unexcused absence due to transportation issues, a matter of personal responsibility, on February 8. The weight of the evidence establishes additional unexcused late arrivals on March 21 and June 5 that were due to Mr. Pritchard's failure to budget appropriate time to get to his work station in time for the start of production. The May 31 and June 1 late arrivals were also unexcused absences in light of Mr. Pritchard's failure to budget time for the predictable train delay or to choose the alternate commuting route that would allow him to avoid the train altogether. In addition, Mr. Pritchard did not make any attempt to notify the employer that he would be late. The remaining absences were excused absences under the law. The excessive number of unexcused absences occurred in the context of multiple warnings and discussions regarding Mr. Pritchard's attendance issues. Mr. Pritchard's excessive unexcused absences demonstrated an intentional and substantial disregard for the employer's interests.

Because the evidence establishes a discharge for misconduct in connection with the employment, Mr. Pritchard is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Pritchard must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period

employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Pritchard received unemployment insurance benefits, but this decision disqualifies him for those benefits. Accordingly, the \$2,082.00 in benefits that Mr. Pritchard received for six weeks between July 15, 2018 and September 8, 2018 constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. Pritchard is required to repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to Mr. Pritchard.

DECISION:

The August 1, 2018, reference 01, decision is reversed. The claimant was discharged on July 16, 2018 for misconduct in connection with the employment based on excessive unexcused absences. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant was overpaid \$2,082.00 in benefits for six weeks between July 15, 2018 and September 8, 2018. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn