

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JOHN W ZOBEL
Claimant

APPEAL NO. 19A-UI-09045-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCE BUILDINGS CORPORATION
Employer

OC: 02/10/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

John Zobel filed a timely appeal from the November 14, 2019, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Mr. Zobel was discharged on October 30, 2019 for excessive unexcused absenteeism. After due notice was issued, a hearing was held on December 11, 2019. Mr. Zobel participated. Greg Smalley represented the employer.

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: John Zobel was employed by Advance Builders Corporation as a full-time construction laborer from 2017 until October 30, 2019, when Greg Smalley, General Manager, discharged Mr. Zobel from the employment for attendance. Mr. Zobel's scheduled start time 5:30 a.m. or 6:00 a.m. Mr. Zobel's shift would end sometime between 5:00 p.m. and 6:00 p.m. Mr. Zobel's regular work days were Monday through Friday. Mr. Zobel worked on Saturdays as needed. Mr. Zobel's supervisor would be the jobsite foreman. At the start of the employment, the employer advised Mr. Zobel that if he needed to be absent from work, he was to call the employer's office and leave a message on the office answering machine prior to the scheduled start of his shift. During the employment, the employer also accepted calls to the jobsite foreman as appropriate notice. If Mr. Zobel knew before the absence date that he would need to be absent, Mr. Zobel was required to complete a time off request form for the employer's consideration.

The final absent that factored in the discharge occurred on October 29, 2019. On that day, Mr. Zobel was absent from his shift so that he could administer periodic breathing treatments to his girlfriend's son while his girlfriend worked her job from the couple's home. Mr. Zobel called a foreman prior to the scheduled start of his shift to give notice of his need to be absent. When Mr. Zobel reported for work on October 30, Mr. Smalley discharged him from the employment.

At the end of August 2019, Mr. Smalley spoke to Mr. Zobel about his attendance being a problem. On October 21, 2019, the employer attached a letter to Mr. Zobel's check stub to give notice to Mr. Zobel that his employment was in jeopardy due to attendance issues. On October 24, 2019, Mr. Zobel was absent without notice to the employer. On October 25, 2019, Mr. Zobel was again absent without timely notice to the employer. On the afternoon of October 25, Mr. Zobel notified a foreman that he had not reported for work earlier that day. On October 28, 2019, Mr. Zobel was absent from his shift so that he could take his girlfriend's eight-year-old son for medical evaluation and treatment of a respiratory illness. Mr. Zobel's girlfriend and her son reside with Mr. Zobel. Mr. Zobel's girlfriend has a work-at-home job that she pursues from the couple's home. Mr. Zobel elected to be absent from his employment so that his girlfriend could perform her work-at-home job. At 5:15 a.m., Mr. Zobel called and spoke to a foreman to give notice of his need to be absent and the reason for the absence. At 6:04 a.m., Mr. Zobel took his girlfriend's son to the emergency room. The child was discharged to home same day. The final absence followed one day later.

The employer considered several earlier absences when making the decision to discharge Mr. Zobel from the employment. Mr. Zobel was a no-call/no-show on September 3, 4, 9, 13 and October 8, 2019. On September 16, 2019, Mr. Zobel was absent to care for his sick six-year-old son. Mr. Zobel gave notice to the employer by calling and text messaging a foreman prior to the scheduled start of his shift. On September 30, 2019, Mr. Zobel called the employer at about the scheduled start of his shift to give notice that he needed to be absent from work so that he could move out of his residence.

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 weight of the evidence in the record establishes a discharge for misconduct based on excessive unexcused absences. The evidence fails to establish a reasonable basis for Mr. Zobel to be voluntarily absent from his employment on October 28 and 29, at a time when he knew his employment was in jeopardy, to care for his girlfriend's sick child when his girlfriend was at home and could presumably care for her own child. Given these circumstances, the absences on October 28 and 29 were unexcused absences. The weight of the evidence further establishes that Mr. Zobel was a no-call/no-show on October 24, 2019 and on at least five other occasions during the preceding weeks. Each of the absences was an unexcused absence.

The weight of the evidence establishes that Mr. Zobel provided late notice of his need to be absent on October 25, 2019. Based on the late notice, this absence was an unexcused absence. Mr. Zobel had yet another unexcused absence on September 30, 2019, when he provided last minute notice of his need to be absent to move, a matter of personal responsibility. These unexcused absences during the months of September and October 2019 were excessive and occurred in the context of a discussion at the end of August about Mr. Zobel's attendance being a problem and a written warning attached to Mr. Zobel's paystub on October 21, 2019. Mr. Zobel's frequent unexcused absences demonstrated an intentional and substantial disregard for the employer's interests. The absence on September 16, 2019 was due to Mr. Zobel's need to care for his sick child, was properly reported to the employer and therefore was an excused absence under the applicable law.

Because the evidence in the record establishes a discharge for misconduct in connection with the employment, Mr. Zobel is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Zobel must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The November 14, 2019, reference 01, decision is affirmed. The claimant was discharged on October 30, 2019 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 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn