

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEVAR J JOHNSON
Claimant

APPEAL NO. 17A-UI-04545-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABCM CORPORATION
Employer

OC: 04/02/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Levar Johnson filed a timely appeal from the April 25, 2017, reference 02, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Johnson was discharged on April 4, 2017 for excessive unexcused absenteeism after being warned. After due notice was issued, a hearing was held on May 18, 2017. Mr. Johnson participated. Ananda Back represented the employer and presented additional testimony through Michelle Moore. Exhibits 1 through 13 and A 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: Levar Johnson was employed by ABCM Corporation as a full-time developmental aide from 2013 until April 4, 2017, when Ananda Back, Human Resource Coordinator, and Michelle Moore, Program Coordinator, discharged him for attendance. Mr. Johnson performed his work duties at Harmony House in Waterloo. Mr. Johnson's work hours were 6:00 a.m. to 2:00 p.m. Ms. Moore was Mr. Johnson's immediate supervisor.

If Mr. Johnson needed to be absent from work, the employer's policy required that he call the workplace at least one hour prior to the scheduled start of his shift and leave a message with whoever answered the phone. It would be up to the person who answered the phone to document the call, the time of the call, and the reason for the absence. The employer also required that employees provide a doctor's notice within 48 hours returning to work that covered the absence due to illness.

The final absence that triggered the discharge occurred on March 28, 2017. On that day, Mr. Jonson was absent due to illness. At 4:50 a.m., Mr. Johnson properly notified the nurse on duty that he would be absent from his March 28 shift. The employer did not doubt that

Mr. Johnson was ill. Mr. Johnson lacked insurance at the time and did not go to a doctor in connection with his absence due to illness that day. When Mr. Johnson returned to work on March 29, Ms. Moore asked Mr. Johnson whether he had medical paperwork regarding his absence. Mr. Johnson asserted that he had previously been approved for leave under the Family and Medical Leave Act based on his high blood pressure issues. Ms. Moore told Mr. Johnson that the prior FMLA certification was insufficient. The employer subsequently discharged Mr. Johnson on April 4, 2017, based on his failure to provide a doctor's note to cover the March 28 absence.

The employer considered two additional absences when making the decision to discharge Mr. Johnson. One of those absence occurred on March 25, 2017, when Mr. Johnson was absence without notice because he forgot he had agreed to pick up the shift. The other absence was on February 27, 2017, when Mr. Johnson was absent due to illness. On that day, Mr. Johnson contacted the employer at 5:37 a.m. regarding his need to be absent from his 6:00 a.m. shift.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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 final absence that triggered the discharge was an excused absence under the applicable law and cannot serve as the basis for disqualifying Mr. Johnson for unemployment insurance benefits. The absence on March 28, 2017 was due to illness, was properly reported to the employer and, accordingly, was an excused absence under the applicable law, regardless of whether the employer deemed it excused. Because the absence that triggered the discharge was an excused absence under the applicable law, the evidence fails to establish a discharge based on misconduct in connection with the employment. Mr. Johnson is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The April 25, 2017, reference 02, decision is reversed. The claimant was discharged on April 4, 2017 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/rvs