

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**BRUCE L SAGER**  
Claimant

**MENARD INC**  
Employer

**APPEAL NO. 21A-UI-17108-JT-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/02/21  
Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the July 27, 2021, reference 01, decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on April 24, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on September 24, 2021. Claimant, Bruce Sager, participated. James Anderson, Store Counsel, represented the employer and presented testimony through Jake McCloud and Kohl Hallagan. Exhibits 1 through 9 were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record reflects no benefits have been disbursed in connection with the May 2, 2021 original claim.

**ISSUES:**

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, Bruce Sager, was employed by Menard, Inc. as a Yard laborer from July 2019 until April 23, 2021, when the employer discharged him for attendance. The claimant worked at the Menards store in Council Bluffs. Jake McCloud, Receiving Manager, was the claimant's primary supervisor. The claimant voluntarily transitioned from full-time to part-time status effective April 4, 2021, in connection with beginning a second employment.

The employer provided the claimant with a copy of the employer's attendance policy at the start of the employment. If the claimant needed to be absent from or late for a shift, the policy required that the claimant call the workplace prior to the scheduled start of his shift and speak with the manager on duty. The claimant was at all relevant times aware of the absence reporting requirement. The attendance policy assigns attendance points to absences. The number of appoints assigned are based on the nature of the absence and whether timely notice was provided.

The employer provided the claimant with access to an online scheduling portal. This allowed the claimant to remotely check his work schedule.

When the employer entered the claimant's change in status from full-time to part-time employment into the employer's computer records, the claimant's upcoming work schedule at Menard's was temporarily deleted from the online scheduling portal. The claimant took the absence of a schedule posted in the online scheduling portal to mean that he was not scheduled to work at Menard's and made arrangements to work at his other job.

The issue with the claimant's schedule came to the attention of Assistant Manager Kohl Hallagan on April 6, 2021. On that day, Mr. Hallagan sent a text message to the claimant in which he stated he did not know why the claimant was taken off the schedule. Mr. Hallagan asked what the claimant's availability was for the week. Later in the day, Mr. Hallagan sent another text message asking whether the claimant had received his earlier message. The claimant did not immediately respond. The claimant had been working out of town at his new job in an area where he did not have a cell phone signal.

On April 7, 2021, the claimant had checked his schedule on the online portal and saw that he was scheduled to work April 9 and 10, 2021.

On April 8, 2021, the claimant sent a message to Mr. Hallagan indicating that he was now in a location where he could receive a cellphone signal. Mr. Hallagan called the claimant at that time. Mr. Hallagan told the claimant that he was willing to overlook the shifts missed earlier that week, and would be okay with the claimant missing Friday, April 9, but that he needed the claimant to work his shift on Saturday, April 10. The claimant told the employer he would do his best to report for the April 10 shift. Prior to the start of the shift, the claimant notified the employer that he was working at his other job and could not report for the shift.

The final absences that triggered the discharge occurred on April 15 and April 20, 2021.

On April 15, 2021, the claimant was absent without properly notifying the employer prior to the scheduled start of the shift. The claimant was scheduled to work from 7:00 a.m. to 1:00 p.m. that day. The claimant had requested the day off so that he could take his son to a medical appointment. However, the employer had approved the request. The claimant assumed the request was approved.

While the employer asserts a final absence on April 20, 2021, the claimant asserts he was not scheduled to work that day. The employer has provided a schedule showing the claimant was scheduled to work the date in question. The weight of the evidence establishes the claimant was absent for personal reasons.

On April 23, 2021, the employer issued multiple written warnings attendance.

The employer also considered absences on September 10 and October 2, 2020 when making the decision to discharge the claimant from the employment. On September 10, the claimant was absent for personal reasons and properly notified the employer. On October 2, 2020, the claimant was absent for personal reasons and did not notify the employer prior to the scheduled start of the shift.

## 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.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences. The weight of the evidence establishes three consecutive unexcused absences on April 10, 15 and 20, 2021. The three consecutive unexcused absences were excessive. Accordingly, the claimant is disqualified for benefits until she 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 for benefits .

Because no benefits have been disbursed in connection with the claim, there is no overpayment of benefits to address.

**DECISION:**

The July 27, 2021, reference 01, decision is reversed. The claimant was discharged for misconduct in connection with the employment. 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 will not be charged.



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James E. Timberland  
Administrative Law Judge

November 29, 2021  
Decision Dated and Mailed

jet/kmj

*Note to Claimant:* This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who are unemployed for reasons related to COVID-19, may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.