

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**JOSEPH E BORMANN**  
Claimant

**APPEAL NO. 19A-UI-07581-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IOWA BATH SOLUTIONS LLC**  
Employer

**OC: 08/18/19**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Joseph Bormann filed a timely appeal from the September 16, 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. Bormann was discharged on August 12, 2019 for violation of a known company rule. Mr. Bormann requested an in-person hearing. After due notice was issued, an in-person appeal hearing was held on October 17, 2019 in Des Moines. Mr. Bormann participated. Nathan Hamersley represented the employer and presented additional testimony through Andrew Cormello. Exhibits 2, 3, 4 and A through D 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: Joseph Bormann was employed by Iowa Bath Solutions, L.L.C. as a full-time installer from July 2018 until August 12, 2019, when Nathan Hamersley, Regional Production Manager, and Andrew Carmello, Director of Production, discharged him from the employment for attendance and falsification of timekeeping records. Mr. Hamersley was Mr. Bormann's supervisor. Mr. Bormann usually worked a Monday through Friday work week, but also worked on weekends as needed. Mr. Bormann was allowed some flexibility in his start time, but was expected to start work no later than 6:30 a.m. Mr. Bormann worked on commission, but his work hours factored in the compensation he received. Mr. Bormann was required to start each work day at the employer's shop in Des Moines unless he was on the second or subsequent day of a multiple-day project. The employer uses a software application for timekeeping purposes. For most of the employment, Mr. Bormann used his personal cell phone to access the timekeeping application. Toward the end of the employment, the employer provided Mr. Bormann with a work cell phone. The employer's written work rules required that Mr. Bormann clock in upon arrival at the employer's shop. Mr. Bormann was then required to stock his work truck in preparation for the day's work assignments before heading to those assignments. The employer maintained a global position system (GPS) in Mr. Bormann's work truck so that the employer could monitor the location of the work truck. Mr. Bormann was allowed to take the work truck home at night

and would commute in the work truck from his home to the shop each morning unless he was on the second or subsequent day of a multiple-day project, in which case Mr. Bormann would travel from his home to the project site.

If Mr. Bormann needed to be absent or late for work, the employer's attendance policy required that Mr. Bormann call Mr. Hamersley no later than one hour prior to the scheduled start. Mr. Bormann was at all relevant times aware of the absence reporting requirement.

On March 26, 2019, Mr. Hamersley placed Mr. Bormann on a written action plan that required him to report for work by 6:30 a.m. each work day. The action plan warned that Mr. Bormann would face corrective action and/or termination of the employment if he failed to comply with the action plan. On April 27, 2019, Mr. Hamersley had Mr. Bormann sign the action plan, after Mr. Hamersley concluded that Mr. Bormann had not resolved the tardiness issue.

On April 29, 2019, Mr. Hamersley issued a written warning to Mr. Bormann based on attendance, including tardiness. The reprimand warned that further violation of company policies would result in further disciplinary action up to and including termination of the employment.

The final incident that triggered the discharge occurred on August 10, 2019, when Mr. Bormann was late for work. On that day, Mr. Bormann failed to clock in for his shift. The GPS record documented that Mr. Bormann started the work van at 6:30 a.m. and that he arrived at the workplace at 6:38 a.m. Mr. Bormann had not notified the employer that he would be late for work that day.

During the week that preceded the discharge, Mr. Bormann has been late for work multiple times, but had used the timekeeping application to clock in before he arrived at the workplace to make it look like he started his work day earlier than his arrival at the employer's shop.

On August 5, 2019, Mr. Bormann clocked in while enroute to the shop. The GPS record showed that Mr. Bormann started the employer's work van at 6:36 a.m. and arrived at the shop at 6:57 a.m. Mr. Bormann clocked in at 6:44 a.m. Mr. Bormann had not notified the employer he would be late for work that day.

On August 6, Mr. Bormann again clocked in while enroute to the shop. The GPS record showed that Mr. Bormann started the employer's work van at 5:56 a.m. and arrived at the shop at 6:49 a.m. Mr. Bormann clocked in at 6:38 a.m. Mr. Bormann had not notified the employer he would be late for work that day.

On August 7, Mr. Bormann again clocked in while enroute to the shop. The GPS record showed that Mr. Bormann started the employer's work van at 6:30 a.m. and arrived at the shop at 6:48 a.m. Mr. Bormann clocked in at 6:37 a.m. Mr. Bormann had not notified the employer he would be late for work that day.

On August 8, Mr. Bormann failed to clock in. The GPS record showed that Mr. Bormann started the employer's work van at 6:26 a.m. and arrived at the shop at 7:04 a.m. Mr. Bormann clocked in at 6:38 a.m. Mr. Bormann had not notified the employer he would be late for work that day.

On August 9, Mr. Bormann again clocked in while enroute to the shop. The GPS record showed that Mr. Bormann started the employer's work van at 6:30 a.m. and arrived at the shop at 6:38 a.m. Mr. Bormann had not notified the employer he would be late for work that day.

## 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 misconduct in connection with the employment based on excessive unexcused tardiness and timekeeping fraud. On August 5, 6, 7, 8, 9 and 10, 2019, Mr. Bormann reported late for work for personal reasons and without notifying the employer he would be late. Each of those late arrivals was an unexcused absence under the applicable law. These unexcused late arrivals occurred on the context of the March 2019 action plan and the April 2019 reprimand for attendance. The unexcused absences were excessive and constituted misconduct in connection with the employment. In connection with each of the late arrivals between August 5 and 9, Mr. Bormann knowingly and intentionally clocked in prior to arriving at the workplace in order to create a fraudulent record that he was at work on time each day. Mr. Bormann's intentional dishonesty demonstrated a willful and wanton disregard of the employer's interests and undermined the employer's ability to trust Mr. Bormann in other matters related to his employment. Mr. Bormann's commission-based compensation did not justify, excuse or mitigate the misconduct. Mr. Bormann 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. Bormann must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

#### **DECISION:**

The September 16, 2019, reference 01, decision is affirmed. 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 shall not be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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