IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANTWOINE M ALLEN
Claimant

CG ACQUISITION CO
Employer

APPEAL NO. 17A-UI-07429-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/02/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Antwoine Allen filed an appeal from the July 18, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that Mr. Allen was discharged on June 21, 2017 for excessive unexcused absenteeism. After due notice was issued, a hearing was held on August 8, 2017. Mr. Allen did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Bailey Voss represented the employer.

ISSUE:

Whether Mr. Allen separated from the employment for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Antwoine Allen was employed by CG Acquisition Company as a full-time maintenance technician from 2011 until June 21, 2017, when Joan Johnson, Human Resources Manager, discharged him for attendance. Mr. Allen's work hours were 6:00 a.m. to 2:30 p.m. Monday through Friday and either Saturday or Sunday.

The employer has a "no-fault" attendance policy. If Mr. Allen needed to be absent from work, the employer's policy required that Mr. Allen call the designated absence reporting line at least one hour prior to the scheduled start of his shift and leave a message with his name and his supervisor's name. The employer did not require or expect Mr. Allen to provide the reason for an absence.

The final absence that triggered the discharge occurred on June 21, 2017. On that day, Mr. Allen was absent and did not notify the employer. When Mr. Allen did not appear for work or report a need to be absent, Ms. Johnson telephoned Mr. Allen. Ms. Johnson told Mr. Allen that if he did not appear for work that day, the employment would be terminated. Mr. Allen told Ms. Johnson that he was going through a lot, had too much going on, and could not come to work that day. Ms. Johnson then ended the employment.

In making the decision to discharge Mr. Allen from the employment, the employer considered Mr. Allen's 2017 attendance history. On January 16, Mr. Allen was absent for his shift and provided proper notice. The employer witness does not know why Mr. Allen was absent. On January 24, Mr. Allen clocked in one minute late. Clocking in took only a few seconds. All Mr. Allen had to do was swipe his badge through the time-keeping machine. The employer allows employees to clock in up to 15 minutes early. The employer had two time-clocks that Mr. Allen could use. Five to 10 employees would be clocking in at the same time. On February 1, Mr. Allen left work at 7:25 a.m. and returned at 9:44 a.m. Mr. Allen spoke to his supervisor prior to departing from the workplace. The employer witness does not know why Mr. Allen left for part of the shift or what he might have said to the supervisor. On March 1, April 1 and April 3, Mr. Allen was absent from his shift and provided proper notice. The employer witness does not know the basis for the absences. On May 5, Mr. Allen arrived at 8:45 a.m. for his 6:00 a.m. shift. Mr. Allen provided no notice that he would be late. The employer witness does not know why Mr. Allen was late. On May 17, Mr. Allen was absent from his shift and provided proper notice of the absence. The employer witness does not know why Mr. Allen was absent. On June 15, Mr. Allen arrived at 9:22 a.m. for his 6:00 a.m. shift. Mr. Allen had not given notice that he would be late. The employer witness does not know why Mr. Allen was late.

The employer had issued warnings to Mr. Allen for attendance on March 22, April 1 and April 3, 2017. The employer had prepared a warning based on the June 15, 2017 absence, but did not issue the warning to Mr. Allen prior to the final absence and discharge on June 21, 2017.

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 evidence in the record establishes excessive unexcused absences. The employer presented sufficient evidence to prove an unexcused absence on January 24, 2017, when Mr. Allen clocked in late. The employer presented sufficient evidence to prove an unexcused absence on May 5, 2017, when Mr. Allen was two hours and 45 minutes late without notice to the employer. The employer presented sufficient evidence to prove an unexcused absence on

June 15, 2017, when Mr. Allen was three hours and 22 minutes late without notice to the employer. The employer presented sufficient evidence to prove a final unexcused absence on June 21, 2017, when Mr. Allen was absent without providing notice to the employer and cited unspecified personal problems as the basis for the absence when the employer contacted him.

The employer did not present sufficient evidence to prove unexcused absences on January 16, February 1, March 1, April 1, April 3, and May 17, 2017. The employer witness lacked personal knowledge concerning the absences. The employer had the ability to present testimony from Mr. Allen's supervisor or others with personal knowledge of these absences, but elected not to present such testimony. Due to the employer's no-fault policy, the employer did not collect sufficient information at the time of the absences to be able to prove unexcused absences on these dates.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Allen was discharged on June 21, 2017 for misconduct in connection with the employment. Accordingly, Mr. Allen 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. Allen must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The July 18, 2017, reference 01, decision is affirmed. The claimant was discharged on June 21, 2017 for misconduct in connection with the employment. The claimant is disqualified for 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 employer's account shall not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs