

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

CODY L SCHMIDTKE
Claimant

APPEAL NO. 18R-UI-09385-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KERRY INC
Employer

OC: 07/01/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 19, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Schmidtke was discharged on June 21, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on September 26, 2018. Mr. Schmidtke participated. The employer received proper notice of the hearing and was aware of the hearing. However, the employer did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate.

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: Cody Schmidtke was employed by Kerry, Inc. as a full-time production operator from March 2017 until June 21, 2018, when Annie Marple, Human Resources Manager, discharged him for attendance. Beginning in early 2018, Mr. Schmidtke's work hours were 7:00 a.m. to 3:00 p.m., Monday through Friday, unless the employer required overtime work, during which days the shifts would be 12 hours long. If Mr. Schmidtke needed to be absent from work, the employer's absence reporting policy required that he call the designated absence reporting number an hour before his shift and leave a message to give notice of his need to be absent. Mr. Schmidtke was at all relevant times aware of the absence reporting requirement.

The final absence that triggered the discharge occurred on June 21, 2018, when Ms. Schmidtke was absent due to incarceration. At 3:30 p.m. on June 20, 2018, Chickasaw County authorities arrested Mr. Schmidtke in connection with an alleged driving offense and transported him to jail. Mr. Schmidtke was released from custody at 2:00 p.m. on July 21, 2018, after he had his initial appearance before a judge. Mr. Schmidtke did not have the ability to provide notice to the employer that he would be absent from work. At the time of the initial appearance,

Mr. Schmidtke entered a not guilty plea. The charge upon which the arrest was based is still pending.

The next most recent absence that factored in the discharge occurred on June 6, 2018. That absence was also due to incarceration. Mr. Schmidtke was arrested by Chickasaw County authorities at 7:30 p.m. on June 5, 2018 and charged with driving without a license. Mr. Schmidtke was transported to the Chickasaw County Jail in New Hampton. Mr. Schmidtke was released from custody at 1:00 p.m. on June 6, 2018, after he had his initial appearance before a judge. At the time of the initial appearance, Mr. Schmidtke entered a not guilty plea. The charge upon which the arrest was based is still pending. On June 7, 2018, Mr. Schmidtke met with Ms. Marple and the acting plant manager. At that time, the employer placed Mr. Schmidtke on a last change agreement.

Mr. Schmidtke had earlier absences that factored into the discharge. On September 25, 2017 and on February 15, March 22 and 23, and April 4, 2018, Mr. Schmidtke was absent due to illness and properly reported the absences to the employer. On February 22 and March 7, 2018, Mr. Schmidtke was late for work because he overslept. On April 20, 2018, Mr. Schmidtke received a written reprimand for attendance.

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 Iowa Supreme Court has found that "involuntary incarceration, at least where the charges are dismissed, also falls within the "other reasonable grounds" for absence contemplated under rule 871-24.32(7). *Irving v. EAB*, 883 N.W.2d 179, 202 (Iowa 2016).

The evidence in the record establishes a discharge for no disqualifying reason. The employer did not participate in the hearing and presented no evidence to meet its burden of proving that Mr. Schmidtke was discharged for misconduct. In this case, the final absence that triggered the discharge and the next most recent absence that factored in the discharge were due to involuntary incarceration. While the charges that triggered the incarcerations have not been dismissed, the employer had presented no evidence to prove misconduct in connection with the incarceration or associated absences. The evidence establishes that Mr. Schmidtke lacked the ability to notify the employer of his need to be absent in connection with the incarcerations, each

of which lasted less than 24 hours, and made contact with the employer at his first opportunity upon his release from custody. Because the evidence fails to establish a current act of misconduct, Mr. Schmidtke is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The July 19, 2018, reference 01, decision is reversed. The claimant was discharged on June 21, 2018 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