IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

ISRAEL RIVERA MOORE Claimant **STRYTEN MANUFACTURING LLC** Employer	**APPEAL NO. 21A-UI-12175-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/28/21** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 26, 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 October 22, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on July 23, 2021. Claimant, Israel Rivera Moore, participated. Laura Scharosch represented the employer and presented additional testimony through Justin Biggs and Micah Berger. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 5 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

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: The claimant was employed by Stryten Manufacturing, L.L.C. as a full-time Process Attendant until October 22, 2020, when the employer discharged him for attendance. The claimant became a Stryten employee effective August 25, 2020, when Atlas Holdings, L.L.C. purchased the division of Exide Technologies with which the claimant had been employed since March 2019. Iowa Workforce Development has determined Stryten to be a full successor to Exide. The claimant's regular full-time hours at Stryten were 1:30 p.m. to 10:00 p.m. on Thursday and Friday and 6:00 p.m. to 6:00 p.m. on Saturday and Sunday.

From the time the claimant became a Stryten employee, the claimant was required to work overtime hours on a consistent basis due to the employer's short-staffing. The employer uses a Monday through Sunday work week. During the work week that ended August 30, 2020, the

claimant worked 54 hours. During the workweek that ended September 6, 2020, the claimant worked 67 hours. During the workweek that ended September 13, 2020, the claimant worked 74 hours. During the workweek that ended September 20, 2020, the claimant worked 60 hours. During the workweek that ended September 27, 2020, the claimant was on vacation. During the workweek that ended October 4, 2020, the claimant worked 59 hours. During the workweek that ended October 11, 2020, the claimant worked 54 hours. During the workweek that ended Sunday, October 18, 2020, the cliamant worked 77 hours.

Right as the claimant was finishing at 12-hour overnight shift at 6:00 a.m. on Monday October 19, 2020, the employer notified the claimant that he was required to return late that day for a 1:30 p.m. to 10:00 p.m. overtime shift, that he was also required to work the same overtime shift on October 20 and 21, 2020. The claimant was already scheduled to work his normal 40-hour work week on Thursday through Sunday, October 22 through October 25, 2020 and would be expected to work those hours. The addition of the overtime hours meant the claimant would be required to work at least 64 hours in the workweek that would end on October 25, 2020. Before the claimant left work on the morning of October 19, 2020, he told the employer he could not return to work the additional hours that day and could not work the overtime hours on the next two days, but would work his usual hours beginning on Thursday. The claimant was feeling exhausted after finishing a 77 hour work week. The claimant was upset that the long hours deprived him the opportunity to spend time with family. Requiring the claimant to return at 1:30 p.m. the same day meant there would only be a 7.5-hour break in the shifts during which time the claimant would need to drive home, sleep, eat, take care of his daily hygiene, and drive back to the workplace. During that day, the claimant noted multiple calls from the employer. The claimant did not answer the calls. It is unclear whether the calls were made at a time when the claimant was sleeping. At 1:22 p.m., the claimant called the absence reporting line and stated that he would not be able to cover the overtime shifts on the Monday, Tuesday and Wednesday, but that he would return on Thursday to work his regular work week. Stryten's written attendance policy required employees to call the absence reporting line at least 30 minutes prior to the scheduled start of the shift if they needed to be absent. The claimant had not received an employee handbook or attendance policy from Stryten, but the absence reporting requirement was the same as it had been during the Exide employment. The employer does not require employees to call in each day of a multiple-day absence. The cliamant did not report for the overtime shifts on October 19, 20 and 21.

By the time the claimant reported for work on Thursday, October 22, 2020, the employer had decided to discharge the claimant based on the number of attendance points the employer assigned to the claimant's absences. The claimant reported for work, prepared to start his work duties and then was summoned to a meeting. At the meeting, the employer notified the claimant that his employment was being terminated for attendance points.

The employer has a no-fault attendance policy. The employer assigns attendance points to all absences unless they fall within a list of exceptions. Absences due to illness are not excused unless they are covered by the Family and Medical Leave Act.

While Stryten considered Exide absences going back to December 14, 2019, the claimant did not become a Stryten employee until August 25, 2020. The only absences in connection with the Stryten employment were the absences on October 19, 20 and 21, 2020. There had been no warnings for attendance issued to the claimant in connection with the Stryten employment.

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 evidence in the record establishes a discharge for no disqualifying reason. The evidence establishes three consecutive absences during the Stryten employment. All three absences were appropriately reported to the employer. The claimant notified the employer in person on the morning of October 19 that he could not appear for an overtime shift later that day or during the next two days. The claimant's telephonic notice later that day was not the employer's first notice of the absences. The employer's expectation that the claimant would return on October 19, 2020 to work an eight-hour shift after providing the claimant with notice just that morning, and with only a 7.5-hour break between shifts, was unreasonable and potentially unsafe. The claimant's absence on October 19, 2020 cannot be deemed an unexcused absence within the meaning of the law. The claimant's absences on October 20 and 21, 2020 were technically unexcused absences. For those shifts, the claimant had a day or two notice. However, the claimant's argument that the pattern of overtime hours was excessive and detrimental has merit. The claimant had just completed a 77-hour workweek at the time the employer announced a requirement that he commence a 64-hour workweek. The employer's conduct was unduly exploitive and detrimental to the claimant. The claimant was understandably upset by it. If the claimant had quit under the circumstances, the quit would have been with good cause attributable to the employer. See Iowa Administrative Code rule 871-24.26(4) (regarding quits due to intolerable and detrimental working conditions). Under the circumstances, the claimant's unexcused absences in the Stryten employment were not excessive. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The April 26, 2021, reference 01, decision is affirmed. The claimant was discharged on October 22, 2021 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

July 30, 2021
Decision Dated and Mailed

jet/mh