

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

MITCHELL R ROOZEBOOM
Claimant

APPEAL NO. 18A-UI-12393-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KLM PLUMBING
Employer

**OC: 10/28/18
Claimant: Respondent (2R)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 21, 2018, reference 01, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and that the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on October 25, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on January 15, 2019. Claimant Mitchell Roozeboom participated. Kyle Gilbert represented the employer. The administrative law judge received Exhibits 1, A and B into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kyle Gilbert owns and operates KLM Plumbing. Mr. Gilbert's company specializes in new construction. Mr. Gilbert operates the business from a shop adjacent from his home in Grimes. Mitchell Roozeboom was employed by KLM Plumbing as a full-time plumber's helper from June 2018 until October 25, 2018, when Mr. Gilbert discharged him from the employment. Mr. Roozeboom would usually meet Mr. Gilbert at Mr. Gilbert's shop and then would ride in the work van with Mr. Gilbert to the jobsite. During the employment, Mr. Roozeboom resided in Runnells, east of Des Moines. Mr. Roozeboom's usual work hours were 8:00 a.m. to 4:30 p.m., Monday through Friday. Mr. Gilbert hired Mr. Roozeboom with knowledge that Mr. Roozeboom was a recovering heroin addict and that Mr. Roozeboom had to report daily to a Des Moines methadone clinic to receive a daily dose of methadone. When possible, Mr. Roozeboom would make such stops for after his work day had ended. However, Mr. Roozeboom often had to

make such stops during his morning commute. Mr. Roozeboom's time at the methadone clinic would usually be no more than five minutes. The clinic opened at 6:00 a.m.

The final incident that triggered the discharge occurred on Thursday, October 25, 2018. On that day, Mr. Roozeboom notified Mr. Gilbert at 7:51 a.m. that he was stuck in traffic and would be 10 minutes late. Mr. Gilbert had previously told Mr. Roozeboom that if he needed to be late Mr. Gilbert wanted notice 15 minutes prior to the scheduled start of the work day and that if Mr. Roozeboom needed to be absent Mr. Gilbert wanted notice 30 minutes prior to the scheduled start of the work day. After Mr. Roozeboom arrived at Mr. Gilbert's shop late, Mr. Gilbert drove the pair to a job site in Leon, Iowa. Leon is more than an hour's drive from Grimes. During the drive, Mr. Gilbert observed that Mr. Roozeboom appeared sleepy and lethargic. Mr. Gilbert concluded that Mr. Roozeboom was likely experiencing the effects of the methadone. Mr. Roozeboom slept on the drive to Leon. Once the pair arrived at the construction site in Leon, Mr. Roozeboom assisted Mr. Gilbert with the plumbing project until Mr. Gilbert sent him on a 30-minute lunch break at 11:30 a.m. During the lunch break, Mr. Roozeboom left the jobsite, went to a local convenience store, purchased a pre-packaged lunch, and then consumed his lunch. After the lunch break, Mr. Roozeboom assisted Mr. Gilbert for another 15 to 30 minutes. At that point, Mr. Roozeboom told Mr. Gilbert that he was feeling ill. Mr. Gilbert directed Mr. Roozeboom to go sit in the work van. Mr. Roozeboom vomited behind the work van. A construction foreman observed Mr. Roozeboom hunched over by the van and reported this to Mr. Gilbert. Mr. Roozeboom fell asleep as he sat in the van. Mr. Gilbert returned to the van at about 12:30 p.m., discovered Mr. Roozeboom sleeping, and decided not to wake him. Mr. Gilbert continued to perform work on the construction project without Mr. Roozeboom's assistance. Mr. Gilbert was displeased with the situation regarding Mr. Roozeboom because Mr. Gilbert had a substantial amount of work to complete at the Leon jobsite. Mr. Roozeboom awoke during the ride back to Mr. Gilbert's shop but continued to be sleepy and lethargic. When the pair arrived at Mr. Gilbert's shop at 4:30 p.m., Mr. Gilbert needed Mr. Roozeboom's help with handling a package that had been delivered to the shop. However, Mr. Roozeboom went to his personal vehicle and left for home. Based on the day's events Mr. Gilbert felt wronged and decided he would not use Mr. Gilbert the next day.

At 8:08 p.m. on October 25, 2018, Mr. Gilbert sent a text message to Mr. Roozeboom. Mr. Gilbert wrote, "I'm just going to go by myself tomorrow." Mr. Roozeboom promptly responded with a series of text messages. Mr. Roozeboom initially asked, "Why?" Mr. Roozeboom then added, "I was fine til I ate that lunchable." Several minutes later, Mr. Roozeboom asked, "What does that mean u don't have work or me tomorrow?" Mr. Gilbert replied, "I have work for you but I don't need you there. I have been paying a lot for you and getting little for it as of late. Give me the weekend and we will talk again on Monday." Mr. Roozeboom responded that he had had a couple bad days bouncing back from being sick and had thrown up during the afternoon after he ate the Lunchable. Mr. Gilbert expected an apology from Mr. Roozeboom over the weekend, but did not communicate this to Mr. Roozeboom. Mr. Gilbert was displeased when no apology came.

Mr. Gilbert did not contact Mr. Roozeboom about plans for the following Monday workday. Mr. Gilbert had decided to discharge Mr. Roozeboom from the employment. At 2:40 p.m. on Monday, October 29, Mr. Roozeboom sent a text message stating that he guessed he did not have a job since he had not heard from Mr. Gilbert. Mr. Gilbert was working at the time and elected not to respond to the message. At 4:02 p.m., Mr. Roozeboom sent another message to Mr. Gilbert in which he stated that if the employer had no work for him, then Mr. Roozeboom needed to come get his heartburn medication and his FM transmitter out of Mr. Gilbert's van. Mr. Gilbert responded that he would be working at a job site in West Des Moines the following day if Mr. Roozeboom wanted to come collect the items. At 8:14 p.m., Mr. Roozeboom sent a

text message stating that he was unsure what was going on, that he hoped Mr. Gilbert was okay, and that he deserved more than being ignored by Mr. Gilbert. At 8:20 p.m., Mr. Gilbert replied that he was not ignoring Mr. Roozeboom, that he had just arrived home from Leon and that he would be in West Des Moines the following day. Mr. Gilbert did not provide Mr. Roozeboom with additional work.

Mr. Gilbert considered Mr. Roozeboom's prior attendance when making the decision to discharge Mr. Roozeboom from the employment. On September 4, Mr. Roozeboom notified Mr. Gilbert at 6:59 a.m. that he had overslept and would arrive for work in 15 minutes. On September 5, Mr. Roozeboom was supposed to arrive for work at 8:00 a.m. At 7:55 a.m., Mr. Roozeboom notified Mr. Gilbert that he had just left the Methadone clinic and would be 15 minutes late. On September 7, Mr. Roozeboom notified Mr. Gilbert that he had overslept and would be late for his 7:00 a.m. shift. On September 10, Mr. Roozeboom notified Mr. Gilbert at 6:45 a.m. that he would be late for his 7:00 a.m. shift due to traffic. On September 11, Mr. Roozeboom was supposed to start work at 7:00 a.m. At 7:02 a.m., Mr. Roozeboom notified Mr. Gilbert that he had overslept and would arrive at work before 8:00 a.m. Mr. Roozeboom arrived at 7:45 a.m. On September 14, Mr. Roozeboom was one minute late for his 7:00 a.m. shift due to traffic. On September 19, Mr. Roozeboom overslept and was late for his 7:00 a.m. shift. At 6:57 a.m., Mr. Roozeboom notified Mr. Gilbert that he was running late and would arrive closer to 8:00 a.m. Mr. Roozeboom arrived at 7:42 a.m. On September 27, Mr. Roozeboom was late for his 7:00 a.m. shift. At 7:05 a.m., Mr. Roozeboom notified Mr. Gilbert that he would arrive at work in 10 minutes. Mr. Roozeboom attributed the late arrival to traffic. On September 28, Mr. Roozeboom reported late for his 7:00 a.m. shift because he needed to appear for a 7:15 a.m. meeting with a counselor at the methadone clinic. Mr. Roozeboom had told Mr. Gilbert the previous day about the appointment and his need to report for work late. Mr. Gilbert arrived at 7:52 a.m. On October 4, Mr. Roozeboom was late for work because his power went out in a storm, his alarm clock did not go off, and he overslept. Mr. Roozeboom contacted Mr. Gilbert as soon as he awoke and reported for work at 8:15 a.m. On October 12, Mr. Roozeboom notified the employer at 7:01 a.m. that he would be absent due to being sick. On October 24, Mr. Roozeboom notified Mr. Gilbert at 7:11 a.m. that he would not be in because he needed to meet with his attorney. Mr. Roozeboom was scheduled to work at 7:00 a.m.

Mr. Roozeboom established an original claim for benefits that was effective October 28, 2018. Mr. Roozeboom received unemployment insurance benefits. KLM Plumbing is a base period employer for purposes of the unemployment insurance claim.

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).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See *Hurtado v. IDJS*, 393 N.W.2d 309 (Iowa 1986). In *Hurtado*, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

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 does not establish misconduct in connection with the employment in connection with the sleeping behavior on October 25, 2018. The weight of the evidence establishes that the sleeping behavior that day was attributable to illness, rather than a disregard for the interests of the employer.

The weight of the evidence in the record does establish misconduct in connection with the employment based on excessive unexcused absences. The administrative law judge concludes that the text message record upon which Mr. Gilbert based his testimony regarding the attendance matters was accurate and more reliable than Mr. Roozeboom's software application and Mr. Roozeboom's recollection. The evidence supports the employer's assertion that Mr. Roozeboom was habitually late for work. Between September 4 and October 25, Mr. Roozeboom was late for work for personal reasons nine times. Each of these incidents were unexcused absences under the applicable law. The unexcused tardiness was excessive. According to Mr. Roozeboom's testimony none of the traffic-related late arrivals were due to crashes or weather. What that means is that Mr. Roozeboom simply left home too late to get where he needed to be. The administrative law judge notes that with a 7:00 a.m. start time, Mr. Roozeboom would avoid the worst of the Des Moines metro's morning rush hour traffic. The weight of the evidence fails to support Mr. Roozeboom's assertion that the employer told him being late by 15 minutes was acceptable. Mr. Roozeboom's morning text messages to the employer in connection with his late arrivals contradict Mr. Roozeboom's assertion. In addition to the nine unexcused late arrivals, Mr. Roozeboom had an unexcused absence on October 12, Mr. Roozeboom, when he provided late notice that he would be absent due to illness. Mr. Roozeboom had another unexcused absence on October 24, when he was absent, without prior request or employer approval, to meet with his attorney. Mr. Roozeboom's late arrival on September 28 was an excused absence under the applicable law. The late arrival was based on Mr. Roozeboom's need to meet with the drug counselor and Mr. Roozeboom had properly notified the employer of his need to be late for that purpose. Mr. Roozeboom's late arrival on October 4 was excused by the employer and was attributed to the weather, something beyond Mr. Roozeboom's control.

Because the evidence in the record establishes misconduct in connection with the employment based on the attendance issues, Mr. Roozeboom is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Roozeboom must meet all other eligibility requirements. The employer's account will not be charged for benefits paid to the claimant after the entry date of this decision.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met:

(1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

Because the employer objected to the administrative law judge taking official notice of the Database Readout (DBRO) that contained the Agency's record of benefits disbursed to the claimant, this matter will be remanded to the Benefits Bureau for initial determination of whether the claimant has been overpaid benefits, determination of the overpayment amount, and determination of whether the claimant or the employer will be assessed for overpaid benefits.

DECISION:

The December 21, 2018, reference 01, decision is reversed. The claimant was discharged for misconduct in connection with the employment based on excessive unexcused absences. The effective discharge date was October 25, 2018. 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 for benefits paid to the claimant after the entry date of this decision.

This matter is remanded to the Benefits Bureau for initial determination of whether the claimant has been overpaid benefits, determination of the overpayment amount, and determination of whether the claimant or the employer will be assessed for overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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