IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU

AMANDA L NORRIS Claimant **BCP MEDIAPOLIS LLC** Employer	**APPEAL NO. 23A-UI-11024-JT-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/29/23** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

On November 27, 2023, the employer filed a timely appeal from the November 21, 2023 (reference 01) decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that ruled the employer's account could be charged for benefits. The deputy concluded the claimant had been discharged for illness-related absences but not for misconduct in connection with the employment. After due notice was issued, a hearing was held on December 13, 2023. Amanda Norris (claimant) participated. Hallie Kurth of Personnel Planners represented the employer and presented testimony through Rhonda Clover, Sonya McLaughlin, and Stacy Reid. Exhibits 1, 2 and 3 were received into evidence. The administrative law judge took official notice of the agency record of benefits disbursed to the claimant. 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.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed by BCP Mediapolis, L.L.C. as a part-time dietary aid, cook and dishwasher from September 19, 2023 until October 13, 2023, when the employer discharged the claimant. The claimant last performed work for the employer on September 29, 2023 and completed her shift on that date.

The claimant was next scheduled to work on October 2, 2023 at 5:00 a.m. The claimant was also scheduled to work shifts on October 3, 4, 5, 7 and 8.

On September 30, 2023, the claimant notified the employer that she had tested positive for COVID-19 through a home test kit.

Pursuant to the employer's COVID-19 policy, the employer required that the claimant remain off work for at least five days and that the claimant twice test negative for COVID-19 pursuant to an employer-administered test before she could return to work at the employer's long-term care facility.

The employer directed the claimant to come to the workplace on October 5, 2023 for her first employer-administered COVID-19 test. The employer directed the claimant not to enter the workplace.

On October 4, the employer told the claimant she would need to present a medical release in order to return to the employment. Up to that point, the claimant had not seen a doctor in connection with the absence.

On October 5, 2023, the claimant appeared as directed for the employer-administered COVID-19 testing. At that time, the claimant tested negative for COVID-19.

The employer directed the claimant to remain off work and to return to the workplace on October 9, 2023 for the second employer-administered COVID-19 test. The employer told the claimant that if she tested negative on October 9, she would be allowed to return to work on October 10.

Pursuant to the employer's directive that the claimant remain away from the workplace, the employer reassigned the shifts the claimant had been scheduled to work on October 7 and 8. The employer did not place the claimant on the schedule for any additional shifts.

The employer did not plan to compensate the claimant for the time the claimant spent coming to the workplace to submit to the employer-issued COVID-19 tests and did not pay the claimant for that time.

The claimant did not report to the workplace on October 9, 2023 for the second employer-administered COVID-19 test. The claimant did not report to the workplace because she was ill and had been diagnosed with bronchitis.

On the morning of Tuesday, October 10, 2023, the claimant contacted the employer via text message in an attempt to speak with her supervisor, but the supervisor was busy and unavailable at that time.

The employee handbook the employer provided to the claimant on September 19, 2023 included an attendance policy. The policy required that the claimant call her immediate supervisor or the Staffing Coordinator at least four hours prior to the start of her shift if she needed to be absent. The policy required medical documentation for an absence lasting three consecutive shifts or more and further stated the absent employee would not be allowed to return to work without a medical release stating the employee was able to perform essential functions of the job.

On the afternoon of October 10, 2023, the claimant again sent a text message to the employer. The claimant indicated that she had been diagnosed with bronchitis. stated she would need to be off work for the remainder of the week.

On the afternoon of October 10, 2023, the employer spoke with the claimant by telephone. The claimant again mentioned the bronchitis diagnosis and stated she had been prescribed

medication to address the illness. The employer asked the claimant to provide a doctor's note and offered to give the claimant a fax number to which her doctor could send the medical note. The employer did not actually provide the fax number and the claimant did not ask for the fax number. The claimant was not at that time released to return to the employment. The employer told the claimant the employer would need to confer with a human resources representative regarding the claimant's employment status.

On the afternoon of October 11, the claimant called to inquire about the status of her employment. The employer shared that the employer had not yet spoken with the human resources personnel.

On October 13, 2023, the claimant again contacted the employer to inquire about the status of her employment. The claimant initially spoke with the human resources representative and then spoke with that person and a supervisor. During the call the employer notified the claimant that she was discharged for attendance. The claimant had at that time still not been released by her doctor to return to the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
> …
> d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:
>
> > …
> > (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
> > …
> > (9) Excessive unexcused tardiness or absenteeism.
> > …

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.

a. For the purposes of this rule, "misconduct" is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 a 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. Misconduct by an individual includes but is not limited to all of the following:

…
(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
…
(9) Excessive unexcused tardiness or absenteeism.
…

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 Admin. Code r.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 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. 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 an October 13, 2023 discharge for no disqualifying reason. The claimant was absent from her October 2, 2023 shift due to illness and properly notified the employer. The October 2, 2023 absence was an excused absence under the applicable law. In light of the employer's directive that the claimant remain off work until after she twice tested negative for COVID-19 pursuant to employer-administered tests, the October 3, 4, 5, 7 and 8 reassigned shifts cannot be deemed unexcused absences. The employer did not schedule the claimant for additional shifts. In light of the employer policy of not compensating the claimant for the time and effort related to the employer-administered COVID-19 testing, the claimant's non-appearance on October 9 for the second employer-administered COVID-19 testing cannot be considered an unexcused absence. During the subsequent period leading up to the October 13 discharge, the claimant was not scheduled to work shifts, had not been released by a doctor to return to work, and had not been authorized by the employer to return to work. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The November 21, 2023 (reference 01) decision is AFFIRMED. The claimant was discharged for no disqualifying reason. The discharge was effective October 13, 2023. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

December 21, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:
1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:
1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.