

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SARAH M KIFER
Claimant

APPEAL NO. 14A-UI-07732-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARKETLINK INC
Employer

OC: 06/29/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Sarah Kifer filed a timely appeal from the July 16, 2014, reference 01, decision that disqualifies her for benefits. After due notice was issued, a hearing was held on August 19, 2014. Ms. Kifer participated and presented additional testimony through Jessica Freeman. Sandy Dunn represented the employer. Exhibits One through Six were received into evidence.

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: Sarah Kifer was employed by Marketlink, Inc., during two distinct periods. Ms. Kifer was most recently employed by Marketlink as a full-time telephone sales representative from April 29, 2014 and last performed work for the employer on May 19, 2014, when Jordan Lickteig, Call Center Manager, discharged her for attendance. Ms. Kifer's work hours were 8:00 a.m. through 4:30 p.m., Monday through Friday. The employer also required employee's, including Ms. Kifer, to work on rotating Saturdays. If Ms. Kifer needed to be absent from work, the employer's policy required that she telephoned the workplace prior to the scheduled start of her shift and speak to a supervisor. Ms. Kifer was aware of the policy.

On May 1, Ms. Kifer left work early due to a family emergency. Ms. Kifer's brother had taken his own life. Ms. Kifer's husband had called Ms. Kifer at work to notify her of the incident. The center manager approved Ms. Kifer's early departure from work.

On May 2, Ms. Kifer reported for work prior to the scheduled start of her shift, encountered problems with logging onto the employer's computer system and logged on at 8:08 a.m. Ms. Kifer promptly reported the problem to her supervisor.

On May 6, Ms. Kifer reported for work 1.5 hours late. Ms. Kifer notified the employer prior to the shift that she would be late. Ms. Kifer was assisting her mother with funeral arrangements concerning her deceased brother.

On May 7, Ms. Kifer was absent for personal reasons so that she could attend her sister's graduation. The center manager had previously notified Ms. Kifer that the request to be absent that day was not approved.

On May 8, Ms. Kifer was 3.5 hours late for work for personal reasons.

On May 12, Ms. Kifer left work early with approval of the Center Manager so that she could obtain and provide to the employer legal documentation concerning her role in facilitating her husband's visitation with a child from a previously relationship. A judge had entered a visitation order that indicated Ms. Kifer would act as an intermediary so that her husband and the child's mother would not come into direct contact. Ms. Kifer needed the documentation to support her request for Saturday, May 17 off. Ms. Kifer was under the belief that she was court-ordered to make herself available to facilitate the visitation.

On May 15, Ms. Kifer left work early to take her minor child to the hospital. The child was being readmitted to the hospital for treatment of an eye injury. The employer approved Ms. Kifer's early departure that day.

The final absence that triggered the discharge occurred on May 17, 2014, when Ms. Kifer was absent from a Saturday shift. The employer had notified Ms. Kifer on the afternoon of May 16, that her request to have May 17 off to facilitate her husband's visitation was not approved. The employer notified Ms. Kifer that if she did not appear for the Saturday shift, she would be discharged from the employment. Ms. Kifer did not appear for the shift for two reasons. The first was that her child was not discharged from the hospital until 9:00 a.m. and the shift was to start at 8:00 a.m. The second reason for the absence was Ms. Kifer's need to facilitate her husband's visitation with his child.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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).

The administrative law judge notes that the employer's sole witness lacked personal knowledge concerning Ms. Kifer's employment and separation from the employment. The employer had the ability to present testimony from persons with personal knowledge, but elected not to. 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 a final absence that based in part on Ms. Kifer's need to be absent to attend her child's medical needs and due in part to Ms. Kifer's need to facilitate her husband's visitation. Though the administrative law judge questions whether Ms. Kifer would have been subject to any penalty if she had elected not to facilitate her husband's visitation with his child on May 17, Ms. Kifer reasonably believed that she was indeed court-ordered to assist with the visitation as scheduled. Ms. Kifer had properly reported her need to be absent to the employer. The weight of the evidence indicates a final absence that was an excused absence under the applicable law. That absence cannot serve as a basis for disqualifying Ms. Kifer for unemployment insurance benefits. The early departures on May 12 and May 15 were also excused absences under the applicable law. In the first instance, Ms. Kifer left to provide documentation requested by the employer and left with the employer's approval. In the second instance, Ms. Kifer left to attend the medical needs of her injured child and left with the approval of the employer. The evidence establishes unexcused absences on May 7 and May 8. On May 7, Ms. Kifer took the day off to attend her sister's graduation despite knowing that the absence was not approved by the employer. On May 8, Ms. Kifer was significantly late for non-specified personal reasons. Ms. Kifer's May 1 early departure was an excused absence. On that day, Ms. Kifer left early due to a bona fide family emergency and left with the permission of the employer. There was no late arrival on May 2. Ms. Kifer had arrived on time for work and had been hindered in documenting her arrival time by the employer's computer system. Ms. Kifer's late arrival on May 6 was an excused absence. Ms. Kifer was dealing with her brother's funeral arrangements and had properly notified the employer of her need to be late. There were no no-call/no-show absences.

Because the final absence was an excused absence under the applicable law, the administrative law judge concludes that Ms. Kifer was discharged for no disqualifying reason. The administrative law judge notes that final three absences were all excused absences under the applicable law. Ms. Kifer is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claims deputy's July 16, 2014, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css