

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALEXANDRIA K CLINE

Claimant

APPEAL NO. 16A-UI-05732-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MISSISSIPPI VALLEY REG BLOOD CTR

Employer

OC: 04/24/16

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Alexandria Cline filed a timely appeal from the May 10, 2016, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Ms. Cline was discharged on April 22, 2016, for violation of a known company rule. After due notice was issued, a hearing was held on June 7, 2016. Ms. Cline participated and presented additional testimony through Jennifer Stark. Janel Boelens represented the employer. Exhibits One through 12, A, B, and C 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. The administrative law judge concludes that the employer did not prove a current act of misconduct and, therefore, that the discharge did not disqualify Ms. Cline for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mississippi Valley Regional Blood Center (MVRBC) conducts blood drives to collect blood from volunteer blood donors for distribution to hospitals. Alexandria Cline began her employment with MVRBC in October 2014 as a full-time Collection Specialist, or phlebotomist. Ms. Cline's duties included registering and screening donors, conducting a cursory physical to ensure that donors were healthy enough to donate blood, monitoring donors while they were actively donating blood, and assisting with loading and unloading equipment. Ben Lammers, Manager of Donor Services, was Ms. Cline's immediate supervisor throughout the employment.

In April 2015, the employer promoted Ms. Cline to the position of full-time Collection Specialist/Driver, which meant that Ms. Cline would at some point be assigned to drive the employer's van, with the equipment trailer in tow, to and from blood drive sites around the state. The promotion increased Ms. Cline's hourly pay from \$12.60 to \$13.85. Though Ms. Cline received the pay increase and additional title of Driver, Mr. Lammers would not include Ms. Cline in the pool of drivers until Ms. Cline demonstrated to his satisfaction that she could safely and responsibly operate the employer's vehicles. Until Mr. Lammers signed off to indicate his approval, Ms. Cline was relegated to operating the employer's vehicles only when

another approved driver was present to supervise her operation of the employer's vehicles. Those approved drivers were expected to evaluate Ms. Cline's driving ability and report back to Mr. Lammers.

Because the location, travel distance, size, and other circumstances of each blood donor drive were different, Ms. Cline did not have set work hours and could be scheduled for any time on Monday through Saturday. The shifts could last from four to 12 hours. The driving time was considered the designated break time and formal breaks were not allowed while blood drives were in progress. Ms. Cline was allowed to step away briefly for an informal break so long as she first obtained approval from the MVRBC supervisor supervising the blood drive.

Between April 2015 and February 19, 2016, Mr. Lammers issued several warnings or reprimands to Ms. Cline for various matters including failure to obtain Mr. Lammers approval of her driving, attendance, and violation of the cell phone policy. The employer has a detailed written attendance policy that the employer provided to Ms. Cline at the start of the employment. The policy stressed the importance of appearing for work, for appearing on time for work, and sets forth a progressive discipline policy. However, the policy does not include an absence reporting policy other than referencing that absent employees will be deemed a no-call/no-show if they fail to notify their supervisor within 30 minutes after the scheduled start of their shift.

The employer has a detailed written cell phone policy that the employer provided to Ms. Cline on October 15, 2015. Ms. Cline signed her acknowledgment of the policy that same day. The policy reads as follows:

Mobile phones are not allowed for personal use in donor contact areas (registration, screening, collection, etc.) and may not be carried by Donor Services staff into any donor collection areas.

The donor collection area is a designated biohazard working area. As such, there is the potential for exposure to blood. All personal mobile phones, other than that supplied by MVRBC for the purpose of communication, will remain stored with staff personal properly for the duration of the work day.

Answering, speaking, texting, or looking at a screen on a personal mobile phone in the presence of our donors indicates that you are not fully engaged in their care and wellbeing. This activity does not meet the blood center's or our donors' customer service expectations.

Staff may utilize their personal mobile phones during breaks as long as that use is not done in the presence of our donors. As noted in the Employee Handbook, employees are not allowed to utilize any cell phone's camera/video features on the Company premises at any time for personal use.

On April 13, 2015, Mr. Lammers issued a "Staffing Dialogue" to Ms. Cline after she was tardy for work on April 11, 2015 because she had not reviewed the schedule to see she was scheduled to work.

On August 10, 2015, Mr. Lammers issued a "Staffing Dialogue" to Ms. Cline for failing to complete the "driver's training." Ms. Cline had difficulty getting other drivers to agree to let her drive and supervise her driving. After the warning, Ms. Cline drove for the employer at least 16 times between August 2015 and April 22, 2016 without incident but Mr. Lammers declined to give the final approval necessary to place Ms. Cline in the driver pool.

On October 22, 2015, Mr. Lammers issued a "Staffing Dialogue" to Ms. Cline after a charge nurse twice observed Ms. Cline violating the cell phone policy on October 15 during a blood drive. In one instance Ms. Cline had stepped away from the donor area with permission while donors were waiting and the charge nurse found Ms. Cline scrolling through items on her cell phone. In the second instance, Ms. Cline was scrolling through items on her cell phone in the presence of donors.

On November 9, 2015, Mr. Lammers issued a "Staffing Dialogue" to Ms. Cline for attendance. Ms. Cline had been late for personal reasons on January 8, April 11, May 12, May 15, June 16, September 10, and October 8, 2015.

On January 7, 2016, Mr. Lammers issued an "Employee Counseling Report" to Ms. Cline for attendance. Ms. Cline had been late for personal reasons on November 6, 7, and 12, and on December 19 and 22, 2015. The reprimand also referenced the earlier late arrivals. Ms. Cline signed the reprimand without adding comments in the space provided for her comments

Also on January 7, 2016, Mr. Lammers issued an "Employee Counseling Report" to Ms. Cline for based on incidents that occurred on November 30 and December 9, 2015. On November 30, Ms. Cline got into an argument with a charge nurse concerning which lancets should be used to test iron levels in donors' blood. The employer had authorized staff to commence using the newer lancets beginning on November 30. Ms. Cline's disagreement with the nurse arose when Ms. Cline asserted the older lancets should be used first. On November 9, Ms. Cline got into an argument with a charge nurse over whether donor address forms needed to be sent to the employer's Davenport office. The charge nurse believed the forms should be sent to Davenport. Ms. Cline thought the forms, which contained erroneous donor addresses and were replaced during the drive with forms containing the correct address, could be discarded. Ms. Cline took the documents from the charge nurse, ripped them up, and put them in the biohazard bin to be destroyed. The reprimand also addressed complaints from the charge nurse that Ms. Cline had argued with the charge nurse about how the donation unit should be set up. The reprimand also referenced charge nurse complaints that Ms. Cline would disappear when she was needed during blood drives and was many times found to be on her cell phone. Ms. Cline concedes that on December 9 she would check her cell phone to make certain she did not have any messages from her children's babysitter. Ms. Cline signed the reprimand without adding comments in the space provided for her comments

On February 19, 2016, Mr. Lammers issued Ms. Cline a final written warning concerning a blood drive on February 16, 2016. On that day, Ms. Cline stepped away from her duties three times to use her cell phone in the screening area. Mr. Lammers reminded Ms. Cline that he had spoken to her on multiple occasions about similar issues. Mr. Lammers directed Ms. Cline to keep her cell phone with her personal belongings with the sound turned off. Mr. Lammers directed Ms. Cline not to use her cell phone in the presence of donors, to focus on the donors, and to obtain permission from the charge nurse before leaving her work area. Mr. Lammers warned Ms. Cline that if she did not demonstrate immediate improvement, she would face discipline that could include termination of the employment. Ms. Cline signed the reprimand without adding comments in the space provided for her comments

On April 22, 2016, Ms. Cline participated in a blood drive. Upon her return to the employer's office, Mr. Lammers summoned her to a meeting and notified her that she was discharged from the employment. In the reprimand Mr. Lammers prepared for the meeting, Mr. Lammers asserted that since the final warning that he had continued to hear from staff that Ms. Cline was on her cell phone during blood drives. Mr. Lammers acknowledged that Ms. Cline had

commenced notifying the charge nurse when she needed to step away for a restroom break. Mr. Lammers asserted that Ms. Cline was taking her cell phone with her for those breaks and that her breaks were excessively long. Mr. Lammers asserted that Ms. Cline had not shown the expected improvement in her conduct. In the reprimand, Mr. Lammers faulted Ms. Cline for not having earned his approval to become part of the driving pool. Mr. Lammers asserted that Ms. Cline did not show initiative in assisting with loading and unloading vehicles. On or about April 21, a coworker became upset because the coworker did not feel Ms. Cline was sufficiently assisting with unloading equipment. Ms. Cline had taken a moment to place some beds back onto a dolly. Mr. Lammers asserted that Ms. Cline's conduct created a negative work environment. Ms. Cline declined to sign this final reprimand document.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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).

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.

While the evidence establishes that the employer had legitimate concerns about Ms. Cline's work performance and adherence to the work rules on or before February 16, 2016, the evidence in the record fails to establish a current act of misconduct. The employer's allegations that Ms. Cline violated policy or otherwise engaged in misconduct subsequent to the final warning are allegations without proof. The administrative law judge notes that the employer elected not to present testimony from Mr. Lammers or anyone who purportedly observed Ms. Cline engaged in any alleged violation of company policy subsequent to the February 19, 2016 final warning. The employer had the ability to present such testimony. The evidence in the record is insufficient to establish that there was any violation of the cell phone policy subsequent to the February 19 final warning. The evidence in the record is insufficient to establish that Ms. Cline did in fact take excessive breaks or that she neglected loading or unloading duties. With regard to the failure to obtain final approval needed to join the driving pool, the evidence indicates that between August 2015 and the discharge date, Ms. Cline took reasonable steps to satisfy the requirement by driving for the employer several times without incident. Mr. Lammers' subjective conclusion that Ms. Cline had not yet passed muster on her driving skills did not constitute misconduct on the part of Ms. Cline.

Because the evidence fails to establish a current act of misconduct, the evidence fails to establish a discharge that would disqualify Ms. Cline for unemployment insurance benefits. Ms. Cline was discharged for no disqualifying reason. Accordingly, Ms. Cline is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The May 10, 2016, reference 01, decision is reversed. The evidence fails to establish a current act of misconduct. 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

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