

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAHESHER ANDERSON
Claimant

APPEAL NO. 15A-UI-03771-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

REMEDY INTELLIGENT STAFFING INC
Employer

OC: 02/22/15
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 18, 2015, reference 01, decision that that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on February 20, 2015 for no disqualifying reason. After due notice was issued, a hearing was commenced on April 30, 2015 and concluded on June 3, 2015. Claimant Tahesher Anderson did not provide a telephone number for either hearing date and did not participate. John "JT" Breslin represented the employer on April 30, 2015 and provided testimony. Mr. Breslin was on that date substituting for employer representative/witness Emily Martin who was unavailable due to an unplanned absence to care for a sick child. Mr. Breslin did not have full access to Ms. Martin's records concerning the claimant's separation from the employment. The administrative law judge concluded there was good cause to adjourn the appeal hearing and recommence the hearing at a later date when Ms. Martin could be available. On April 30, 2015, the administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. On that date, the administrative law judge took official notice of the fact-finding materials for the limited purpose of documenting the employer's participation in the fact-finding interview. On June 3, 2015, Emily Martin represented the employer and provided testimony.

ISSUE:

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: Remedy Intelligent Staffing, Inc., is a temporary employment agency that provides temporary workers to General Mills in Cedar Rapids. Claimant Tahesher Anderson performed work for the employer in a temporary assignment at General Mills from August 2014 until February 22, 2015, when General Mills ended the assignment due to attendance. The claimant was part of a pool of

temporary workers that the employer would send to General Mills to fulfill General Mills' staffing needs, which might change from day to day. The claimant would learn whether she was expected to work on a particular day either by being told by a General Mills supervisor at the end of the prior shift or by calling Remedy on the day in question and being "confirmed" to work that day. If the claimant needed to be absent from a confirmed shift, the employer expected the claimant to contact Remedy prior to the scheduled start of a shift.

The employer does not know the date of the final absence that triggered the discharge from the assignment. The employer's records reflect an absence on February 16, 2015. The employer does not know whether the claimant was confirmed to work at General Mills that day. Prior to the purported absence on February 16, 2015, the next most recent absence occurred on January 22, 2015, when the claimant notified the employer she would be absent. The employer does not know the reason for the absence. The next most recent absence occurred on January 20, 2015, when the claimant was absent without notifying the employer.

The claimant established a claim for benefits that was effective February 22, 2015 and received \$456.00 in benefits for the four-week period of February 22, 2015 through March 21, 2015.

On March 17, 2015, a Workforce Development claims deputy conducted a fact-finding interview to address the claimant's separation from Remedy. Emily Martin represented the employer at that proceeding.

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.

The employer has presented insufficient evidence to establish an unexcused absence that would constitute a current act of misconduct. The employer could not state the final absence that prompted the discharge from the assignment at General Mills and separation from Remedy. The employer could not state with certainty whether the claimant was confirmed to work on February 16, 2015. The absences in January 2015 would not constitute current acts.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged on February 22, 2015 for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

DECISION:

The March 18, 2015, reference 01, decision is affirmed. The claimant was discharged on or about February 22, 2015 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/pjs