

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BLOSSOM, SABRINA, M
Claimant

APPEAL NO. 13A-UI-04448-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VON MAUR INC
Employer

OC: 04/01/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 1, 2013, reference 05, decision that allowed benefits and that held the employer's account could be charged. After due notice was issued, a hearing was held on May 20, 2013. Cathy Rockwell represented the employer. Claimant Sabrina Blossom did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Exhibits One through Seven 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: Sabrina Blossom was employed by Von Maur, Inc., as a full-time merchandise processor at the employer's distribution center in Davenport. Ms. Blossom began the employment in April 2012. On March 8, 2013, Cathy Rockwell, then District Center Manager, in consultation with the employer's human resources department, discharged Ms. Blossom for attendance. If Ms. Blossom needed to be absent from work, the employer's written attendance policy required that she notify the employer at least one hour prior to the scheduled start of her shift. Ms. Blossom's regular work hours were 7:30 a.m. to 4:00 p.m., Monday through Friday. The policy was set forth in the handbook provided to Ms. Blossom at the start of her employment. In addition Ms. Rockwell had spoken to Ms. Blossom a number of times about the need to follow the call-in policy.

The final absences that triggered the discharge occurred on March 6 and 7, 2013. On March 6, Ms. Blossom was absent without notifying the employer. On March 7, Ms. Blossom was absent and did not contact the employer until 2:30 p.m. At that time, Ms. Blossom asked Ms. Rockwell whether she needed to come in and fill out separation paperwork. Ms. Blossom referenced prior warning from Ms. Rockwell that additional absences would lead to discharge from the employment. Ms. Rockwell directed Ms. Blossom to appear for her shift the next day. On March

8, Ms. Blossom appeared for work on time, but made immediate contact with Ms. Rockwell and refused to begin working unless she was given a decision regarding whether her absences subjected her to discharge from the employment. Ms. Blossom told Ms. Rockwell that if she did not hear from Ms. Rockwell by morning break, that Ms. Blossom was going to leave at that time. Ms. Blossom's conduct during at least the last few days of the employment suggested she was trying to provoke the employer to discharge her from the employment. Ms. Rockwell did get back to Ms. Blossom that morning with a decision that she was discharged from the employment. Ms. Blossom's attitude was a factor in that decision.

Prior to the final two absences, Ms. Blossom had also been absent on March 5, 2013. On that day, Ms. Blossom waited until an hour after scheduled start time to notify the employer she was running late but would be in to work. Ms. Blossom then did not report for any part of her shift and did not make further contact with the employer to indicate she would be gone for the entire shift.

On February 28, and again on March 1, 2013, Ms. Blossom told the employer during her shift that she had some sort of family emergency involving one of her children and needed to leave work. The employer does not know the specifics of the purported family emergencies.

On February 27, Ms. Blossom arrived late for work because she needed to attend a meeting with an attorney. Ms. Blossom provided last-minute notice to the employer of her need to be gone for a portion of her shift.

Ms. Blossom had an extensive history of missing all or part of her shift. Many of those absences were for personal reasons. Employer issued two reprimands for attendance during employment. The first reprimand was issued in September 2012. Second reprimand was issued on February 7, 2013.

Ms. Blossom established a claim for benefits that was effective March 10, 2013.

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.

871 IAC 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.

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 evidence in the record establishes excessive unexcused absences. The evidence in the record establishes three consecutive unexcused absences on March 5, 6, and 7, 2013.

Regarding the first absence, Ms. Blossom provided late notice that she would be tardy and then failed to appear for any part of the shift or make further contact with the employer indicating she would need to be gone for the entire shift. For the second absence, Ms. Blossom was a no-call no-show. For the third absence, Ms. Blossom failed to contact the employer until the latter part of her shift. The weight of the evidence supports the employer's suspicion that Ms. Blossom was indeed trying to provoke the employer to discharge her from the employment. The three consecutive unexcused absences occurred in the context of reprimands for attendance, the most recent of which had been issued a month earlier. The evidence indicates that Ms. Blossom knew her employment was in jeopardy due to her attendance issues at the time of each of the three final absences. Even without taking into consideration the prior attendance matters, which included additional unexcused absences, the final three consecutive unexcused absences were sufficient to establish excessive unexcused absences constituting misconduct in connection with the employment. Because Ms. Blossom was discharged for misconduct in connection with the employment, she is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Blossom.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits. The remand should also address whether the claimant has been able and available for work since she established the additional claim for benefits that was effective March 10, 2013.

DECISION:

The Agency representative's April 1, 2013, reference 05, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits. The remand should also address whether the claimant has been able and available for work since she established the additional claim for benefits that was effective March 10, 2013.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs