

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI	
<b>ALICIA A BONTRAGER</b> Claimant  <b>MERCER HEALTH &amp; BENEFITS ADMINISTRATION</b> Employer	<b>APPEAL NO. 17A-UI-12370-JTT</b>  <b>ADMINISTRATIVE LAW JUDGE DECISION</b>  <b>OC: 11/12/17</b> <b>Claimant: Appellant (2)</b>

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

**STATEMENT OF THE CASE:**

Alicia Bontrager filed a timely appeal from the November 29, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Benefits Bureau deputy's conclusion that Ms. Bontrager was discharged on November 7, 2017 for excessive unexcused absences. After due notice was issued, a hearing was held on December 22, 2017. Ms. Bontrager did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Mary Olson represented the employer. Exhibits 1 through 5 were received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Alicia Bontrager was employed by Mercer Health & Benefits Administration as a full-time Call Center representative from November 2015 until November 27, 2017, when the employer discharged her for attendance. If Ms. Bontrager needed to be absent from work, the employer's oral attendance policy required that she call her supervisor or a designated absence reporting telephone number. Ms. Bontrager was familiar with the absence reporting requirement. The final absence that triggered the discharge occurred on November 2, 2017. On that day, Ms. Bontrager was absent to care for her sick child and properly reported the absence. Ms. Bontrager had also been absent to care for her sick child on October 30, 2017 and had properly reported that absence. On October 5 and 27, 2017, Ms. Bontrager had been absent due to her own illness and had properly reported those absences. Ms. Bontrager had left work early on October 10, 2017, but the employer witness does not know the particulars of that earlier departure. On September 26, 2017, Ms. Bontrager was absent so that she could attend a court proceeding. Ms. Bontrager had not requested that time off in advance.

The employer considered prior attendance issues and associated progressive discipline when making the decision to discharge Ms. Bontrager from the employment. In July 2016, Operations Supervisor Gail Daniels issued a verbal reprimand to Ms. Bontrager for attendance. In December 2016, Operations Supervisor Joe Vitelli issued a written reprimand to Ms. Bontrager for attendance. On October 17, 2017, Operations Supervisor Lydia Vignovich issued a Final Written Warning to Ms. Bontrager for attendance.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 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.

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 evidence in the record establishes a discharge for attendance, but fails to establish a discharge based on a current act. The absences on October 5, October 27, October 30, and November 2, 2017 were based on personal illness or the need to care for a sick child and were properly reported to the employer. Each is an excused absence under the applicable law and cannot serve as a basis for disqualifying Ms. Bontrager for unemployment insurance benefits. The employer presented insufficient evidence regarding the early departure on October 10, 2017 to prove that absence was an unexcused absence under the applicable law. One has to go all the way back to September 26, 2017 to find an absence that would be deemed an unexcused absence under the applicable unemployment insurance law. Because the discharge was not based on a current act of misconduct, the discharge does not disqualify Ms. Bontrager for unemployment insurance benefits or relieve the employer's account of liability for benefits. Ms. Bontrager is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

#### **DECISION:**

The November 29, 2017, reference 01, decision is reversed. The claimant was discharged on November 7, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs