

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MELISSA A ADKINS
Claimant

EGS CUSTOMER CARE INC
Employer

APPEAL 15R-UI-11265-JTT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/26/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

This matter was before the administrative judge upon the Employment Appeal Board remand for a new hearing in Hearing Number 15B-UI-09281, after the employer missed September 3, 2015 appeal hearing set in Appeal Number 15A-UI-09281-SC-T. The September 3, 2015 appeal hearing had been set in response to claimant Melissa Adkins' appeal from the August 12, 2015, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on an Agency conclusion that Ms. Adkins had been discharged on July 27, 2015 for excessive unexcused absenteeism. The parties were properly notified of the rescheduled hearing set for October 26, 2015. Ms. Adkins was available for the hearing. The employer representative, Turkessa Newsone, was not available for the hearing at the number the employer provided for the hearing or at the two additional numbers at which the administrative law judge attempted to reach her or some other employer representative. Based on the employer's failure to appear for the rescheduled hearing, and based on the claimant's prior participation in and the record made at the time of the September 3, 2015 appeal hearing, and based on the applicable law, the administrative law enters the following findings of fact, conclusions of law, and decision, all adopted from the administrative law judge decision entered in Appeal Number 15A-UI-09281-SC-T.

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: Melissa Adkins was employed by EGS Customer Care, Inc., from August 2014 until July 27, 2015 when the employer discharged her for attendance. During the period of the employment, Ms. Adkins suffered from a medical condition. Ms. Adkins had made the employer aware of her medical condition, had requested accommodations based on the medical condition, and had been approved for accommodations. Pursuant to the approved accommodations, Ms. Adkins was required to telephone a team leader if she needed to be absent due to an episode related to her medical condition.

The final absence that triggered the absence occurred on July 27, 2015, when Ms. Adkins experienced a medical episode that it made her unable to attend work. Ms. Adkins notified the employer pursuant to the previously established protocol. Later that day, Ms. Adkins' supervisor notified her that she was discharged from the employment for exceeding the allowed number of attendance points.

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 did not participate in the September 3, 2015 appeal hearing in Appeal Number 15A-UI-09281-SC-T and, thereby, did not present evidence on that date to establish any absences that would be unexcused absences under the applicable law. The employer also did not participate in the rescheduled hearing set in this matter to accommodate the employer's participation and, thereby, did not present evidence on that date to establish any absences that would be unexcused absences under the applicable law.

Based on the evidence in the record from the September 3, 2015 appeal hearing in Appeal Number 15A-UI-09281-SC-T and application of the appropriate law, the administrative law judge concludes that Ms. Adkins was discharged for no disqualifying reason. Accordingly, Ms. Adkins is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Adkins.

DECISION:

The August 12, 2015, reference 01, unemployment insurance decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs