

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY K SCUDDER
Claimant

APPEAL NO. 15A-UI-04271-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 03/22/15
Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

Ashley Scudder filed a timely appeal from the April 6, 2015, reference 01, decision that that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that she had been discharged on March 23, 2015 for excessive unexcused absences. After due notice was issued, a hearing was held on May 13, 2015. Ms. Scudder did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. John O'Fallon of Barnett Associates represented the employer and presented testimony through Alyson Flowers and Chad Brennecke.

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: Ashley Scudder was employed by Wells Fargo Bank North America as a full-time loan services specialist from August 2014 until March 23, 2015; when Alyson Flowers, Loan Administration Manager, discharged her for attendance. Ms. Flowers was Ms. Scudder's immediate supervisor. Ms. Scudder's work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. If Ms. Scudder needed to be absent from work for a planned absence, the employer required notice the previous day. If Ms. Scudder needed to be absent for an unplanned absent, the employer required notice as soon as possible. The employer provided the policy to Ms. Scudder at the time of hire, reviewed the policy with Ms. Scudder monthly, and reviewed the policy with Ms. Scudder at the time the employer issued warnings in January and February for attendance.

The final absence that triggered the discharge occurred on March 23, 2015, when Ms. Scudder was over an hour late because she had overslept. The next most recent absence occurred on March 17, 2015, when Ms. Scudder was over an hour late due to transportation issues. Ms. Scudder notified Ms. Flowers at the scheduled start of her shift that her battery was dead and that she was waiting for a friend to help to jump start her car. Ms. Scudder lived in West Des Moines. The workplace was located in West Des Moines.

The employer considered additional absences when making the decision to end the employer. On September 26, 2014, Ms. Scudder had been absent due to illness and properly reported the absence to the employer. Similar absences occurred on November 20 and 25, 2014. On December 17, 2014, Ms. Scudder was absent due to her pre-teen daughter's illness and notified the employer at the scheduled start of her shift. On December 31, 2014, Ms. Scudder left work early due to illness and properly notified the employer.

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 weight of the evidence in the record establishes two absences that were unexcused absences under the applicable law. The remainder of the absences were due to illness, were properly reported to the employer, and were excused absences under the applicable law. The two unexcused absences were the final two absences. These absences occurred six days apart and followed two warnings for attendance. One for transportation, a matter of personal responsibility. The other was due to oversleeping. Given the close proximity of the unexcused absences and the prior warnings for attendance, the administrative law judge concludes that the unexcused absences were excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Scudder was discharged for misconduct. Accordingly, Ms. Scudder 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.

DECISION:

The April 6, 2015, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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