

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AVISHIA D HODGES
Claimant

APPEAL NO. 17A-UI-05267-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BETTENDORF HEALTHCARE MGMT
Employer

OC: 04/16/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Avishia Hodges filed a timely appeal from the May 8, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Hodges was discharged on April 19, 2017 for excessive unexcused absences. After due notice was issued, a hearing was held on June 6, 2017. Ms. Hodges participated. The employer did not respond to the hearing notice instructions to register a telephone for the hearing and did not participate. Exhibit A was 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: Avishia Hodges was employed by Bettendorf Healthcare Management as a full-time Certified Nursing Assistant (CNA) from September 2016 until April 19, 2017, when the employer discharged her for attendance. Ms. Hodges was assigned to the 2:00 p.m. to 10:00 p.m. shift. The long-term care facility's administrator, director of nursing, and assistant director of nursing functioned as her supervisors.

On Sunday April 16, 2017, Ms. Hodges was absent from work so that she could spend the Easter holiday with her children. On Wednesday, April 12, 2017, Ms. Hodges sent a group text message to her coworkers asking whether anyone wanted to pick up her shift on April 16. A coworker responded and agreed to pick up the shift. The employer's human resources manager had created the texting group for the purpose of recruiting employees to work open shifts. The assistant director of nursing was part of the group-texting group. The employer's policy regarding employees picking up or exchanging shifts required that Ms. Hodges and the coworker complete a written schedule change request and submit that to the assistant director of nursing for approval. Ms. Hodges and her coworker did not comply with that policy in connection with the April 16 absence.

On Monday, April 17, 2017, Ms. Hodges was absent from her 2:00 p.m. shift to care for her sick four-year-old son. The employer's policy required that Ms. Hodges call at least two hours prior to the shift and speak with a nurse or the, the assistant director of nursing or the director of nursing. At 10:00 a.m., Ms. Hodges called the workplace to report the absence, but no one answered that call. Ms. Hodges did not make an additional attempt to provide notice to the employer of her need to be absent.

When Ms. Hodges appeared for work on April 18, 2017, the administrator and the assistant director of nursing summoned her to a meeting and told her that she was being discharged for being a no-call/no-show for the two shifts. Ms. Hodges requested a union representative join the meeting. The employer adjourned the meeting until the next day so that a union representative could participate. During the meeting, Ms. Hodges asserted that other employees had been absent without notice during the preceding week but had not been discharged from their employment. The administrator cited Ms. Hodge's two consecutive absences as a distinguishing factor. The administrator also referenced a prior reprimand for tardiness.

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 evidence in the record establishes unexcused absences on April 16 and 17, 2017. In the first instance, Ms. Hodges knew she was required to submit a written schedule change request in order for the coworker to pick up the shift, but Ms. Hodges failed to comply with the policy. In the second instance, Ms. Hodges made a single, timely call to the employer to provide notice of her need to be absent to care for her son. When no one answered the call, Ms. Hodges did not make another attempt to notify the employer of her need to be absent. It was unreasonable for Ms. Hodges to make just the one attempt to notify the employer of her need to be absent. Given the nature of the employer's business, a reasonable person would expect there to be times when those responsible for answering the phone might be temporarily unavailable to answer the phone while they performed other duties. The employer did not present evidence to

establish any additional unexcused absences. Based on the specific circumstances surrounding these two unexcused absences, specifically the steps Ms. Hodges took to cover the first absence and the attempt Ms. Hodges took to report the second absence, the administrative law judge concludes that the unexcused absences were not excessive. Ms. Hodges was discharged for no disqualifying reason. Accordingly, Ms. Hodges is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The May 8, 2017, reference 01, decision is reversed. The claimant was discharged 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/rvs