

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CINDI HARVEY
Claimant

SAFELITE SOLUTIONS LLC
Employer

APPEAL NO. 22A-UI-03558-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/02/22
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

On January 27, 2022, the employer filed a timely appeal from the January 21, 2022 (reference 01) decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on January 3, 2022 for no disqualifying reason. After due notice was issued, a hearing commenced on March 24, 2022 and concluded on March 25, 2022. Claimant, Cindi Harvey, participated. Annette Kohl represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6 and A through D into evidence. The administrative law judge took official notice of the fact-finding materials.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant, Cindi Harvey, was employed by Safelite Solutions, L.L.C. as a full-time customer service representative from February 2020 until January 3, 2022, when the employer discharged the claimant for habitual tardiness. The claimant's usual work hours were 6:00 a.m. to 4:00 p.m., Monday through Thursday. On or before September 24, 2021, the claimant transitioned from working in the employer's call center to performing the same computer-based work from home. The final incident of tardiness that triggered the discharge occurred on December 20, 2021, when the claimant was late in returning from her lunch break for personal reasons. The claimant also been late for the start of her work day for personal reasons or late returning from a break for personal reasons at least 12 times between September 8, 2021 and

December 20, 2021. These include five instances in November and another five instances in December. Prior to discharging the claimant from the employment, the employer has issued multiple warnings to the claimant for attendance. These included a final warning issued on December 14, 2021. In connection with the final warning, the employer warned that the next incident would result in discipline that could include discharge from the employment. Between the final incident on December 20, 2021 and the January 3, 2022 discharge, the claimant was away from work on an approved vacation for all but a couple days. The discharge occurred on the first day back at work. The employer did not take into consideration any instances wherein the claimant was late logging in work due to computer issues.

The claimant established an original claim for benefits that Iowa Workforce Development deemed effective January 2, 2022. IWD set the weekly benefit amount at \$449.00. This employer is the sole base period employer. The claimant received \$4,013.00 in benefits for the nine weeks between January 2, 2022 and March 5, 2022.

On January 19, 2022, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed the claimant's discharge from the employment. The claimant participated and provided a verbal statement that did not include intentional misrepresentation. Neither the employer nor its third-party representative participated in the fact-finding interview.

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).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 January 3, 2021 discharge for misconduct in connection with the employment, based on excessive unexcused tardiness. Given the claimant's time away from the workplace between the final incident and the discharge from the employment, the employer did not unreasonably delay notifying the claimant that the final incident could or would trigger discharge from the employment. The evidence indicates the claimant was habitually late for work and late returning from breaks for personal reasons and despite repeated warnings from the employer regarding the need to report work in a timely manner. The claimant's habitual tardiness amounted to an intentional and substantial disregard for the employer's interests. The claimant is disqualified for benefits until she has worked in and

been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received \$4,013.00 in benefits for the nine weeks between January 2, 2022 and March 5, 2022, but this decision disqualifies the claimant for those benefits. Accordingly, the benefits the claimant received are an overpayment of benefits. Because the claimant did not receive benefits due to fraud or willful misrepresentation and because the employer failed to participate in the finding interview, the claimant is not required to repay the overpayment. The employer's account shall be charged for the overpaid benefits. However, the employer's account shall not be charged for benefits for the period beginning March 6, 2022.

DECISION:

The January 21, 2022 (reference 01) decision is REVERSED. The claimant was discharged on January 23, 2021 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$4,013.00 in benefits for the nine weeks between January 2, 2022 and March 5, 2022. The claimant is not required to repay the overpaid benefits. The employer's account shall be charged for the overpaid benefits. However, the employer's account shall not be charged for benefits for the period beginning March 6, 2022.



James E. Timberland
Administrative Law Judge

April 1, 2022
Decision Dated and Mailed

jet/jh