

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BLANDINE M MATONDO

Claimant

APPEAL NO. 17A-UI-12193-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STAFF MANAGEMENT SOLUTIONS LLC

Employer

OC: 11/05/17

Claimant: Appellant (4)

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

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Blandine Matondo filed a timely appeal from the November 22, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on a Benefits Bureau deputy's conclusion that Ms. Matondo was discharged on November 3, 2017 for violation of a company rule. After due notice was issued, a hearing was held on December 19, 2017. Ms. Matondo participated. The employer did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. French-English interpreter Edith Jgabor of CTS Language Link assisted with the hearing. Exhibits A through F were received into evidence.

ISSUES:

Whether Ms. Matondo separated from the employment for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

Whether Ms. Matondo has been able to work and available for work since she established her claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Blandine Matondo is a native French speaker and has limited English language skills. Ms. Matondo was employed by Staff Management Solutions, L.L.C. as a full-time laborer from 2015 until November 3, 2017, when the employer discharged her for attendance. Staff Management Solutions provides workers for a Proctor & Gamble plant in Iowa City. Staff Management Solutions is located on-site at the Proctor & Gamble plant. Ms. Matondo's regular work hours were 6:00 a.m. to 2:00 p.m., Monday through Friday and Saturdays as needed.

Ms. Matondo last performed work for Staff Management Solutions and Proctor & Gamble on October 31, 2017. On that day, a supervisor sent Ms. Matondo home early in response to Ms. Matondo's request for a restroom break. Ms. Matondo had not asked to go home early.

Ms. Matondo was next scheduled to work on November 1, 2017. On that day, Ms. Matondo was absent due to back pain and properly notified the employer of her need to be absent. On November 1, 2017, Ms. Matondo was evaluated by Dr. Robert Wood, D.O., of the University of Iowa Hospitals & Clinics. The doctor provided Ms. Matondo with a medical excuse that stated as follows:

Blandine M Matondo was seen on 11/01/17 at the University of Iowa Hospitals and Clinics for a medical appointment.

Comments:

Patient has acute back pain that may or may not effect [sic] her work. Please consider augmenting her work for the next couple of days to help not exacerbate her low back pain. I told her that she will have to be the one to determine if the pain is too much and she is not able to work.

In connection with the medical appointment, Dr. Wood prescribed cyclobenzaprine, a muscle relaxer.

Ms. Matondo was next scheduled to work on November 2, 2017. On that morning, Ms. Matondo was late for work without proper notice to the employer. Ms. Matondo had taken one of the muscle relaxer pills and overslept. Ms. Matondo appeared at the workplace at noon. Ms. Matondo took the medical excuse from the November 1 appointment with her. When Ms. Matondo presented the medical note to the employer, the employer advised Ms. Matondo that she was discharged from the employment for accruing too many attendance points.

Despite being advised on November 2 that she was discharged from the employment, Ms. Matondo contacted the employer on November 3 to see whether the employer had additional work for her. At that time, the employer reiterated that Ms. Matondo had been discharged from the employment.

Ms. Matondo established a claim for unemployment insurance benefits that was effective November 5, 2017. Ms. Matondo had been released by her doctor to return to work and her back pain had resolved prior to the effective date of the claim. Ms. Matondo made weekly claims for the weeks that ended November 11 and 18, 2017. During those two weeks, Ms. Matondo applied for two or more jobs and was available for full-time work. When Ms. Matondo received the November 22, 2017, reference 01, decision that disqualified her for unemployment insurance benefits, she discontinued her weekly claims. The decision had included instructions to continue making weekly claims while an appeal is pending. Ms. Matondo did not make a weekly claim for the weeks that ended November 25 and December 2, 2017. During the week of December 3-9, 2017, Ms. Matondo reactivated her unemployment insurance claim and recommenced making weekly claims. Ms. Matondo applied for two or more jobs during the weeks that ended December 9 and 16, 2017. Ms. Matondo has conducted her work search via the Internet, by reviewing help wanted ads, and through direct contact with prospective employers.

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 no disqualifying reason. The evidence establishes a discharge based on attendance. The employer did not participate in the appeal hearing and did not present any evidence to meet its burden of proving, by a preponderance of the evidence, misconduct in connection with the employment. The evidence does not establish an absence on October 31, 2017, when the supervisor elected to send Ms. Matondo home. The evidence in the record establishes an absence due to illness and properly reported to the employer on November 1, 2017. The evidence establishes an absence due to illness, but not properly reported to the employer on November 2, 2017. The employer has presented no evidence to establish which absence was the final absence that triggered the discharge. If the employer treated the early departure on October 31 as the final absence, then the absences on November 1 and 2 would not matter. If the employer treated the absence on November 1 as the triggering absence, the absence on November 2 would not matter. In the absence of evidence proving excessive unexcused absences or other misconduct in connection with the employment, the discharge would not disqualify Ms. Matondo for unemployment insurance benefits. Based on the separation from employment, Ms. Matondo is eligible for benefits provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The weight of the evidence in the record establishes that Ms. Matondo was physically and mentally able to work, was available for full-time work, and was actively and earnestly engaged in a search for new employment during the weeks that ended November 11, November 18, December 9, and December 16, 2017. Ms. Matondo had recovered from her acute lower back pain and had been released to return to full-time work before she established her claim for unemployment insurance benefits. Ms. Matondo was conducting a search for full-time employment via the Internet, by researching help wanted ads, and by direct contact with prospective employers. Ms. Matondo is eligible for benefits for the weeks the weeks that ended November 11, November 18, December 9 and December 16, provided she meets all other eligibility requirements. Ms. Matondo will continue to be eligible for benefits for further claim weeks, provided she continues to comply with the able and available requirements and meets all other eligibility requirements.

No continued claim for benefits shall be allowed until the individual claiming benefits has completed a continued claim or claimed benefits as otherwise directed by Iowa Workforce Development. Iowa Administrative Code rule 871-24.2(1)(g). Because Ms. Matondo did not

complete a timely weekly claim for weeks that ended November 25 and December 2, 2017, she did not meet the availability requirements for those weeks and is not eligible for benefits for those weeks.

DECISION:

The November 22, 2017, reference 01, decision is modified as follows. The claimant was discharged for no disqualifying reason. The effective date of the discharge was November 2, 2017. Based on the separation from the employment, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

The claimant was able to work, available for work, and actively and earnestly engaged in a search for new employment during the benefit weeks that ended November 11, November 18, December 9 and December 16, and is eligible for benefits for those weeks provided she meets all other eligibility requirements. The claimant will continue to be eligible for benefits for further claim weeks, provided she continues to comply with the able and available requirements and meets all other eligibility requirements. The claimant did not make weekly claims for the weeks that ended November 25 and December 2, 2017, and thereby did not meet the availability requirement for those weeks. Accordingly, the claimant is not eligible for benefits for the weeks that ended November 25 and December 2, 2017.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs