

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KIMBERLY K BROULIK
Claimant

APPEAL NO. 24A-UI-05989-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SOLON NURSING CARE CENTER INC
Employer

OC: 05/26/24
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

On June 25, 2024, Kimberly Broulik (claimant) filed a timely appeal from the June 19, 2024 (reference 01) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on May 24, 2024 for repeated tardiness in reporting for work after being warned. After due notice was issued, a hearing was held on July 15, 2024. Ms. Broulik participated. Tiffany Bauer represented the employer and presented additional testimony through Jennifer Baskerville. Exhibits 1, A, B, C, and D were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

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

Kimberly Broulik was employed by Solon Nursing Care Center, Inc. as a full-time Certified Nursing Assistant (CNA) until May 24, 2024, when the employer discharged her from the employment for attendance. Ms. Broulik began her employment in 2015 as a housekeeper and commenced working as a CAN in 2018.

The employer allows employees to clock in as late as seven minutes after the scheduled start of the shift without being considered tardy. Ms. Broulik regularly appeared for work more than seven minutes late.

On February 22, 2024, the employer issued a reprimand for attendance. After the warning, Ms. Broulik was more than seven minutes late for personal reasons 12 times between March 29, 2024 and May 7, 2024. These late arrivals occurred on March 28, April 2, 4, 11, 16, 18, 22, 23, 25, 29 and 30, and on May 7, 2024. In the final instance, Ms. Broulik was late so she could look for her lost cat. In another instance, Ms. Broulik was late so that she could clean spilled garbage at the end of her driveway. Usually, Ms. Broulik was late

because she did not budget enough time to get to work on time. Ms. Broulik was also late on April 30, 2024 so that she could take her step-father to a medical appointment. Ms. Broulik had in that instance told the employer ahead of the absence that she would be late. Ms. Broulik's late arrivals interfered with the shift-change reports and forced the CNA she was supposed to replace to have to stay late. Ms. Broulik worked six shifts between final absence on May 7, 2024 and the May 24, 2024 discharge date.

In making the decision to discharge Ms. Broulik from the employment, the employer also considered an alleged insubordination incident from May 23, 2024. A nurse had directed Ms. Broulik to give a resident with dementia a shower. The resident cooperated with the shower related to her bottom half but refused to allow Ms. Broulik to remove her blouse so Ms. Broulik could shower her upper half. Residents had the right to refuse services. About 20 minutes after the resident refused to remove her shirt, Ms. Broulik was able to persuade the resident to allow Ms. Broulik to shower her upper half and Ms. Broulik completed that portion of the shower.

The employer also considered an incident from the February 20, 2024 overnight shift, when Ms. Broulik did not check on a resident every two hours as required. The resident was new to the facility and preferred to sleep in a recliner rather than in a bed. It was more difficult for Ms. Broulik to attend to urinary incontinence issues when a resident elected to sleep in a chair. Rather than check the resident every two hours to ensure the resident was dry, Ms. Broulik elected not to disturb the resident. Ms. Broulik had left the resident with a call light and had asked the resident to summon her if she was needed.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...

(9) Excessive unexcused tardiness or absenteeism.

...

See Iowa Admin. Code r. 871-24.32(1)(a) (duplicating the text of the statute).

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 Iowa Administrative Code rule 87124.32(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. 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 87124.32(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.

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes a May 24, 2024 discharge for excessive unexcused tardiness. The March 19, 2024 late arrival due to the need to transport the step-father to and from the medical appointment and involved reasonable notice to the employer. That absence was an excused absence and does not count against Ms. Broulik in this matter. On the other hand, between March 28, 2024 and May 7, 2024, the claimant was late for personal reasons 12

times. Each of these late arrivals was an unexcused absence under the applicable law. These unexcused absences were excessive and communicated an intentional and substantial disregard for the employer's interests in maintaining appropriate and orderly staffing. The excused unexcused tardiness after the February 22, 2024 reprimand was misconduct in connection with the employment. The employer allowed MS. Broulik to work another six shifts before discharging her from the employment. This delay was not unreasonable and did not prevent the final absence from being a "current act." Accordingly, Ms. Broulik is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Broulik must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

The evidence does not indicate misconduct based on insubordination. The claimant did not unreasonably refuse an employer directive on May 23, 2024. Instead, the claimant honored the resident's right to refuse services. A short while later, the claimant was able to move forward with the remainder of the shower. The February 20, 2024 neglect of the resident was not a current act and was insufficient to establish misconduct in connection with the employment based on non-attendance concerns.

DECISION:

The June 19, 2024 (reference 01) decision is AFFIRMED. The claimant was discharged on May 24, 2024 for misconduct in connection with the employment that was based on excessive unexcused tardiness. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.



James E. Timberland
Administrative Law Judge

July 23, 2024
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
6200 Park Ave Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.