

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NIKKI R JOHNSON
Claimant

APPEAL NO. 17A-UI-02103-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CALERIS INC
Employer

OC: 01/29/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Nikki Johnson filed a timely appeal from the February 13, 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. Johnson was discharged on December 16, 2016 for excessive unexcused absenteeism after being warned. After due notice was issued, a hearing was held on March 17, 2017. Ms. Johnson participated. Quint Bartlett, Human Resource Business Partner, represented the employer. Exhibits 1 through 18 and A were 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: Nikki Johnson was employed by Caleris, Inc. as a full-time Customer Service Representative from 2013 until December 16, 2016, when Managers Alicia Tuttle and Heather Jenner discharged her for attendance. If Ms. Johnson needed to be absent from work, the employer's policy required that she call the workplace at least 30 minutes prior to the scheduled start of her shift and speak to a manager. Ms. Johnson was aware of the absence reporting requirement.

In making the decision to discharge Ms. Johnson from the employment, the employer considered absences going back to September 20, 2016. On that day, Ms. Johnson arrived late for work because she needed to use an air compressor at home to inflate her tire in light of a slow leak. The slow leak was an ongoing issue. Ms. Johnson was aware of the slow leak issue, but did not budge time to address the issue on September 20 so that she could get to work on time. On September 27, Ms. Johnson was absent due to illness and properly reported the absence. On October 21, Ms. Johnson arrived late for work because of traffic. On October 22, 2016, Ms. Johnson arrived late for work because she overslept. On October 24, Ms. Johnson arrived late for work for personal reasons. On October 27, 2017, Ms. Johnson left work early due to illness and properly reported the absence. On November 22, 28 and 29, Ms. Johnson was absence due to illness and properly reported the absences. On

November 30, Ms. Johnson left work early due to illness and properly reported the absence. On December 1, Ms. Johnson was absent for a portion of her shift due to illness and properly reported that absence. On December 7, Ms. Johnson was absent from work due to illness and properly reported the absence. On December 8, Ms. Johnson left work early due to illness and properly reported the absence.

The December 16, 2016, discharge followed four consecutive absences on December 12 through 15. Each of these absences was related to Ms. Johnson's December 14 wedding. In 2015, Ms. Johnson had requested December 12-16, 2016 off so that she could use that time for wedding planning, the wedding rehearsal, the wedding day, and related celebration. Ms. Johnson knew at the time she made the time-off request that approval of the time off request would be contingent upon her having Earned Time Benefit (ETB), essentially a paid time off (PTO) benefit, available at the time of the proposed absence. In August 2016, Ms. Johnson used some of her ETB to travel out of state to visit her parents. Ms. Johnson then used additional ETB in connection with some or all of the absences mentioned above. As of December 7, 2017, it was clear to Ms. Johnson that she had no ETB left. On December 9, Ms. Johnson enlisted the assistance of two sympathetic supervisors and those supervisors referred the matter to Angie Harlow, Director of Human Resources.

As of December 12, 2016, Ms. Johnson had not heard from Ms. Harlow regarding her need for the time off in connection with her wedding. On that day, Ms. Johnson learned that she had lost use of her wedding rehearsal venue. Ms. Johnson left work early to address the matter and provided proper notice to the employer. Ms. Johnson was absent on December 13 due to last minute wedding planning. Ms. Johnson was absent on December 14 for her wedding day. Ms. Johnson was absent on December 15 so that she could continue the wedding celebration with her relatives, who had traveled from out of state to attend the wedding. Ms. Johnson properly reported each of these four absences to the employer. Ms. Johnson was discharged when she returned to work on December 16.

The discharge followed several written reprimands for attendance that were issued to Ms. Johnson in 2016. These included "Final" warnings issued on October 25 and December 8. Each of the reprimands warned of subsequent discipline if the attendance issues continued up to and including termination of the employment.

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).

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

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 fails to establish a current act of misconduct. The final absences that triggered the discharge were the absences during the period of December 12 through 16, 2016. Each of those absences was an excused absence under the applicable law because Ms. Johnson had reasonable grounds for being absent on each day and had properly reported each absence. Ms. Johnson had requested the time off a year earlier. Though Ms. Johnson understood at the time of the request that approval of the request was contingent upon the continued availability of Earned Time Benefit, she could have not have foreseen exhaustion of her ETB in connection with her unplanned absences due to illness. Each of Ms. Johnson's earlier absences that were based on illness and that were properly reported to the employer were excused absences under the applicable law and cannot be considered against her. That means that one has to go back to the late arrival on October 24, 2016 to find an absence that would be an unexcused absence under the applicable law. That absence cannot be deemed a "current act." Because the evidence does not establish a current act of misconduct, the administrative law judge need not further consider the prior absences or warnings for attendance.

While the decision to discharge Ms. Johnson was within the employer's discretion, Ms. Johnson was not discharged for a reason that disqualifies her for unemployment insurance benefits. Accordingly, Ms. Johnson is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 13, 2017, reference 01, decision is reversed. The evidence did not establish a current act of misconduct. The claimant was discharged on December 16, 2016 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