

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

JESSICA BUFFINGTON
Claimant

JO-ANN STORES LLC
Employer

APPEAL NO. 23A-UI-00331-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/11/22
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

On January 13, 2023, the employer filed a timely appeal from the January 5, 2023 (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 December 7, 2022 for no disqualifying reason. After due notice was issued, a hearing was held on January 31, 2023. Jessica Buffington (claimant) did not comply with the hearing notice instructions to call the designated toll-free number at the time of the hearing and did not participate. Roxanne Tobias of Equifax represented the employer and presented testimony through Taleigha Steger and Michelle Humphrey. The administrative law judge took official notice of the Iowa Workforce Development record of benefits disbursed to the claimant (DBRO), which record reflects no benefits have been disbursed to the claimant in connection with the December 11, 2022 original claim. Exhibits 1 through 6 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: Jessica Buffington (claimant) was employed by Jo-Ann Stores, L.L.C. as an Inventory Coordinator at the employer's Cedar Rapids store from 2018 until December 7, 2022, when District Manager Taleigha Steger, in consultation with the Team Member Relations personnel, discharged her from the employment for attendance. The claimant's shift included a 30-minute unpaid lunch break. On November 7, 2022, Michelle Humphrey became the Cedar Rapids Store Manager. After two weeks of training in the Cedar Rapids store, Ms. Humphrey commenced functioning as the claimant's immediate supervisor effective November 21, 2022.

The employer's written Performance Accountability Policy provides a list of conduct violations deemed serious and includes "Excessive absenteeism, tardiness, unreliability, or a failure to report to work without proper notification." If the claimant needed to be absent from or late for work, the employer's written attendance policy required that the claimant call the workplace and speak to the manager on duty prior to the scheduled start of the shift. The employer reviewed the policy with the claimant at the start of the employment and annually thereafter. Though the

written policy required a phone call, Ms. Humphrey accepted text messages as appropriate notice. If the claimant needed to leave work early, she was required to notify the store manager before she left. This requirement was reinforced in a reprimand issued to the claimant on September 9, 2022. The employer advises that it uniformly enforces the attendance policy.

The final absence that factored in the discharge occurred on November 30, 2022. The claimant was scheduled to start work at 8:00 a.m. At 7:26 a.m., the claimant sent a text message to Ms. Humphrey in which the claimant stated that she was experiencing nausea, did not know whether she “ate something bad” or had the flu, and would not be at work. Based on the attendance pattern that immediately preceded the November 30 absence, Ms. Humphrey suspected the claimant was not actually ill on November 30, 2022.

In making the decision to discharge the claimant from the employment, the employer considered the claimant’s attendance for the period beginning September 1, 2022. On that date, the claimant was scheduled to work from 8:00 a.m. to 3:00 p.m., but left at 1:00 p.m. without notifying the Keyholder or District Manager Taleigha Steger, who was in the store at the time. When the employer addressed the unauthorized early departure with the claimant, the claimant asserted that she had completed her work prior to her departure and had plans for the remainder of the day. The employer issued a written reprimand to the claimant, reiterated the absence reporting requirement, and warned of possible further disciplinary action, up to and including termination of the employment.

Throughout the month of October 2022, and until Ms. Humphrey began as Store Manager in November 2022, the Cedar Rapids store was without a store manager.

Ms. Humphrey began documenting attendance concerns pertaining to the claimant effective November 21, 2022, the day she became the claimant’s supervisor. On that day, the claimant reported seven minutes late for a shift set to start at 5:00 a.m. The claimant did not provide notice that she would be late. The claimant’s shift was scheduled to end at 1:00 p.m. At 10:59 a.m., the claimant told Ms. Humphrey she a medical appointment and that she was leaving work at that time. When Ms. Humphrey asked the claimant whether she could reschedule her appointment for after she was done with her shift, the claimant said the appointment was “already made.” The claimant left at that time.

On November 22, 2022, the claimant arrived at 9:36 a.m. for an 8:00 a.m. shift. At 8:01 a.m., the claimant sent a text message to Ms. Humphrey in which the claimant advised she would report for work by nine. The claimant did not provide a reason for the late arrival. On that same day, the claimant took at 53-minute unauthorized extended lunch break.

On November 23, 2022, the claimant was six minute late without notice for a 7:00 a.m. shift.

On November 25, 2022, Black Friday, the claimant was 14 minutes late without notice for an 8:00 a.m. shift. On that same day, the claimant clocked out for lunch at 12:42 p.m. and then never clocked back in that day. The claimant was supposed to return from lunch at 1:12 p.m. At 1:20 p.m., Ms. Humphrey unsuccessfully attempted to locate the claimant. Ms. Humphrey called for the claimant over the store’s radio system, but the claimant did not respond. Ms. Humphrey sent a text message to the claimant, but the claimant did not respond. At some point between 2:00 p.m. and 2:30 p.m., Ms. Humphrey saw the claimant working in the store room. Ms. Humphrey did not notice that the claimant had failed to clock back in until the next day. When Ms. Humphrey spoke to the claimant on Monday, November 28, about not being able to locate the claimant at 1:20 p.m. on November 25, the claimant asserted she had been in the store’s restroom at that time. Ms. Humphrey suspected the claimant had instead not yet returned to the store by that time, but had not thought to check the restroom when she was trying to locate the claimant.

On November 28, 2022, the claimant reported eight minutes late without notice for an 8:00 a.m. shift. On that same day, the claimant an 39-minute unauthorized extended lunch break.

On November 29, 2022, the claimant was 13 minutes late without notice for a 7:00 a.m. shift. On that same day, the claimant took a 43-minute unauthorized extended lunch break. The claimant then left work without notifying anyone she was leaving and without clocking out. The final absence and the claimant's assertion that she was nauseous followed the next day.

On November 30, 2022, Store Manager Michelle Humphrey sent an email message to District Manager Taleigha Steger in which she detailed the claimant attendance issues during the period of November 21, 2022 through November 30, 2022.

The claimant established an original claim for benefits that was effective December 11, 2022, but made no weekly claims and received no weekly benefits.

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.

...
(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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 Legislature recently codified the misconduct definition along with a list of types of disqualifying misconduct. See Iowa Code section 96.5(2)(d).

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 Iowa Admin. Code r.871-24.32(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 preponderance of the evidence in the record establishes excessive unexcused absences and a discharge for misconduct in connection with the employment. Each of the six incidents of

tardiness without notice to the employer between November 21 and November 29, 2022 was an unexcused absence under the applicable law. Each of the unauthorized extended lunch breaks on November 22, November 28, and November 29 involved an additional instance of unexcused tardiness and was an unexcused absence under the applicable law. The preponderance of the evidence establishes an additional unauthorized extended lunch break and unexcused tardiness on November 25. The weight of the evidence supports the employer's reasonable conclusion the claimant was not in the store at 1:20 p.m. on November 25 at the time she employer radioed and texted in an attempt to locate the claimant. Regardless of whether the claimant's early departure on November 21, 2022 for the purported medical appointment complied with or violated the letter of the employer's absence notice policy, the claimants decision to wait until she was heading out the door to provide notice was unreasonable, but consistent with the pattern of disregard for the employer's interests. The preponderance of the evidence establishes an unauthorized early departure without notice on November 30, 2022, another unexcused absence under the applicable law, along with a repeat incident of failing to use the established clock-in/clock-out protocol. Given the pattern of unexcused absences, the intentional and substantial level of disregard for the employer demonstrated by the claimant over the period of November 21 to November 29, and the dubious reason the claimant provided for the absence on November 30, the preponderance of the evidence supports the employer's reasonable conclusion that the claimant was not actually ill when she contacted the employer on November 30 to indicate she would be absent that day. In other words, the weight of the evidence establishes a final unexcused absence on November 30, 2022.

She 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 employer's account shall not be charged for benefits.

DECISION:

The January 5, 2023 (reference 01) decision is REVERSED. The claimant was discharged on December 7, 2022 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 employer's account shall not be charged for benefits.



James E. Timberland
Administrative Law Judge

February 7, 2023
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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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.