

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MURANDA L MARKEY
Claimant

APPEAL NO. 17A-UI-02010-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SHEARERS FOODS BURLINGTON LLC
Employer

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

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

STATEMENT OF THE CASE:

Muranda Markey filed a timely appeal from the February 17, 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. Markey had voluntarily quit on January 30, 2017 without good cause attributable to the employer. After due notice was issued, a hearing was held on March 16, 2017. Ms. Markey participated. The employer representative, Melissa Stiffler, was not available at the number the employer had registered for the hearing and did not participate in the hearing. Exhibits 1, 2 and A were received into evidence.

ISSUE:

Whether Ms. Markey 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.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Muranda Markey was employed by Shearers foods Burlington, L.L.C. as a full-time machine operator from April 2016 and last performed work for the employer on January 26, 2017. On January 28, 2017, the employer discharged her for attendance. Ms. Markey's final absence occurred on January 27, 2017. Fifteen minutes into Ms. Markey's 40-minute commute, the brakes went out in Ms. Markey's car as she approached a stop sign. Ms. Markey concluded it was too dangerous to continue to work. Ms. Markey contacted the employer to advise that she would be absent. Ms. Markey took her vehicle to where her boyfriend was located to have him check the brakes. Ms. Markey subsequently learned that the problem was a hydraulic control unit. On January 28, 2017, a supervisor notified Ms. Markey that she was coming to her apartment to collect her employer-issued tools. The supervisor told Ms. Markey that she was not going to need the tools. In other words, the supervisor communicated that Ms. Markey was discharged from the employment.

REASONING AND CONCLUSIONS OF LAW:

The lower decision references a voluntary quit. Ms. Markey testified that she was discharged. The employer did not make itself available for the hearing and, thereby, presented no evidence to rebut Ms. Markey's assertion that she was discharged. Based on the evidence in the record, the administrative law concludes that Ms. Markey was indeed discharged from the employment.

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).

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 employer presented no evidence to prove that Ms. Markey's discharge was based on excessive unexcused absences or other disqualifying misconduct in connection with the employment. The evidence establishes a final absence that was based on a bonafide transportation emergency that made it unsafe for Ms. Markey to make the lengthy commute to the workplace. Ms. Markey took reasonable steps to report the absence to the employer and was discharged the next day. The evidence in the record indicates an absence on January 27, 2017 that was an excused absence under the applicable law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Markey was discharged on January 28, 2017 for no disqualifying reason. Accordingly, Ms. Markey is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 17, 2017, reference 01, decision is reversed. The claimant was discharged on January 28, 2017 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