**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**JANET MILLER**
Claimant

**PREMIER ESTATES 509, LLC**
Employer

**APPEAL NO. 17A-UI-05696-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 04/30/17**
**Claimant: Appellant (5)**

Iowa Code Section 96.5(1) – Voluntary Quit
Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Janet Miller filed a timely appeal from the May 22, 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. Miller was discharged on April 9, 2017 for excessive unexcused absenteeism. After due notice was issued, a hearing was held on June 15, 2017. Ms. Miller participated. Brenda Williams represented the employer.

**ISSUE:**

Whether Ms. Miller 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: Janet Miller was employed by Premier Estates 509, L.L.C., d/b/a Garden View Care Center as a full-time dietary aide. Ms. Miller began the employment in 1982 and last performed work for the employer on April 4, 2017. Ms. Miller completed her shift that day. Ms. Millers work hours were 6:15 a.m. to 1:45 p.m. Ms. Miller generally worked five shifts per week, but her work days varied. During the last two years of the employment Brenda Williams was Dietary Supervisor and Ms. Miller's immediate supervisor at Garden View Care Center.

After Ms. Miller completed her shift on April 4, 2017, she was next scheduled to work on April 7, 2017. Ms. Williams had posted the upcoming work schedule a couple weeks earlier. Ms. Williams made additional copies of the work schedule for employees to take with them and Ms. Miller had taken a copy of the work schedule home. Ms. Miller misread the work schedule and was absent on April 7 without notice to the employer. When Ms. Miller did not appear for her shift, Ms. Williams tried to contact her at the number the employer had on file for Ms. Miller. Ms. Miller did not answer and Ms. Williams could not leave a voicemail message because the voicemail box was full. Ms. Miller's daughter-in-law caught the error and brought it to Ms. Miller's attention. If Ms. Miller needed to be absent from work, the employer's policy required that she call Ms. Williams at least two hours prior to the scheduled start of her shift.

Ms. Williams provided her cell phone number and home phone number to employees for that purpose. Ms. Miller was aware of the absence reporting requirement. Ms. Miller had Ms. Williams' cell phone number, but did not have Ms. Williams' home number. Ms. Miller called Ms. Williams' cell phone number on the evening of April 7, but Ms. Williams did not answer. Ms. Miller thinks she left a message, but cannot recall what she put in that message. Ms. Williams did not return the call.

Ms. Miller was then absent from her shift on April 8 without proper notice to the employer. Ms. Miller did not call Ms. Williams to report an absence. Instead, Ms. Miller sent Ms. Williams a text message at 7:56 a.m. in which she wrote, "You could have told me I was fired." However, the employer had not discharged Ms. Miller from the employment.

Ms. Miller was then absent without notice to the employer on April 9, 2017. At that point, Ms. Williams and Heather Laire, Interim Administrator, determined that Ms. Miller would be discharged if and when she again appeared for work. However, Ms. Miller did not appear for additional work and did not make further contact with the employer. At the time, Ms. Miller ceased appearing for work, she was on the schedule to work through April 13, 2017.

Ms. Miller's disappearance in April 2017 followed 11 instances in March 2017 and 12 instances in February 2017 in which Ms. Miller was late because she overslept or was otherwise running behind. These late arrivals followed a written reprimand that Ms. Williams issued to Ms. Miller in July 2016 for tardiness.

**REASONING AND CONCLUSIONS OF LAW:**

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The weight of the evidence in the record establishes that Ms. Miller voluntarily quit effective April 7, 2017 by failing to cease appearing for additional shifts. Ms. Miller continued to be on the work schedule through April 13, 2017. The employer had not notified her that she was discharged from the employment.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

The evidence in the record establishes a voluntary quit that was without good cause attributable to the employer. Ms. Miller's erroneous belief on April 7 and 8 that she had been discharged from the employment did not cause the separation to be for good cause attributable to the employer. The employer had neither made a discharge decision nor communicated a discharge decision at that point.

Ms. Miller's separation from the employment could be analyzed in the alternative as a discharge from the employment in light of the employer's decision to call the employment done effective April 9, 2017.

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 a discharge 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 misconduct in connection with the employment based on excessive unexcused absences. At the time the employer decided on April 9, 2017 to call Ms. Miller's employment done. Ms. Miller had just been absent for personal reasons without proper notice to the employer. Each of those absences was an unexcused absence under the applicable law. The three consecutive unexcused absences were excessive. However, those three absences followed 23 instances in February and March wherein Ms. Miller was late to work either because she overslept or was otherwise running behind for personal reasons. Each of those late arrivals was an unexcused absence. The evidence in the record establishes a pattern of unexcused absences that were excessive and that demonstrated an intentional and substantial disregard of the employer's interests.

Under the quit analysis and the discharge analysis, Ms. Miller is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Miller must meet all other eligibility requirements. The employer's account shall not be charged.

**DECISION:**

The May 22, 2017, reference 01, decision is modified as follows. The claimant voluntarily quit effective April 7, 2017 without good cause attributable. In the alternative, the claimant was discharged on April 9, 2017 for misconduct in connection with the employment. Either way, the claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/scn