

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RENAE L ANDERSON
Claimant

APPEAL 17A-UI-08334-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

AT&T MOBILITY SERVICES LLC
Employer

**OC: 07/16/17
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Rena L. Anderson (claimant) filed an appeal from the August 14, 2017, reference 01, unemployment insurance decision that denied benefits based upon the determination AT&T Mobility Services, LLC (employer) discharged her for violation of company rules. The parties were properly notified about the hearing. A telephone hearing was held on August 31, 2017. The claimant participated. The claimant's mother, Sharon Smith, and sister, Deborah McCaw, participated on the claimant's behalf. The employer participated through Attendance Manager Jamie Durkop and Senior Investigator Richard Sebahar. It was represented by Dena Shelton of Talx UCM Services. Claimant's Exhibit A was received. The employer did not provide any proposed exhibits for the hearing.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Customer Service Representative beginning on November 17, 2014, and was separated from employment on August 1, 2017, when she was discharged.

In February 2017, the claimant completed paperwork under the Family Medical Leave Act (FMLA) to receive intermittent job-protected leave as she was the sole caregiver for her terminally-ill mother, Sharon Smith. The claimant was authorized to take any time needed to provide essential care for Smith such as doctor's appointments, dressing, bathing, et cetera.

In April 2017, the claimant requested and took four vacation days to drive Smith to visit her eldest daughter, Deborah McCaw, in California. The claimant expected to return on April 21; however, Smith was having difficulty breathing and her oxygen tank was not properly functioning which required the claimant to make frequent, unexpected stops to make the machine work. The claimant required an extra day off on April 22 due to these issues and

coded it as an FMLA absence. She followed the process she had been using to report her absences. Smith was hospitalized upon their return to Iowa.

On May 16, 2017, the claimant's Area Manager became aware of some of the claimant's Facebook posts from April 2017 that called into question whether her April 22 absence was properly reported as an FMLA absence. The supervisor submitted a request to Universal Leave Examiner Mary Glass to conduct an investigation into the incident. Glass reviewed the incident and requested that Senior Investigator Richard Sebahar conduct an investigation by interviewing the claimant. She did not request any further action by Sebahar.

Sebahar interviewed the claimant on June 26, 2017. He did not review the claimant's FMLA certification and what the doctor had authorized for leave, but asked her about her absence on April 22. At the end of the interview, he placed the claimant on suspension pending a final determination. On June 29, 2017, Sebahar gave his investigative report to Glass who concluded the claimant had violated the employer's FMLA policy. The claimant was discharged on August 1, 2017. The claimant had not received any prior warnings related to misclassification of an absence.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa Administrative Code rule 871-24.32(1)a provides:

"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). If a claim is filed as the result of a disciplinary suspension, the claimant is considered discharged and the issue of misconduct is to be addressed. Iowa Admin. Code r. 871-24.32(9). If an employer alleges misconduct or dishonesty but does not provide any corroboration, the misconduct will not result in disqualification from receiving unemployment insurance benefits. *Id.*

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial."

Additionally, the termination of employment must be based on a current act of misconduct in order to be disqualifying. Iowa Admin. Code r.871-24.32(8). The claimant cannot be disqualified from benefits based on a past act of misconduct. *Id.* Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

In this case, the claimant allegedly misused her approved leave under the FMLA on April 22, 2017. The employer had notice of the issue, at the latest on May 16, when the Area Manager requested an investigation. The investigation was to consist solely of interviewing the claimant to obtain additional information. The claimant was not notified of the investigation or the alleged misconduct until June 26. The investigation was concluded on June 29, but the claimant was not discharged until August 1. The employer made the decision to delay the investigation into the alleged misconduct and the subsequent suspension and termination. The employer could not provide any good cause reason for the delay. Because the act for which the claimant was discharged was not current and the claimant may not be disqualified for past acts of misconduct, benefits are allowed.

In the alternative, even if the suspension and discharge was for a current act, the claimant would still be allowed to receive benefits. The employer did not establish that the claimant misused her job-protected leave. The claimant contends her use of leave under the FMLA was within the doctor's certification and was within the employer's policy. The employer did not provide a first-hand witness with any information about what was contained in the claimant's FMLA certification or that taking the day as an FMLA absence was a violation of the claimant's certification or the employer's policy. Additionally, the claimant had not received any previous warnings for misclassification of an absence. The employer did not establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The August 14, 2017, reference 01, unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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