

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SANDRA J CHRISTOFFERSON
Claimant

APPEAL NO. 16A-UI-11395-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC
Employer

OC: 09/25/16
Claimant: Respondent (1/R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 13, 2016, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant had been discharged on September 21, 2016 for no disqualifying reason. An appeal hearing was held on November 4, 2016. Claimant Sandra Christofferson participated. Rosa Frausto represented the employer and presented additional testimony through Joshua Strums. The employer received timely notice of the appeal hearing. Claimant Sandra Christofferson received only two days' notice of the hearing, but waived any defects in the hearing notice. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sandra Christofferson was employed by West Liberty Foods as a full-time shipping clerk from 2014 until September 21, 2016, when the employer discharged her for attendance. Ms. Christofferson last performed work for the employer on August 31, 2016. If Ms. Christofferson needed to be absent, the employer's absence reporting policy required that she telephone the work day each day of the absence no later than two hours after the scheduled start of her shift. Ms. Christofferson was aware of the absence reporting requirement and provided proper notice to the employer for each day she was absent from the employment.

In June 2016, Ms. Christofferson was diagnosed with major depression and general anxiety disorder. Ms. Christofferson was prescribed medication for both diagnoses. Ms. Christofferson was initially off work for the period of June 13, 2016 through July 5, 2016. Ms. Christofferson

requested and the employer approved a continuous leave of absence for that period. Ms. Christofferson was then off work for the period of July 6, 2016 through August 28, 2016. Ms. Christofferson requested and the employer approved a continuous leave of absence for that period. While Ms. Christofferson was on continuous FMLA leave, she was not required to notify the employer each day of the absence. Ms. Christofferson's doctor completed a medical care provider certification of Ms. Christofferson's need for continuous leave for each period. The leave for the period of July 6 through August 28, 2016 also certified a need for intermittent FMLA leave subsequent to August 28, 2016. Ms. Christofferson's doctor quantified the need for intermittent leave as one time every three weeks for three months for two days at a time.

Ms. Christofferson returned to the employment on August 28, 2016 and continued to work through August 31, 2016. Beginning September 1, 2016, Ms. Christofferson provided proper notice each work day that she needed to be absent due to illness. Ms. Christofferson was still struggling with her depression and anxiety issues. On September 12, Rosa Frausto, Human Resources Specialist, contacted Ms. Christofferson regarding her continued absence from work. Ms. Frausto told Ms. Christofferson that since she appeared to be on a continue leave, rather than an intermittent leave, the employer need a new medical certification from Ms. Christofferson's doctor. Ms. Frausto told Ms. Christofferson that she was going to begin accruing attendance "occurrences." Ms. Frausto asked Ms. Christofferson whether Ms. Christofferson would like Ms. Frausto to contact Ms. Christofferson's doctor for the additional certification. Ms. Christofferson told Ms. Frausto that she preferred that Ms. Frausto not do that. Ms. Christofferson continued to struggle with her mental health issues, but continued to hope that her mental health would improve and that she would be able to return to the employment. Ms. Christofferson's mental health issues were such that she could not leave her home and experienced anxiety attacks.

On September 20, 2016, Ms. Frausto spoke with Ms. Christofferson about her FMLA period expiring that day and the expectation that Ms. Christofferson would return to work the next day. Ms. Frausto confirmed that Ms. Christofferson was still considered an employee. Ms. Frausto indicated there would be further discussion regarding obtaining paperwork from Ms. Christofferson's doctor to support the absences between September 1 and September 20. However, the next day, Ms. Frausto notified Ms. Christofferson that she was discharged for attendance.

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).

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 any absences that were unexcused absences under the applicable law. The evidence indicates that Ms. Christofferson complied with the employer's absence reporting requirement for each day she was absent between September 1 through 20, 2016. The evidence also indicates that Ms. Christofferson was absent due to illness. While the employer had suggested the need for additional documentation to support the absences, the employer had not provided Ms. Christofferson with a date certain by which she needed to provide such documentation. Instead, the employer cut that process short by notifying Ms. Christofferson that she was discharged from the employment.

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

Based on the evidence presented at the hearing, this matter will be remanded to the Benefits Bureau for determination of whether Ms. Christofferson has met the able and available eligibility requirements for each claim week since she established her claim for benefits.

DECISION:

The October 13, 2016, reference 01, decision is affirmed. The claimant was discharged on September 21, 2016 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged. This matter is remanded to the Benefits Bureau for determination of whether Ms. Christofferson has met the able and available eligibility requirements for each claim week since she established her claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs