

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAWN M AUKES
Claimant

APPEAL NO. 17A-UI-09041-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

REMBRANDT ENTERPRISES INC
Employer

OC: 07/30/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Dawn Aukes filed a timely appeal from the August 24, 2017, reference 03, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Aukes was discharged on August 7, 2017 for failure to follow instructions in the performance of her work. After due notice was issued, a hearing was held on September 25, 2017. Ms. Aukes participated. Susan Golwitzer represented the employer. Exhibits A, B and C were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dawn Aukes was employed by Rembrandt Enterprises, Inc. as a full-time egg production laborer from November 2016 until August 4, 2017, when Susan Golwitzer, Human Resources Manager, discharged her from the employment for attendance. Larry Chada, West Side Supervisor, was Ms. Aukes' immediate supervisor. Patty Hansmeier, Cage-free Manager, was above Mr. Chada in the chain of command and also functioned as Ms. Aukes' supervisor. Ms. Aukes' work hours were 6:30 a.m. to 5:00 p.m. Ms. Aukes' work days fell within a two-week recurring schedule wherein Ms. Aukes would work Wednesday through Sunday or one week and Wednesday through Friday the next week.

The employer reviewed its attendance policy with Ms. Aukes at the start of the employment. Under that policy, Ms. Aukes was required to speak with a supervisor to give notice of her need to leave work early. Under that policy, Ms. Aukes was required to call or send a text message to a supervisor at least two hours prior to the start of her shift if she needed to be late or absent. In mid-July 2017, the employer notified Ms. Aukes and other employees that text messages would no longer be acceptable notice and that employees must call the supervisor. Ms. Aukes was at all relevant times aware of the absence reporting requirements.

The final absence that triggered the discharge occurred on August 4, 2017, when Ms. Aukes was absent in connection with her young child being abused by a day care provider. At 8:30 p.m. on August 3, Ms. Aukes discovered a bruise on her four-year-old son's buttock. The child told Ms. Aukes that he had gotten into trouble at day care and that the day care lady had spanked him. Ms. Aukes immediately contacted an Iowa Department of Human Services toll-free number to report that her son had been abused by the day care provider. The DHS hotline representative instructed Ms. Aukes to contact the Mason City DHS office the following morning. The DHS hotline representative advised Ms. Aukes that an investigator would come to Ms. Aukes' home within 24 hours of the Ms. Aukes' call to the abuse hotline to speak with the child. When Ms. Aukes concluded her call with DHS, she telephoned Mr. Chada's cell phone and left a voice mail message setting forth the particulars of her need to be absent the next day to meet with DHS regarding abuse of her son. Ms. Aukes also sent a text message to Mr. Chada and to Ms. Hansmeier setting forth the same information. The Mason City DHS office hours were 8:00 a.m. to 4:30 p.m. At 8:00 a.m. on August 4, Ms. Aukes contacted the Mason City DHS office and scheduled an appointment with the investigator for 1:30 p.m. to take place at Ms. Aukes' home. Ms. Aukes had received a final warning for attendance on July 14, 2017 and was concerned that the absence might result in her being discharged from the employment. Ms. Aukes have received an earlier warning for attendance on February 1, 2017. At 11:34 a.m. on August 4, Ms. Aukes contacted Susan Golwitzer, Human Resources Manager, to discuss her need to be to be absent and her desire to preserve the employment. During that call, Ms. Golwitzer notified Ms. Aukes that she was being discharged for attendance. Ms. Aukes kept her appointment the DHS Child Protective Worker.

The employer considered several prior absences when making the decision to discharge Ms. Aukes from the employment. The next most recent absences had occurred on July 29 and 30, 2017. On July 29, Ms. Aukes left work early due to illness and notified Mr. Chada of her need to leave due to dizziness before she left the workplace. After she left work, Ms. Chada went to the emergency room, where she was diagnosed with vertigo. The health care provider gave Ms. Aukes medicine to combat the dizziness and sent her home to rest. The health care provided gave Ms. Aukes a medical note that indicated she had been seen on July 29, 2017 and could return to work on July 31, 2017. On the evening of July 29, Ms. Aukes called Mr. Chada's cell phone and left a message indicating that she would be absent the next day due to illness and that she had a medical note that covered her absences on July 29 and 30. After the shift on July 30, Ms. Aukes was next scheduled to work on August 2. Ms. Aukes returned to work on August 2 and provided the employer with the medical excuse she had obtained on July 29. Ms. Aukes worked her entire shift on August 2 and 3 before the final absence on August 4.

Prior to the absences on July 29 and 30, Ms. Aukes' next most recent absences had been on July 13 and 14. On both days, Ms. Aukes was absent due to illness and properly notified the employer.

The employer considered several additional absences when making the decision to discharge Ms. Aukes from the employment. On December 12, 17 and 30, 2016, Ms. Aukes was absent due to illness and properly reported the absences to the employer. On January 25, 2017, Ms. Aukes was absent due to a blizzard and properly notified the employer. The Iowa Department of Transportation had issued a travel advisor. The employer's plant was located three miles north of Thompson, Iowa, near the Iowa-Minnesota border. Ms. Aukes resided in Thompson during the period of employment and carpooled with a coworker because Ms. Aukes had lost her driving privileges. On January 28 and 29 and February 1, Ms. Aukes was absent due to illness and properly notified the employer. On March 24, Ms. Aukes absent to care for her ill four-year-old son and properly notified the employer. On May 7, 10, 11 and 12,

Ms. Aukes was absent in connection with a substance abuse relapse and related incarceration. Ms. Aukes was arrested on May 11 and charged with public intoxication and disorderly conduct. Ms. Aukes was released from custody on May 12. On that day, Ms. Aukes met with Ms. Golwitzer to discuss her situation and to request to remain in the employment. The employer agreed to continue the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

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 establishes a discharge for no disqualifying reason. The administrative law judge notes that the employer elected not to present testimony from either of Ms. Aukes’ immediate supervisors. Those were the people with personal knowledge of the particulars relating to the absences that factored in the discharge. The employer did not present sufficient evidence and sufficiently direct and satisfactory evidence to rebut Ms. Aukes’ testimony that she had provided proper notice of the absences on July 30 and August 4. The employer had the ability to present such testimony. The final absence on August 4, 2017 was an excused absence under the applicable law. The absence was based on Ms. Aukes moral and legal duty to address injury to suspected abuse of her young child by a day care provider. Ms. Aukes was subject to the parameters set by the Iowa Department of Human Services, which told Ms. Aukes she would need to be available for a meeting with the Child Protective Worker during work hours on August 4. Ms. Aukes properly reported the need to be absent to Mr. Chada. The absences on July 29 and 30 were also excused absences under the applicable law. Each was due to illness and was properly reported to the employer. The only absences that factored in the discharge that were unexcused absences under the applicable law were the absences on May 7, 10, 11 and 12, when Ms. Aukes was absence due to substance use and incarceration related to the substance abuse. Because the most recent absence that was an unexcused absence under the applicable law occurred months before the discharge, the evidence fails to establish a current act of misconduct. The discharge did not disqualify Ms. Aukes for benefits. Ms. Aukes is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The August 24, 2017, reference 03, decision is reversed. The claimant was discharged 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