IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

ALLISON J KJELLBERG
Claimant

CLAIR FAMILY DENTAL CORPORATION
Employer

APPEAL NO. 19A-UI-05782-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/16/19
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 10, 2019, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged, based on the deputy's conclusion that the claimant was discharged on June 17, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on August 13, 2019. Claimant Allison Kjellberg participated and presented additional testimony through Katie Kjellberg. Dr. Isaac Clair, D.D.S. represented the employer and presented additional testimony through McKenzie Lawrence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant is required to repay overpaid 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: Allison Kjellberg was employed by Clair Family Dental Corporation as a full-time receptionist and dental assistant until June 17, 2019, when Dr. Isaac Clair, D.D.S., discharged her from the employment. Ms. Kjellberg began her full-time employment in 2015 as a receptionist and dental assistant. In April 2018, the employer promoted Ms. Kjellberg to Office Manager. In December 2018, the employer demoted Ms. Kjellberg from Office Manager back to receptionist and dental assistant. Ms. Kjellberg's attendance was a factor in the demotion. After Ms. Kjellberg was demoted, the employer subsequently placed McKenzie Lawrence in the position of Office Manager. Dr. Clair was Ms. Kjellberg's primary supervisor. Another dentist, Dr. Andrew

Majeran, and Ms. Lawrence also had supervisory authority over Ms. Kjellberg's work. Ms. Kjellberg's regular work days were Monday, Tuesday, Thursday and Friday. Ms. Kjellberg's scheduled start time was 6:30 or 6:45 a.m. On Mondays, Tuesdays, and Thursdays, Ms. Kjellberg would usually conclude her workday between 2:30 p.m. and 3:00 p.m. On Fridays, Ms. Kjellberg would usually conclude her workday between 1:30 p.m. and 2:00 p.m.

The final incident that triggered the discharge occurred on June 17, 2019 and involved both an unauthorized early departure and inappropriate conduct in the workplace as Ms. Kjellberg was leaving. On that day, Dr. Majeran's usual dental assistant was away from the workplace and Ms. Kjellberg was scheduled to assist Dr. Majeran with his patients. Ms. Kjellberg was scheduled to work from 7:00 a.m. to 4:30 p.m. Dr. Majeran ended up leaving early, at noon. While Ms. Kjellberg was assisting Dr. Majeran, Ms. Lawrence filled in for Ms. Kjellberg at the front desk. At about 11:45 a.m., Dr. Clair asked Ms. Kjellberg to return to her regular duties at the front desk to free up Ms. Lawrence to attend to other matters. Ms. Kjellberg told Dr. Clair that she had made other plans for the afternoon and was leaving. Ms. Kjellberg's other plans were to go swimming at her sister's home. Dr. Clair told Ms. Kjellberg that her unauthorized early departure would be an unexcused absence. Ms. Kjellberg elected to leave anyway. Before Ms. Kjellberg left, she made a scene at the front desk by interrupting Ms. Lawrence's conversation with a patient to tell Ms. Lawrence that she was tired of Ms. Lawrence "screwing [her] over." Ms. Kjellberg raised her voice during the utterance. Ms. Kjellberg's outburst prompted the patient with whom Ms. Lawrence was speaking to hastily retreat to the waiting area. Other patients were in the waiting area and within earshot of Ms. Kjellberg's outburst. Ms. Lawrence reported the incident to Dr. Clair. At 12:22 p.m., Dr. Clair sent a text message to Ms. Kjellberg discharging her from the employment. Other dental assistants who, unlike Ms. Kjellberg, did not have receptionist duties would generally leave the workplace once the dentist to whom they were assigned finished seeing patients.

Dr. Clair considered Ms. Kjellberg's attendance record during roughly the preceding year and reprimands issued during that same period when making a decision to discharge Ms. Kjellberg from the employment. On June 4 and August 24, 2018, Ms. Kjellberg reported late for work because she had overslept. On October 22, October 30, 2018, Ms. Kjellberg was absent from her shifts due to illness and properly reported the absences. If Ms. Kjellberg needed to be absent, the employer required that she contact Dr. Clair or Dr. Majeran prior to the scheduled start of her shift. On September 19, 2018, Dr. Clair met with Ms. Kjellberg to discuss her work performance, included her attendance. On December 6, 2018, Ms. Kjellberg elected to miss her entire workday to care for her sick cat. Ms. Kjellberg provided timely notice of her need to take her cat to the veterinarian that morning. Ms. Kjellberg then elected to miss the remainder of her workday, rather than have the veterinary clinic or someone else look after her cat. Ms. Kjellberg was absent with proper notice for a scheduled half day of work on December 7, 2018 so that she could monitor her cat. That afternoon, Ms. Kjellberg's sister-in-law watched Ms. Kjellberg's cat so that Ms. Kjellberg could attend the dental clinic's Christmas party at noon. On December 18, 2018, Dr. Clair met with Ms. Kjellberg to demote her from the Office Manager position, in part, due to attendance issues. On February 8, 2019, Ms. Kjellberg was late for work for personal reasons. On February 18, 2019, Ms. Kjellberg reported four hours late for work because she elected not to attempt the trip to work until the City of Des Moines' snowplow plowed her street. It usually took Ms. Kjellberg about 15 minutes to commute from her Des Moines home to the workplace in Windsor Heights. Ms. Kjellberg had properly notified the employer she would be late. On March 7 and 8, 2019, Ms. Kjellberg was absent due to illness and properly reported the absences. On May 9, 2019, Ms. Kjellberg was about two hours late for work because her power had gone out and she did not think she could open her garage door without electrical power. At 6:09 a.m., Ms. Kjellberg sent a message to the employer to advise of her circumstances. On May 13, 16 and 17, 2019, Ms. Kjellberg was absent due to illness and

properly reported the absences to the employer. On May 21, 2019, Dr. Clair and Dr. Majeran met with Ms. Kjellberg to discuss her attendance. At that time, Dr. Clair told Ms. Kjellberg that further absences would result in discipline up to termination of the employment. The final absence that triggered the discharge followed less than a month later.

Ms. Kjellberg established an original claim for benefits that Iowa Workforce Development deemed effective June 16, 2019. Ms. Kjellberg received $2,802.00 in benefits for the six weeks between June 30, 2019 and August 10, 2019.

On July 9, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Kjellberg's separation from the employer. Dr. Clair represented the employer at the fact-finding interview.

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.
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> 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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. *Deever v. Hawkeye Window Cleaning, Inc*. 447 N.W.2d 418 (Iowa Ct. App. 1989).

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. The weight of the evidence establishes a final unexcused absence on June 17, 2019, when Ms. Kjellberg elected to leave work without authorization halfway through her scheduled shift. Ms. Kjellberg did not have a reasonable basis for leaving at noon that day. Ms. Kjellberg unreasonably refused to follow the employer's reasonable directive that she return to her regular duties as receptionist. The weight of the evidence establishes additional unexcused absences on June 4, August 24, December 6 and December 7, 2018. In the first two instances Ms. Kjellberg was late because she overslept. In

connection with the December incidents, Ms. Kjellberg missed the initial day because she unreasonably elected to extend her absence beyond what was necessary to attend to her cat's health needs. In the second December absence, Ms. Kjellberg unreasonably elected to miss work to monitor her cat. The December absences gave rise to the second warning the employer provided regarding attendance. The employer sent what a reasonable person would perceive as a strong message by demoting Ms. Kjellberg. The evidence establishes additional unexcused absences on February 8, February 18, and May 9, 2019. The first instance was another incident of simple tardiness. The February 18 incident of tardiness was based on Ms. Kjellberg's unreasonable decision not to attempt at all to make the trip to work after a snowfall. The weight of the evidence fails to establish weather conditions that prevented Ms. Kjellberg from getting to work or from making at least an attempt to get to work. The May 9 absence was based on Ms. Kjellberg's purported inability to open her garage door in the absence of electricity. The administrative law judge finds implausible Ms. Kjellberg's assertion that there was no bypass cord she could have pulled to easily and readily free her vehicle from the garage. Ms. Kjellberg knew about the issue in advance of her shift, but failed to reasonably explore her options for getting to work on time. Ms. Kjellberg's May absences triggered a final warning regarding attendance. Ms. Kjellberg's final absence occurred in the context of that final warning. The remainder of Ms. Kjellberg's absences were due to illness, were properly reported to the employer and, therefore, were excused absences under the applicable law.

Ms. Kjellberg's inappropriate and disruptive utterance on June 17, 2019 was an isolated incident, should not be minimized, but would not by itself rise to the level of disqualifying misconduct in connection with the employment. However, the inappropriate conduct was an aggravating factor attending the unexcused early departure on that date.

Because the evidence in the record established a discharge based on misconduct in connection with the employment, Ms. Kjellberg is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Kjellberg must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Kjellberg received $2,802.00 in benefits for the period of June 30, 2019 through August 10, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Kjellberg received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Kjellberg is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The July 10, 2019, reference 01, decision is reversed. The claimant was discharged on June 17, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid $2,802.00 in benefits for the period of June 30, 2019 through August 10, 2019. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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