

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

YOLANDA M GAINES
Claimant

APPEAL NO. 12A-UI-02586-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 01/29/12
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 March 9, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 29, 2012. Claimant Yolanda Gaines participated. Jamal Grcic, Human Resources Clerk, represented the employer.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Yolanda Gaines was employed by Tyson Fresh Meats as a full-time production worker from 2009 until January 27, 2012, when Terry Ray, Human Resources Manager, discharged her for attendance. Ms. Gaines' work hours were 6:00 a.m. to 2:30 p.m., Monday through Friday. If Ms. Gaines needed to be absent from work, the employer's attendance policy required that she contact the designated phone line at least 30 minutes before the scheduled start of her shift and leave a voice mail message. Ms. Gaines was aware of the policy.

Ms. Gaines last performed work for the employer on January 16, 2012 and completed her shift on that day. On January 17, 18, 20, 23, 24, 25, 26 and 27, 2012, Ms. Gaines was absent due to illness and properly notified the employer of her need to be absent. Ms. Gaines had previously been approved for leave under the Family and Medical Leave Act (FMLA) and referenced her FMLA approval each time she called in an absence. The FMLA approval was based on depression and anxiety.

On the afternoon of January 23, 2012, Ms. Gaines went to the workplace and spoke with Terry Ray, Human Resources Manager. Ms. Gaines told Ms. Ray that she had been out sick pursuant to her prior FMLA approval and that she had been reporting her absences daily. Ms. Gaines told Ms. Ray that she had been in contact with the employer's corporate office to pursue a transfer to Texas. Ms. Gaines' husband had been transferred to Fort Worth, Texas.

Ms. Gaines asked Ms. Ray for assistance with being transferred to a Tyson facility in Texas. Ms. Ray told Ms. Gaines that she would look into it and get back to her.

On the afternoon of January 27, 2012, Ms. Gaines returned to the workplace and spoke again with Ms. Ray to follow up on the request for assistance with a transfer. Ms. Ray told Ms. Gaines at that time that her employment had been terminated due to attendance points.

Ms. Gaines moved with her husband to Forth Worth, Texas on February 3, 2012, and immediately filed an Iowa claim for unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

871 IAC 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.

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 employer has presented insufficient evidence, and insufficient direct and satisfactory evidence, to establish a voluntary quit or to establish that Ms. Gaines’ absences during the period of January 17-27 were unexcused absences under the applicable law. While the employer had, by Mr. Grcic’s account, hundreds of employee calls to keep track of each day, Ms. Gaines had only her own conduct to track. The weight of the evidence indicates that Ms. Gaines’ testimony regarding the events of January 17-27 is the more reliable testimony. While Ms. Gaines’ ability to go to the workplace in person on January 23 and 27 for the purpose of discussing a proposed transfer, and her ability to follow up with the employer’s corporate office regarding the transfer, call into question just how sick she was, the employer has simply failed to present sufficient evidence to rebut her testimony that she was absent due to illness properly reported to the employer.

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

In light of the claimant’s extended absence toward the end of her employment due to diagnosed mental illness, and in light of the fact that neither party presented medical evidence regarding the claimant’s ability to perform full-time work, this matter will be remanded to the Claims Division for initial investigation and determination of whether the claimant has been able to work and available for work since she established her claim for benefits.

DECISION:

The Agency representative's March 9, 2012, reference 01, decision is affirmed. 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.

This matter is remanded to the Claims Division for investigation and determination of whether the claimant has been able to work and available for work since she established her claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs