

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PAMELA R MILLER Claimant ABCM CORPORATION Employer	<div>68-0157 (9-06) - 3091078 - EI</div> <div>APPEAL NO. 18A-UI-07358-JTT</div> <div>ADMINISTRATIVE LAW JUDGE DECISION</div> <div>OC: 06/10/18 Claimant: Appellant (5)</div>
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Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Pamela Miller filed a timely appeal from the July 2, 2018, reference 02, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Miller voluntarily quit effective September 9, 2017 without good cause attributable to the employer by being absent three days without notifying the employer of her need to be absent. After due notice was issued, a hearing was held on July 26, 2018. Ms. Miller participated. Brian Clark represented the employer. Exhibits 1, 2 and A were received into evidence. The administrative law judge took official notice of clerk of court information concerning Buchanan County case numbers STA0056755 and STA056756, which information is available to the public at www.iowacourts.state.ia.us. The administrative law judge took official notice of the following agency administrative records: DBRO, WAGE-A, WAGE-B and WAGE-C.

ISSUE:

Whether Ms. Miller separated from the employment for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Pamela Miller was employed by ABCM Corporation, d/b/a Harmony House Health Care Center, as a part-time Developmental Assistant. Ms. Miller began the employment in on August 8, 2017 and last appeared and performed work for the employer on August 31, 2017. Ms. Miller was thereafter absent without notice to the employer for three consecutive shifts on September 1, 8 and 9, 2017. Ms. Miller did not make further contact with the employer following the shift she worked on August 31, 2017. On September 12, 2017, Brian Clark, Human Resources Coordinator, documented a discharge from the employment and mailed a copy of the discharge document to Ms. Miller.

If Ms. Miller needed to be absent from work, the employer's absence reporting policy required that Ms. Miller telephone the workplace at least two hours prior to the scheduled start of her shift and speak with a team leader. The employer provided Ms. Miller with a copy of the employer's written attendance policy and reviewed the absence reporting policy with Ms. Miller during her orientation to the employment. Under the employer's written policy deemed three no-call, no-show absences within a 12-month period would subject Ms. Miller to "automatic" termination of

the employment. The employer lacked a written policy that deemed three consecutive no-call, no-show absences a voluntary quit.

Ms. Miller's separation from this employer was not based on incarceration. Ms. Miller was not incarcerated at any point during the period of August 31, 2017 through September 12, 2017. However, on September 24, 2017, Ms. Miller was arrested in Buchanan County and charged with two offenses: Driving While License Denied, Suspended, Cancelled or Revoked in violation of Iowa Code section 321.218(1) and Failure to Provide Proof of Financial Liability in violation of Iowa Code section 321.20B. On September 24, 2017, Ms. Miller was incarcerated on the driving charge and her bond was set at \$300.00 cash only. Ms. Miller remained in custody until September 29, 2017, at which time she entered a guilty plea to the driving offense. On September 29, 2017, Ms. Miller was sentenced to four days in jail with credit for time served and was sentenced to pay a fine. On September 29, 2017, the Failure to Provide Proof of Financial Liability charge was dismissed by the court. See Buchanan County case numbers STA0056755 and STA056756.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See Iowa Administrative Code rule 871-24.25.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

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).

In the absence of an employer rule that deemed multiple, consecutive no-call, no-show absences a voluntary quit, the administrative law judge concludes that Ms. Miller's separation from the employment occurred on September 12, 2017, when the employer sent the letter discharging her from the employment.

The employer has the burden of proof in a discharge 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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 no-call, no-show absences on September 1, 8 and 9, 2017. Each of the absences was an unexcused absence under the applicable law. None of the absences was due to incarceration. The three consecutive unexcused absences were excessive, especially given the brevity of the employment. The excessive unexcused absences demonstrated an intentional and substantial disregard for the employer's interest in providing reliable, consistent services to the employer's clients.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Miller was discharged for misconduct in connection with the employment. Accordingly, Ms. Miller is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Miller must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The July 2, 2018, reference 02, decision is modified as follows. The claimant was discharged for misconduct in connection with the employment based on excessive unexcused absences. The discharge was effective September 12, 2017. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs