

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JODEE E HAND

Claimant

APPEAL NO. 14A-UI-03242-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC

Employer

OC: 03/02/14

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Jodee Hand filed a timely appeal from the March 21, 2014, reference 01, decision that disqualified her benefits. After due notice was issued, a hearing was held on April 16, 2014. Ms. Hand participated. Lindy Helm represented the employer.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jodee Hand commenced her full-time employment with West Liberty Foods in 2010 and last performed work for the employer on December 10, 2013. Ms. Hand then commenced a period of approved medical leave under the Family and Medical Leave Act. At the time the employer approved the leave, Ms. Hand's anticipated return to work date was February 5, 2014. Ms. Hand did not return to work that day.

Ms. Hand was released by her doctor to return to work effective February 7, 2014. Ms. Hand had an appointment with her doctor that day and knew, based on her conversation with doctor, that she was released to return to work that day. Ms. Hand did not return to work on February 7, 2014 or notify the employer that she had been released to return to work. On February 17, 2014, ten days after Ms. Hand been released by her doctor to return to work, the employer received written notice that Ms. Hand been released to return to work on February 7, 2014.

On the morning of February 18, 2014, the employer contacted Ms. Hand and asked her why she had not returned to work. Ms. Hand told the employer that she lacked transportation to get to work. The employer had never agreed to provide transportation for Ms. Hand and Ms. Hand had always provided her own transportation to and from work. The employer told Ms. Hand that the employer would deem the absence period of February 5-17 a one-time approved personal leave, but that Ms. Hand needed to report for her shift that day at 6:00 p.m. Ms. Hand's usual

work hours were 6:00 p.m. to 6:00 a.m. Ms. Hand had previously been provided with her work schedule for all of 2014. On February 18, 21, 22, and 23, Ms. Hand called in absences due to a lack of transportation. On February 24, the employer terminated the employment.

Ms. Hand had possessed a working vehicle before she commenced her leave of absence. Ms. Hand had hit a deer in November 2013, had her vehicle repaired after that incident, but continued to have problems with the vehicle. The vehicle became non-functioning during the leave of absence period.

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 evidence in the record establishes unexcused absences on February 18, 21, 22, and 23, 2014, when Ms. Hand was absent due to a lack of transportation. The unexcused absences were excessive and constituted misconduct in connection with the employment. Accordingly, Ms. Hand is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits.

The separation could be analyzed in the alternative as a voluntary quit without good cause attributable to the employer, based on Ms. Hand's failure to return to work at the end of an approved leave of absence and based on the fact that she ceased appearing for work due to a lack of transportation. See Iowa Code section 96.5(1); see also 871 IAC 24.25(1) and 871 IAC 24.22(j)(2).

DECISION:

The claims deputy's March 21, 2014, reference 01, decision is affirmed. The claimant was discharged for misconduct. 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 allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css