

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUNNY D BARTON
Claimant

APPEAL NO. 12A-UI-13128-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PJ TRADING POST
Employer

OC: 10/07/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 24, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 4, 2012. Claimant Sunny Barton participated. Pam Hennenfent, Owner, represented the employer. Exhibits Two, Three, Four, and Six through Eleven 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: Sunny Barton was employed by PJ Trading Post as a part-time convenience store clerk from June 18, 2012 until July 4, 2012, when Pam Hennenfent, owner, discharged her for attendance. For most of the period of employment, the employer was preparing to open its new convenience store. The store opened for business on July 2, 2012. Ms. Barton lived 25 minutes from the workplace.

The employer lacked formal work rules at the time of the employment, including a formal attendance policy. The employer had provided Ms. Barton with cell phone numbers for Ms. Barton to use if she needed to be absent or late for work.

On July 4, Ms. Barton was scheduled to work at 6:00 a.m. One June 28, the employer had provided Ms. Barton with a work schedule for July 2 through 7. At 8:30 a.m., Ms. Barton contacted the employer and told the employer she had overslept because her son had taken her phone. Mr. Barton used the phone as an alarm clock.

Prior to June 28, the employer had not generated a written schedule, but instead advised Ms. Barton ahead of time when to appear for work.

The next most recent absence that factored in the discharge was Ms. Barton's late arrival on June 26, 2012. Ms. Hennenfent had directed Ms. Barton and other employees to appear for work at 9:00 a.m., because a vendor was to be there that morning to show the staff how to prepare pizzas and sandwiches. Ms. Barton arrived at 9:47 a.m. Ms. Barton had to stop and fill a tire that was low on air. Ms. Barton was then stopped by law enforcement and cited for speeding. Ms. Barton was already going to be late for work at the time she was stopped by law enforcement

The first absence that had factored in the discharge had occurred on June 20. Prior to that date, Ms. Hennenfent had directed Ms. Barton and other staff to appear at 7:00 a.m. in preparation for a health inspection that was to start at 8:00 a.m. Ms. Barton contacted the employer at 11:30 a.m. At that time, co-owner Steven Hennenfent directed Ms. Barton to come speak with the employer. When Ms. Barton came to the workplace, the employer learned that Ms. Barton had been the victim of domestic violence the night before, had visible facial injury, and was too upset to work. The domestic assault situation had involved the police. Ms. Barton had been up late, had overslept, and for that reason did not notify the employer of the absence prior to 11:30 a.m.

Ms. Barton had also been late getting to work on July 2, the day the store opened for business.

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).

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).

The evidence in the record establishes unexcused absences on June 20, June 26, July 2, and July 4, 2012. While the administrative law judge does not minimize the significance of Ms. Barton being the victim of domestic abuse on the evening of June 19, that situation does not explain why Ms. Barton did not notify the employer prior to the scheduled start of her shift on June 20 that she would be late or absent. Even if one disregards that absence on June 20, there is still sufficient evidence to establish excessive unexcused absences during the very brief employment. The June 26 absence was attributable to two things. The first was the tire with low air. This is something that should have taken minimal time to address. The subsequent traffic stop for speeding would in no way legitimize the late arrival. The weight of the evidence indicates that Ms. Barton was indeed late for work for personal reasons on July 2, and then was late again for personal reasons on July 4.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Barton was discharged for misconduct. Accordingly, Ms. Barton 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.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the

claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's October 24, 2012, reference 01, decision is reversed. 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 will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css