**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**LESLIE K LOPEZ**
Claimant

**WESLEY RETIREMENT SERVICES INC**
Employer

**APPEAL NO. 12A-UI-13648-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 10/14/12**
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Leslie Lopez filed a timely appeal from the November 5, 2012, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on January 9, 2013. Ms. Lopez participated and presented additional testimony through Cara Kidd. Robyn Moore of Equifax Workforce Solutions represented the employer and presented testimony through David Tofanelli. The hearing in this matter was consolidated with the hearing in Appeal Number 12A-UI-13647-JTT. Exhibits One, Two, Five, Seven, Eight, Ten, Eleven, and Twelve were received into evidence.

**ISSUE:**

Whether Ms. Lopez was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits. The administrative law judge concludes that Ms. Lopez was discharged for misconduct based on excessive unexcused tardiness.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Leslie Lopez was employed by Wesley Acres in Des Moines as a full-time dietary aide/wait staff from 2010 until December 8, 2012, when David Tofanelli, Culinary Services Director, discharged her for attendance. The final two absences that factored into the discharge occurred on October 3 and 4, 2012. On October 3, Ms. Lopez was schedule to work at 10:45 a.m., but did not clock in until 10:48 a.m. On October 4, Ms. Lopez was scheduled to work at 10:45 a.m., but clocked in at 10:53 a.m. The employer's written attendance policy allowed Ms. Lopez to clock in up to seven minutes *early*, but deemed her tardy if she clocked in a minute late. Ms. Lopez had received a copy of the policy. The employer's attendance policy did *not* allow for a seven-minute grace period that would allow Ms. Lopez to be up to seven minutes late before she would be deemed tardy.

Ms. Lopez had a long and well-established history of tardiness, reprimands for tardiness, and evaluations that highlighted her tardiness as problem in the employment. In September 2011,

the employer issued a written reprimand to Ms. Lopez for being tardy 25 times between January 4, 2011 and August 29, 2011. In January 2012, the employer reprimanded Ms. Lopez for being tardy 13 times between September 8, 2011 and November 16, 2011. The employer warned Ms. Lopez to improve her attendance or face suspension without pay. The employer further advised that Ms. Lopez needed to notify the employer prior to the scheduled start of her shift if she needed to be late. In May 2012 the employer reprimanded Ms. Lopez for being 30 minutes late from returning from lunch. Ms. Lopez was allowed 30 minutes but took an hour. Ms. Lopez had left for lunch with two other employees. Whoever was driving ran out of gas. None of the three contacted the employer to advise they would be late or why. As part of that written reprimand, the employer stressed that, "Tardiness is considered arriving at work *anytime* after your scheduled start time or returning to work late after a scheduled break."

The history of tardiness prompted the employer to issue a written "Final Warning" for tardiness on September 10, 2012. Ms. Lopez signed she acknowledged the reprimand on that day. The reprimand instructed Ms. Lopez to "follow the posted schedule at all times." The reprimand set forth, in bold text, that: "The plan for corrective action is immediate and sustainable by the employee. Failure to do so will result in further disciplinary action up to and including termination." In other words, the reprimand warned Ms. Lopez that her job was in jeopardy. The reprimand issued on September 10, 2012 was based on multiple attendance issues that included 16 instances of tardiness from January 2012 to early September 2012.

**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).

Ms. Lopez made some assertions during her testimony that were not credible. These included an assertion that the employer's decision to discharge Ms. Lopez from the employment was based on retaliation from a supervisor after Ms. Lopez complained about the supervisor allegedly using a racial slur. The weight of the evidence indicates that Ms. Lopez's habitual tardiness was a concern to the employer long before Ms. Lopez's complaint about the alleged racial slur. The weight of the evidence indicates that Ms. Lopez was fairly consistently late getting to work during at least the last two years of the employment and that the employer had on multiple occasions warned her that her tardiness was a problem that could lead to additional discipline up to discharge from the employment. The evidence fails to support Ms. Lopez's assertion, echoed by her additional witness, that the attendance policy called for seven-minute grace period whereby Ms. Lopez could be up to seven minutes late without consequence. The evidence indicates that Ms. Lopez and her additional witness both have an axe to grind with the employer and particular members of the management staff. Ms. Lopez attempted to argue the grace period was in the written policy until she read the policy into the record and the policy

clearly indicated there was no grace period. Ms. Lopez's testimony and Ms. Kidd's testimony regarding the alleged grace period is contradicted by the prior reprimands issued to Ms. Lopez.

The evidence in the record establishes that each of the instances of tardiness referenced above was for personal reasons and constituted an unexcused absence under the applicable law. The unexcused absences were excessive. The unexcused absences occurred in the context of multiple reprimands and coachings that included a final warning. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Lopez was discharged for misconduct. Accordingly, Ms. Lopez 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 paid to Ms. Lopez.

**DECISION:**

The Agency representative's November 5, 2012, reference 02, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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