

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

HYDI DESSEL
Claimant

APPEAL NO. 18A-UI-12436-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FBG SERVICE CORPORATION
Employer

OC: 11/25/18
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 20, 2018, reference 01, decision that held the claimant was eligible for benefits provided she met all other eligibility requirements and the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on November 19, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on January 16, 2019. Claimant Hydi Dessel participated. Susan Chmelovsky represented the employer and presented testimony through Patrick Carroll and Andrea Jordan. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 2 through 6 into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: FBG Service Corporation provides custodial services to client businesses and agencies. Those client entities include the Future Farmers of America (FFA) Enrichment Center located on the Ankeny campus of Des Moines Area Community College (DMACC). Hydi Dessel was employed by FBG as a full-time Cleaning Specialist from 2016 until November 19, 2018, when Patrick Carroll, District Director, and Larry East, Operations Manager, discharged her from employment. Mr. East was Ms. Dessel's designated supervisor, though the pair had minimal contact. From the beginning of 2018 until the discharge in November 2018, Ms. Dessel was assigned to the FFA Enrichment Center at DMACC. Ms. Dessel regularly interacted with and took direction from the events coordinator at the FFA Enrichment Center. Ms. Dessel's usual work hours were 6:30 a.m. to 3:00 p.m., Monday through Friday. Ms. Dessel was required to perform work outside her established work hours as needed to assist with events at the FFA Enrichment Center.

The employer's decision to discharge Ms. Dessel from the employment was based primarily on attendance issues. On November 18, 2018, Ms. Dessel notified Mr. East of her need to be absent on November 19, 2018 due to an abscessed tooth, a swollen face, and a mouth infection. Ms. Dessel told Mr. East on November 18 that she could not get into the dentist until November 19. On November 19, after Ms. Dessel had provided timely notice of her need to be absent that day due to illness, Mr. Carroll and Mr. East made their decision to discharge her from the employment. Ms. Dessel had last worked on November 17, 2018. Between October 2, 2018 and November 16, 2018, Ms. Dessel arrived late to work for personal reasons and without notice to the employer on more than two dozen occasions. The employer's attendance policy required that Ms. Dessel notify the employer at least four hours prior to the scheduled start of her shift if she needed to be late or absent from work. Ms. Dessel was aware of the absence reporting requirements. During that same period, Ms. Dessel left work early for personal reasons and without notice to the employer on more than two dozen occasions.

In making the decision to discharge Ms. Dessel from the employment, the employer also considered factors other than attendance. These included Ms. Dessel's use of her personal cell phone at work. The most recent such incident occurred on October 25, 2018. Sometime between October 12 and 17, 2018, the employer had gone to DMACC and found Ms. Dessel out of uniform. Ms. Dessel was at that time wearing a hooded sweatshirt, rather than the employer-issued sweatshirt bearing the employer's logo.

REASONING AND CONCLUSIONS OF LAW:

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).

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).

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 weight of the evidence in the record establishes that the final absence that triggered the discharge was in fact Ms. Dessel's full-day absence on November 19, 2018. It was after Ms. Dessel provided timely notice on November 18 of her need to be absent due to illness on November 19 that the employer made the decision to end the employment. The weight of the evidence does not support the employer's assertion that the final absence that triggered the discharge was the late arrival and/or early departure on November 16. Because the final absence that triggered the discharge was due to illness and was properly reported to the employer, it was an excused absence under the applicable law and cannot serve as a basis for a finding of misconduct in connection with the employment or disqualification for unemployment insurance benefits. Because the final absence that triggered the discharge was an excused

absence under the applicable law, the administrative law judge need not further consider the earlier absences. Neither of non-attendance issues involved a current act. Accordingly, neither of the non-attendance concerns can serve as a basis for a finding of misconduct in connection with the employment or disqualification for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged on November 19, 2018 for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The December 20, 2018, reference 01, decision is affirmed. The claimant was discharged on November 19, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs