IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JANNA M KIRKMAN Claimant **THOMAS L CARDELLA & ASSOCIATES INC** Employer	**APPEAL NO. 19A-UI-06665-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/07/19** **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 August 12, 2019, reference 04, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and that employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on July 7, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on September 19, 2019. Claimant Janna Kirkman participated. Barbara Tony of Equifax represented the employer and presented testimony through Allison Armstrong and Jessica Ayala. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

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: Janna Kirkman was employed by Thomas L. Cardella & Associates, Inc. as a full-time Telephone Sales Representative (telemarketer). Ms. Kirkman began the employment on April 8, 2019 and last performed work for the employer on July 3, 2019. Ms. Kirkman completed her shift on July 3. As of June 24, 2019, Ms. Kirkman's work hours were 8:00 a.m. to 4:30 p.m. Monday through Friday and Ms. Kirkman's immediate supervisor was Section Supervisor Jessica Ayala.

After Ms. Kirkman completed her shift on July 3, 2019, she was next scheduled to work at 8:00 a.m. on July 5, 2019. On that day, Ms. Kirkman was on her way to work when a semi tractor-trailer collided with the vehicle Ms. Kirkman was operating. Ms. Kirkman was not visibly injured, but the air bags in vehicle had deployed. Ms. Kirkman was several months pregnant at

the time of the accident. Ms. Kirkman was transported by ambulance to a hospital so that her medical condition could be evaluated. Ms. Kirkman's cell phone initially remained with her wrecked vehicle. Around 11:30 a.m., Ms. Kirkman was still at the hospital when her boyfriend provided her with her cell phone, which the boyfriend had retrieved from the wrecked vehicle. When Ms. Kirkman had not appeared for work that morning, Ms. Ayala had attempted to call Ms. Kirkman at 9:00 a.m. pursuant to the employer's manager protocol. When Ms. Kirkman had not answered the call at 9:00 a.m., Ms. Ayala sent a text message to Ms. Kirkman via Facebook Messenger. At 11:37 a.m., Ms. Kirkman sent a text message response to Ms. Ayala via Facebook Messenger. Ms. Kirkman had stated in the message that she had been a motor vehicle accident with a semi, that she was at the hospital, that the car had been impounded, and that she did not know whether she would be able to make it to work that day. Ms. Kirkman's 11:37 a.m. text message was her first communication with the employer regarding her need to be absent on July 5. Though Ms. Kirkman provided late notice of her need to be absent on July 5, the employer characterized the absence as a no-call/no-show.

The employer has a written attendance policy that is set forth in an employee handbook. At the start of the employment, the employer reviewed the attendance policy with Ms. Kirkman and provided her with computer access to the employee handbook. If Ms. Kirkman needed to be absent, the employer's attendance policy required that Ms. Kirkman telephone the workplace prior to the scheduled start of her shift and speak with her supervisor or with the Center Manager, Mark Grego. The employer has one or more managers at the workplace beginning at 7:30 a.m. At 8:00 a.m. a center administrator/receptionist begins her workday. Once the administrator is available, she fields absence reporting calls from employees and routes employees to the appropriate member of management. If an employee phones the workplace, before 8:00 a.m., the employer's phone system is set up to route incoming calls to the call floor upon the third ring. However, there is no guarantee that the call will be answered if the administrator is not manning incoming calls. Ms. Kirkman was at all relevant times aware of the employer's attendance policy, including the absence reporting policy. The employer's attendance policy also stated that the employer would deem an employee who was absent for three consecutive shifts without notice to the employer to have abandoned and voluntarily resigned from the employment.

After Ms. Kirkman was absent on Friday, July 5, 2019, she was next scheduled to work at 8:00 a.m. on Monday, July 8. On that day, Ms. Kirkman was absent due to a lack of child care for her small child. Ms. Kirkman telephoned the workplace at 7:30 a.m., but no one answered. Ms. Kirkman did not try a second time to reach the employer by telephone to report the absence. At 9:03 a.m., Ms. Kirkman sent a text message to Ms. Ayala to give notice of her need to be absent. Ms. Ayala sent a text message response in which she directed Ms. Kirkman to call the workplace and speak with Mr. Grego. Ms. Kirkman promptly called the workplace and spoke with the administrator, Jennifer. Jennifer told Ms. Kirkman in a non-official capacity that she had "pointed out" and needed to speak with Mr. Grego. Jennifer transferred Ms. Kirkman to Mr. Grego's phone line. Mr. Grego answered the call, but stated he would call Ms. Kirkman later to discuss the matter. Mr. Grego did not call Ms. Kirkman back to discuss the matter. Based on Ms. Ayala's text message directing Ms. Kirkman to speak with Mr. Grego and the administrator's statement that Ms. Kirkman had pointed out and should speak with Mr. Grego, Ms. Kirkman concluded that she was supposed to wait for Mr. Grego to call her to discuss the status of her employment before she returned to the workplace.

On July 9, 2019, Ms. Kirkman again waited for a call from Mr. Grego to discuss the status of her employment, but Mr. Grego did not call. Ms. Kirkman did contact the workplace to report an absence.

At 9:00 a.m. on July 10, 2019, Ms. Kirkman called the workplace, spoke to Jennifer the administrator, and was against routed to Mr. Grego's phone line. When Mr. Grego did not answer, Ms. Kirkman left a voicemail message. Mr. Grego did not respond to the message.

On July 11, 2019, Ms. Kirkman again waited for Mr. Grego to contact her, but Mr. Grego did not call.

A 9:00 a.m. on July 12, 2019, Ms. Kirkman again telephoned the workplace, spoke with Jennifer the receptionist, and was routed to Mr. Grego's voice mail where she left a message. Mr. Grego did not respond. There was no further contact between Ms. Kirkman and the employer.

The employer documented a July 9, 2019 voluntary separation based on three purported consecutive no-call/no-show absences on July 5, July 8 and July 9.

The employer references earlier attendance issues without specifying absence dates or the basis for the absences or whether notice was provided. Ms. Kirkman asserts prior absences were based on her need to take her child to medical appointments.

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.

When a claimant was absent for three days without giving notice to the employer and in violation of company rule, the claimant is presumed to have voluntarily quit without good cause attributable to the employer. See Iowa Administrative Code rule 871-24.25(4).

The weight of the evidence in the record establishes that Ms. Kirkman was discharged for attendance and did not voluntarily quit. The employer asserts that Ms. Kirkman voluntarily quit by being absent without notice to the employer on July 5, 8 and 9, 2019. However, the employer testified that Ms. Kirkman contacted the employer via text message on July 5, 2019 to give notice of her need to be absent due to the motor vehicle accident that occurred that morning. In light of the notice provided, albeit late notice and by means other than a telephone call to the supervisor or center manager, the absence on July 5 was not a no-call/no-show absence within the meaning of the law. The employer also testified to the notice Ms. Kirkman provided via text message on July 8 regarding her need to be absent that day. That July 8 absence was not a no-call/no-show absence within the meaning of law. The weight of the evidence establishes that Ms. Kirkman's failure to call the employer on July 9 to report an absence for that day was based on Ms. Ayala's July 8 directive to speak with Mr. Grego, the administrator's statement that Ms. Kirkman needed to speak with Mr. Grego, and Mr. Grego's promise to call Ms. Kirkman back to discuss the status of her employment. At no time did Ms. Kirkman indicate by word or deed an intention to voluntarily separate from the employment. Rather, the weight of the evidence establishes that Ms. Kirkman attempted to preserve the employment by complying with the directive to contact Mr. Grego.

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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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 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 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 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 weight of the evidence establishes a discharge for no disqualifying reason. The employer cites July 9, 2019 as the final absence date that triggered the employer to conclude the employment was done. However, the weight of the evidence establishes that Ms. Kirkman reasonably concluded she was not to report for work that day or until she heard from Mr. Grego regarding the status of her employment. In other words, Ms. Kirkman reasonably concluded that she was suspended from the employment effective July 8, 2019. The purported July 9, 2019 absence cannot be deemed an unexcused absence with the meaning of the unemployment insurance law. The weight of the evidence establishes a July 5, 2019 absence that was based on circumstances beyond Ms. Kirkman's control and late notice based on circumstances that were beyond Ms. Kirkman's control. Ms. Kirkman provided notice as soon as she was able and by the same means by which the supervisor communicated with her. The July 5 absence cannot be deemed an unexcused absence within the meaning of the law. The weight of the evidence does establish an absence on July 8, 2019 that was an unexcused absence under the applicable law. Ms. Kirkman was absent that day due to a lack of childcare, a matter of personal responsibility. The absence was an unexcused absence regardless of whether Ms. Kirkman attempted to contact the employer at 7:30 a.m. by telephone or made first contact via text message after shift started. The evidence in the record fails to establish additional unexcused absences. The evidence does not establish excessive unexcused absences or any other disqualifying misconduct in connection with the employment. Ms. Kirkman is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The August 12, 2019, reference 04, decision is affirmed. The claimant was discharged on or before July 9, 2019 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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