

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUNDAY S ELLIS
Claimant

APPEAL NO. 13A-UI-08566-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEE ZEE INC
Employer

OC: 06/30/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated July 22, 2013, reference 01, which denied unemployment insurance benefits. After due notice, a telephone hearing was held on August 28, 2013. Claimant participated. The employer participated by Ms. Lacey Leichliter, Human Resource Assistant.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Sunday Ellis was employed by Dee Zee, Inc. from September 12, 2011 until June 24, 2013 when she was discharged from employment. Ms. Ellis most recently was employed as a full-time machine operator and was scheduled to work 7:00 a.m. until 3:00 p.m. Monday through Friday.

The claimant was discharged when she exceeded the permissible number of attendance infraction points allowed under the company's attendance point policy. Under the policy, employees are subject to discharge if they accumulate a set number of infraction points during a rolling period of time. The employer does not consider the reason for the absence but only the accumulation of points.

The claimant received a last warning on January 18, 2013 regarding her attendance. The warning informed the claimant that any further instances of missed time, late clock-ins or early check outs without approved PTO would result in termination. Although the claimant significantly improved her attendance, she was discharged when she was required to be absent to attend the funeral of her nephew on June 14, 17 and 18, 2013. Ms. Ellis properly notified the employer of her absences and the reasons for them and had requested use of vacation time for the funeral. The claimant believed the number of attendance infraction points assessed by the employer for the use of vacation time was not accurate; however, the claimant was discharged from employment.

It appears that the claimant was also assessed infraction points for absences that did not occur at times. Although the claimant had brought these matters to the attention of company management, the points were not removed.

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

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 insurance benefits. Conduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegations, misconduct cannot be established. See 871 IAC 24.32(4).

In this matter, the evidence in the record does not establish intentional, disqualifying misconduct on the part of the claimant. Although the claimant's attendance in the past may have not been satisfactory, the evidence in the record establishes that the claimant made concerted efforts to improve her attendance and punctuality following her final warning on January 18, 2013. The claimant was discharged when she was required to attend the funeral and make funeral arrangements for a nephew who is a close family member. Although the claimant had requested vacation time for these purposes, the employer assessed four infraction points causing the claimant to be discharged.

For the reasons stated herein, the administrative law judge concludes that the employer has not sustained its burden of proof in this matter. The evidence in the record does not establish intentional misconduct sufficient to warrant the denial of unemployment insurance benefits.

DECISION:

The representative's decision dated July 22, 2013, reference 01, is reversed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs