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

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

**REBECCA S NEAVIN**
Claimant

**NORTH CENTRAL SHELTERED WORKSHOP**
Employer

**APPEAL NO: 19A-UI-02617-JC-T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC**: **03/03/19**
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the March 18, 2019, (reference 01) unemployment insurance decision that denied benefits based on separation. The parties were properly notified about the hearing. A telephone hearing was held on April 15, 2019. The claimant participated personally. Natalie Neavin, daughter of claimant, testified on her behalf. The employer participated through Kristie Miller. Bekki Schoon also testified. Employer Exhibits 1-7 and Claimant Exhibits A-C were admitted into evidence. (Exhibit C is a video on cd). The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a direct support staff in a residential home for individuals with intellectual disabilities or mental health conditions. She was discharged from the employer on February 26, 2019. The employer stated the claimant was discharged for being thirty minutes tardy to her shift on February 25, 2019 and bringing her personal dog to work after being directed not to do so (Employer Exhibit 1).

When the claimant was hired, she was trained on the employer rules and procedures (Employer Exhibit 6-7). The employer's attendance policy does not outline a specific number of infractions an employee can have before discipline or discharge (Employer Exhibit 6). The employer allows a seven minute grace period and relies upon employees to self-record their hours when clocking in and out. Prior to discharge, the claimant was issued several warnings.

On December 18, 2018, the claimant was issued a warning in response to her attendance (Employer Exhibit 2). She was also issued a second warning that day for removing the employer issued cell phone from the premises and allowing her son to answer the phone

(Employer Exhibit 3). This breached the employer's rules regarding confidentiality because the phone had private information related to consumers in it.

On July 18, 2018, the claimant was issued a written warning after consumers complained to the employer that the claimant had brought her dog to work and that it was barking (Employer Exhibit 4). The employer asserted the claimant continued to bring the dog to work. Ms. Schoon reported most recently seeing the dog in the claimant's vehicle on February 7, 2019 and believed based upon reports by consumers that the claimant would keep the dog indoors overnight and move him to the car early in the morning before consumers woke up and other staff arrived. The claimant offered conflicting testimony stating she had not brought the dog back after being warned, that she brought him because consumers liked him, that it was "unbearable to be apart" and that sometimes her dog sitter (her daughter was unavailable). Even though Ms. Schoon saw the dog on February 7, 2019, she did not confront the claimant about it until discharge on February 26, 2019.

On February 25, 2019, the claimant was scheduled to be at work at 9:00 p.m. She left her daughter's home with extra time to drive, given the road conditions and winter weather conditions (Natalie Neavin testimony). She arrived to work at 9:10 p.m. three minutes beyond the allotted grace period. Prior to the claimant arriving, other employees had been permitted to leave early due to weather (Claimant Exhibit B). She was subsequently discharged.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In this case, the employer discharged the claimant based upon her repeatedly bringing her dog to work after being directed to stop, and for continued tardiness. Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

The undisputed evidence is the claimant was warned in July 2018 not to bring her dog to work anymore. Based on the evidence presented, Ms. Schoon last saw the dog in the claimant's vehicle on February 7, 2019, almost three weeks before discharge. Ms. Schoon believed the claimant had likely had the dog in the home until early morning. She presented no proof or evidence in support of that belief, such as a witness who saw the dog in the residence or a statement from a witness. In contrast, the claimant denied bringing the dog. Even if the dog was present, the employer allowed the claimant to continue working for 19 days, unaware of potential consequences were pending for almost three weeks.

A claimant cannot be discharged for a past act of misconduct. An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) *Past acts of misconduct.* 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 on such past act or acts. The termination of employment must be based on a current act.

The purpose of this rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. Inasmuch as the employer knew of the dog incident the same day, did not advise the claimant it was an issue that would be subject to the disciplinary process until discharge 19 days later, the act for which the claimant was discharged was no longer current. Because the act for which the claimant was discharged was not current and the claimant may not be disqualified for past acts of misconduct, benefits cannot be denied based upon this conduct.

With respect to the claimant's tardy on February 25, 2019, the claimant stated she was 10 minutes late due to weather. The claimant was discharged based upon this tardy after being warned in December 2018 for her attendance.

Iowa Admin. Code r. 871-24.32(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.

Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv*., 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv*., 321 N.W.2d 6 (Iowa 1982).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences due to properly reported illness are excused, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. *Iowa Admin. Code* r. 871-24.32(7*); Cosper, supra; Gaborit v. Emp't Appeal Bd*., 734 N.W.2d 554 (Iowa Ct. App. 2007).

The administrative law judge is persuaded that the claimant's final tardy on February 25, 2019 should be considered excused because even though the claimant arrived three minutes after the permitted grace period, she could not have reasonably foreseen she would be unable to attend work sooner. It was not practical for the claimant to call the employer while trying to safely and timely arrive to work under poor driving conditions. If the claimant was going to be thirty minutes or later to her shift, the administrative law judge is persuaded she should have notified the employer but under these circumstances, the claimant's failure to notify the employer she would be three minutes later than the grace period was not reasonable, and would have likely resulted in the claimant being later to work if she had taken time to pull off the road and call the employer.

The administrative law judge recognizes the strain the claimant's attendance history had on the employer, but the final absence due to unpredictable winter weather driving and the claimant being late three minutes beyond the grace period, is excused for purposes of unemployment insurance eligibility. The claimant took reasonable steps of leaving early to prevent the tardy. Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to a final or current act of job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

**DECISION:**

The March 18, 2019, (reference 01) decision is reversed. The claimant was not discharged for disqualifying job related misconduct. Benefits are allowed, provided she is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn