

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

LINDSAY L MICKLE
Claimant

PER MAR SECURITY & RESEARCH CORP
Employer

APPEAL NO. 21A-UI-13834-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/21/21
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 June 1, 2021, reference 01, 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 Benefits Bureau deputy's conclusion that the claimant was discharged on March 23, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on August 12, 2021. The claimant did not provide a telephone number for the hearing and did not participate. Isabella Kogut of Valeu NSN, L.L.C. represented the employer and presented additional testimony through Rob Dvorak. 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.

ISSUE:

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: The claimant, Lindsay Mickle, was employed by Per Mar Security & Research Corporation as a full-time receptionist and inspection coordinator at the employer's Des Moines branch office from January 2021 until March 24, 2021, when the employer discharged her for attendance. The claimant last performed work for the employer on March 19, 2021. The claimant's work hours were 8:00 a.m. to 4:00 p.m., Monday through Friday. Rob Dvorak, District Operations Manager, was the claimant's immediate supervisor. At some point in the employment, the claimant told the employer that she suffers from fibromyalgia.

The employer lacks a written attendance policy. However, Mr. Dvorak told the claimant early in the employment that he wanted the claimant to notify him directly if she needed to be absent from the employment and he would then notify the local supervisor, General Manager Randy Moulder. On February 26, 2021, Mr. Dvorak reminded the claimant of this expectation.

The final absence that triggered the discharge occurred on March 24, 2021, when the claimant was late for work because she overslept. The employer contacted the claimant at 11:00 a.m. and the claimant advised at that time that she had overslept. The employer sent the claimant home when she arrived for work.

The next most recent absence occurred on March 22, 2021, when the claimant was absent for her entire shift. When the Mr. Dvorak spoke with the claimant about the absence, she asserted she had contacted another supervisor. Mr. Dvorak had been out of town at the time of the absence, but was available at his cell phone number. The claimant did not provide a reason for the absence.

The claimant's attendance issues began early in the employment. On January 19, 2021, the claimant sent a text message to the employer at 8:00 a.m. to indicate she would be late. The claimant did not provide a reason. The claimant reported for work at 8:45 a.m.

On February 1, the claimant left work early due to illness and with appropriate notice to the employer.

On February 4, the claimant was 30 minutes late due to an issue with a tire on a vehicle. The claimant told the employer the tires on her vehicle were old.

On February 24, the claimant left work early due to illness and with appropriate notice to the employer.

On February 25, the claimant was absence due to illness and with proper notice to the employer.

On February 26, the claimant was absent due to illness. The claimant notified Mr. Moulder, but did not notify Mr. Dvorak. In response to this absence, Mr. Dvorak reminded the claimant that she was to notify Mr. Dvorak when she needed to be absent.

On March 1 and March 2, the claimant left work early due to illness and with proper notice to the employer.

On March 9, the claimant was absent due to illness and with proper notice to the employer. The claimant advised the employer she was going to get tested for COVID-19. At that time, the employer told the claimant she would need to remain away from work for a two-week quarantine or until she tested negative for COVID-19. The claimant was thereafter absent on March 10, 11 and 12, pursuant to the employer's directive.

On March 18, the claimant left work early with appropriate notice to the employer and for a reason the employer did not document and cannot recall.

The employer did not issue any warnings to the claimant for attendance, but did tell the claimant that she was vital to the employer's operations and that it was important for her to be at work.

The claimant established an original claim for benefits that Iowa Workforce Development deemed effective March 21, 2021. Iowa Workforce Development set the weekly benefit amount at \$139.00. The claimant received \$1,431.00 in regular benefits for the 11 weeks between March 21, 2021 and June 5, 2021. The claimant also received \$3,300.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits for the same 11 weeks. The base period for the March 21, 2021 original claim consists of the fourth quarter of 2019 and the first, second and third quarter of 2020. Per Mar Security & Research Corporation is not a base period employer in connection with the March 21, 2021 original claim.

Iowa Workforce Development did not hold a scheduled fact-finding interview, but instead attempted to hold a "cold-call" fact-finding interview. Isabella Kogut, Account Executive with Valeu NSN, L.L.C. advises that Iowa Workforce Development did not contact the employer's representative of record for a fact-finding interview. However, the Benefits Bureau documented an attempt to reach the employer at the phone number of record, that the deputy left a voice mail message, and that the deputy sent a "four-day letter" to the employer representative soliciting input. The claimant participated in the "cold-call" fact-finding interview and provided a statement to the deputy that did not include fraud or intentional misrepresentation.

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 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 in the record establishes a discharge for no disqualifying reason. The evidence in the record establishes unexcused absences on January 19, February 4, March 22, and March 24, 2021. The remainder the absences were due to illness, fibromyalgia, were properly reported to the employer, and were excused absences under the applicable law. In the absence of any warnings to the claimant, including an absence of warnings that the unexcused absences placed the employment in jeopardy, the administrative law judge cannot conclude that the unexcused absences were excessive or constituted misconduct in connection with the employment. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits. The administrative law judge notes this employer is not a base period employer for purposes of the March 21, 2021 original claim and, therefore, will not be charged for benefits in connection with the current benefit year.

DECISION:

The June 1, 2021, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

A handwritten signature in black ink that reads "James E. Timberland". The signature is written in a cursive, flowing style.

James E. Timberland
Administrative Law Judge

November 8, 2021
Decision Dated and Mailed

jet/kmj