

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AUDRINA L ANDERSON
Claimant

APPEAL NO. 13A-UI-04823-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESTAR FOODS INC
Employer

OC: 03/31/13
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 17, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 31, 2013. Claimant Audrina Anderson participated. Jeff Oswald of Unemployment Insurance Services represented the employer and presented testimony through Aaron Langner. Exhibits One through Four were received into evidence.

ISSUE:

Whether Ms. Anderson separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Audrina Anderson was employed by Westar Foods, Inc., d/b/a a Hardee's, as a full-time shift leader during multiple distinct periods of employment. The most recent employment began in August 2012. Ms. Anderson last appeared and performed work for the employer on March 13, 2013. Until October 2012, Aaron Langner had been Ms. Anderson's immediate supervisor while he was in the position of General Manager. Joseph Uhl, Restaurant Manager, became Ms. Anderson's supervisor in October 2012 in connection with Mr. Langner's promotion to District Manager. When Ms. Anderson was at work, she would be in charge of running the shift.

On March 14, 2013, Ms. Anderson was absent from work due to illness. Ms. Anderson was scheduled to work 4:00 to 11:00 p.m. The employer's written policy required that any employee who needed to be absent from work "call the management person in charge immediately ... at least two hours before" the shift was to begin. Ms. Anderson was aware of the policy, and had received a copy of the handbook in connection with a prior period of employment. Ms. Anderson was responsible for enforcing the policy in connection with the shifts she ran as Shift Manager. On March 14, Ms. Anderson elected to send a text message to Mr. Uhl 45 minutes before she was supposed to appear for work to notify him of her absence. Ms. Anderson knew at the time that a text message did not satisfy the employer's notice requirement.

Ms. Anderson was next on the schedule to work March 15, from 8:00 a.m. to 4:00 p.m. Ms. Anderson had not kept track of her scheduled hours and assumed she was on the schedule to work that evening shift on March 15. Between 3:00 and 4:00 p.m., Ms. Anderson telephoned the restaurant and spoke to Mr. Uhl. Ms. Anderson told Mr. Uhl that she had just gotten up for the day and did not remember what hours she was supposed to work. Mr. Uhl told Ms. Anderson she had missed her shift and that he had assumed she quit. Ms. Anderson had no intention to quit and had not voiced any such intention. The employer elected to end the employment at that time.

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.

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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

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 evidence in the record establishes two consecutive unexcused absences on March 14 and 15, 2013. The first absence was unexcused because it was not properly reported to the employer. Notice was not given at least two hours prior to the schedule. Notice was provided via text message rather than through the required phone call. The March 15 absence was essentially a no-call/no-show absence insofar as Ms. Anderson did not contact the employer until the last hour of her shift. Ms. Anderson's conduct in failing to properly notify the employer of the two absences was rather remarkable, given her position as Shift Manager. The two consecutive unexcused absences were excessive and constituted misconduct in connection with the employment. Ms. Anderson is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If

Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's April 17, 2013, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs