

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**BROOKE M SCHROEDER**  
Claimant

**APPEAL NO. 18A-UI-05826-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 04/29/18**  
**Claimant: Appellant (2R)**

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

**STATEMENT OF THE CASE:**

Brooke Schroeder filed a timely appeal from the May 14, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Schroeder was discharged on April 26, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on June 29, 2018. Ms. Schroeder participated personally and was represented by attorney Mary Hamilton. Barbara Buss of Corporate Cost Control represented the employer and presented testimony through Katie Westphal and Jim Flahive. Exhibits 1, 3, 5, 6 and A through G were received into evidence.

**ISSUE:**

Whether Ms. Schroeder was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Brooke Schroeder was employed by Hy-Vee as a full-time assistant manager at the Cherokee Hy-Vee and last performed work for the employer on a shift that ended at 12:47 a.m., on March 30, 2018. Ms. Schroeder started her Hy-Vee employment in 2010 and began working at the Cherokee Hy-Vee in 2016. In November 2016, Ms. Schroeder became an assistant manager. Her immediate supervisor was Jessica Foresman, Assistant Director/Manager of Store Operations. Ms. Foresman reports to Jim Flahive, Store Director. As an assistant manager, Ms. Schroeder's work schedule would vary from week to week pursuant to business needs. Her shifts might include opening shifts, midday shifts, and closing shifts.

The employer has a written attendance policy contained in an employee handbook. Ms. Schroeder was at all relevant times aware of the policy. The policy included an absence reporting requirement, as follows:

We depend on you to be here when you are scheduled to work. If you will be late or cannot come to work, you—not someone else—must contact your store director or supervisor as early as possible prior to the start of your shift. If you are unable to work

for more than one day, daily contact is required unless approved by your store director or supervisor.

The employer also has an employee leave of absence protocol. Ms. Schroeder was at all relevant times aware of the leave of absence protocol.

After Ms. Schroeder completed her shift that ended at 12:47 a.m. on March 30, she was next scheduled to work a 3:00 p.m. to midnight shift on March 30, 2018. Prior to the scheduled start of the shift, Ms. Schroeder called Ms. Foresman to let her know she would be late for work due to a medical appointment. Ms. Foresman approved the late arrival and told Ms. Schroeder to contact her if anything changed. At 3:40 p.m., the employer received by fax a medical note concerning Ms. Schroeder. The note was from Cherokee Regional Medical Center. The note was from Rebecca Mogensen-Kruger, Nurse Practitioner. The note stated that Ms. Schroeder should remain off work until she saw her therapist. The note indicated that Ms. Schroeder had an appointment with her therapist the next Tuesday. The next Tuesday was April 3, 2018. The employer deemed the medical note to be sufficient notice of Ms. Schroeder's need to be absent from work through April 3, 2018. Ms. Schroeder had been scheduled to work March 31 and April 1, 2 and 3. Ms. Schroeder had previously been diagnosed with depression and anxiety. Ms. Schroeder saw the therapist on April 3.

Ms. Schroeder was next scheduled to work on April 4, from 10:00 a.m. to 7:00 p.m. Ms. Schroeder did not appear for the shift. At 2:15 p.m., Ms. Schroeder telephoned the Cherokee Hy-Vee and spoke with Katie Westphal, Human Resources Manager. Ms. Schroeder told Ms. Westphal that she needed to be absent for personal reasons. Ms. Schroeder had been under the erroneous impression that she was scheduled to start work at 3:00 p.m. that day. Ms. Westphal discussed with Ms. Schroeder that Ms. Schroeder was also on the schedule to work April 5. Ms. Schroeder had previously requested April 6 through 8, Friday through Sunday. Off. The employer's weekly work schedule begins on Monday and ends on Sunday. Ms. Schroeder told Ms. Westphal that she would need to be absent from her April 5 shift. Ms. Westphal asked Ms. Schroeder whether she had a doctor's note to cover the absences on April 4 and 5. Ms. Schroeder stated she had a doctor's note, would bring it in later, and that she needed to take some time to figure things out.

While Ms. Westphal was on the phone with Ms. Schroeder on April 4, she took the opportunity to discuss with Ms. Schroeder the work schedule for the work week of April 9 through 15. Ms. Westphal shared with Ms. Schroeder that Ms. Schroeder was on the schedule to work April 10, from 9:00 a.m. to 6:00 p.m. and also scheduled to work shifts on April 12, 13, 14 and 15. Ms. Schroeder stated that she would need April 14 off. At some point after this conversation, the employer deleted the April 14 shift and added an April 11 shift instead.

Ms. Schroeder did not appear for her scheduled shifts for the week of April 9 through 15. On the morning of April 10, Ms. Schroeder called Ms. Foresman and told Ms. Foresman that she needed to be off work until she was able to see a therapist in LeMars on May 4. Ms. Schroeder asked whether she should file for FMLA or paid time off. Ms. Foresman told Ms. Schroeder just to take care of herself, not to worry, and that Ms. Foresman would "take care of it." Ms. Foresman told Ms. Schroeder to contact her if anything changed. Ms. Schroeder saw a therapist on April 11.

On the evening of April 15, 2018, Ms. Schroeder went to the Cherokee Hy-Vee to get groceries. While she was there, she looked at the work schedule and saw that she was on the schedule to work on April 16 from 7:00 a.m. to 5:00 p.m. On the evening of April 15, Ms. Schroeder sent Ms. Foresman a text message. Ms. Schroeder stated that she had been at the store to get groceries, had seen she was scheduled for the April 16 shift, and that she was still waiting for her appointment with her therapist. Ms. Schroeder added that she had previously told Ms. Foresman that she would let her know when she was ready to return. Ms. Foresman

replied, "OK." In addition to being on the schedule to work on April 16, Ms. Schroeder was on the same weekly schedule to work on April 17, 18, 19 and 20. Ms. Schroeder had previously requested and been approved to be off work on April 21 and 22.

On April 20, Katie Westphal, Human Resources Manager, prepared a memo addressed to Ms. Schroeder. However, the employer did not send that memo to Ms. Schroeder and Ms. Schroeder did not receive any such memo from the employer. The memo stated:

Hello Brooke,

We would like to set up a meeting next week to discuss when you will be able to return to work at Hy-Vee. We have scheduled the meeting for Thursday April 26, 2018 at 1pm in Jim's office. If you could bring with you any/all doctors notes that have excused you from work since the week of March 19, 2018, it would be appreciated.

If we do not receive communication or you are not in attendance on Thursday April 26th, 2018 at 1pm at the Cherokee Hy-Vee, we will accept that you are no longer interested in being employed with our company. We are looking forward to your return. Please reach out if you have any questions.

On April 23, Ms. Westphal drafted another memo that the employer did indeed mail to Ms. Schroeder by certified mail. Ms. Schroeder received the memo on April 24. That memo stated as follows:

Brooke Schroeder,

We have set up a meeting to discuss when you will be able to return to work. We would like to meet with you on Thursday April 26, 2018 at 1pm. Bring with you doctors notes that required you to miss work the week of March 19, April 4-5, the week of April 9, and the week of April 16. Please meet at the store directors' office at that time.

We are looking forward to your return. Our business needs require that we reach a decision by Friday, April 27, 2018. Please call if you have any questions.

Ms. Schroeder appeared for the meeting as directed. Also present for the meeting were Ms. Westphal and Mr. Flahive. Ms. Foresman did not participate in the meeting. The only medical note Ms. Schroeder brought to the meeting was the note that Cherokee Regional Medical Center had faxed to the employer on March 30 regarding Ms. Schroeder's need to remain off work until she saw her therapist at the appointment set for the following Tuesday, April 3. At the meeting, Mr. Flahive told Ms. Schroeder that he was happy to see her. Ms. Schroeder told Mr. Flahive and Ms. Westphal that she had an appointment set for May 4, 2018 in Fort Dodge with a different therapist than the one she had been seeing. Ms. Schroeder told the employer that she would know whether she could return to the employment once she had that therapy appointment. Ms. Schroeder told the employer that she have been to see her doctor for a physical. Mr. Flahive asked Ms. Schroeder whether she had doctor's notes to support her time off work. Ms. Schroeder told the employer that she thought everything was okay because she had been using vacation and unpaid time off. Ms. Schroeder produced the March 30 medical note. Mr. Flahive stated that he needed notes as soon as possible for the other times Ms. Schroeder had been off. Ms. Schroeder agreed to get the requested notes for the employer. Once Ms. Schroeder left the meeting, she contacted her primary care provider and learned that the provider was out of the office for a couple days. A couple hours after the meeting with the employer, Mr. Flahive notified Ms. Schroeder that Hy-Vee was ending her employment.

Ms. Schroeder has submitted a memo, dated April 11, 2018, from Janne Johnson, A.R.N.P., which letter states as follows:

To whom it may concern:

Brooke is being treated under my care for anxiety and depression. Patient tells me she is experiencing Anxiety and depression related to a number of Incidents she has experienced while working at HyVee grocery in Cherokee. She tells me that she has shared the stressors that she is experiencing In her work environment with her supervisor and that issues remain unresolved. Patient states she can no longer work in that environment. I continue to treat her with medication for her anxiety and depression and encourage the use of therapy in additional to current regimen.

See Exhibit E.

Ms. Schroeder has also submitted a heavily and excessively redacted progress note concerning her medical appointment on March 30, 2018. See Exhibit D.

Around the turn of the year, Ms. Schroeder was subjected to abusive behavior at work. The abusive behavior was perpetrated by a Hy-Vee overnight stock manager. The employer subsequently discharged the stock manager for abusive behavior directed at Ms. Foresman. Though Ms. Schroeder's mental health issues appear to predate the upsetting experiences at Hy-Vee, at least one of her health care providers has drawn a connection, based on Ms. Schroeder's self-report, between those experiences and Ms. Schroeder's ongoing mental health issues. See Exhibit G.

#### **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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 on April 26, 2018 for no disqualifying reason. Because Hy-Vee elected to end the employment on April 26, 2018, Hy-Vee bears the burden of proving that the separation was for misconduct in connection with the employment. Though aspects of Ms. Schroeder's testimony and at least one of her exhibits suggest a lack of candor on the part of Ms. Schroeder, the employer's evidence suffers greater deficiencies through the employer's failure to present testimony from Ms. Foresman, Ms. Schroeder's immediate supervisor with whom Ms. Schroeder had material contact during the absence that started on March 30. The employer presented insufficient evidence to rebut Ms. Schroeder's testimony that she spoke with Ms. Foresman on April 10 regarding her need to be off work through May 4 and that Ms. Foresman approved the extended absence at that time. Under the

employer's absence reporting policy, such contact appears to have been sufficient to establish approval of the ongoing absence pending the May 4 appointment. On April 26, 2018, Ms. Schroeder appeared as directed for a meeting with the employer, appeared without requested medical documentation, but agreed to obtain and provide such documentation. The employer expressed approval of that plan, but two hours later reversed itself and discharged Ms. Schroeder from the employment without providing her a reasonable opportunity to follow up on the agreed-upon course of action.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Schroeder was discharged for no disqualifying reason. Accordingly, Ms. Schroeder is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

This matter is remanded to the Benefits Bureau for determination of whether Ms. Schroeder has been able to work and available for work since she established her unemployment insurance claim.

**DECISION:**

The May 14, 2018, reference 01, decision is reversed. The claimant was discharged on April 26, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has been able to work and available for work since she established her unemployment insurance claim.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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