

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KIARA SWIFT
Claimant

SAFELITE SOLUTIONS LLC
Employer

APPEAL NO. 19A-UI-09872-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/11/19
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 4, 2019, reference 05, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on November 8, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on January 10, 2020. Claimant Kiara Swift did not register a telephone number for the hearing, did not otherwise provide the Appeals Bureau a telephone number for the hearing, and did not participate. Trenton Kilpatrick of Corporate Cost Control represented the employer and presented additional testimony through Matthew Goettl. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 15 into evidence. 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.

ISSUES:

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

Whether the claimant has been overpaid benefits.

Whether the claimant must repay overpaid 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: Kiara Swift (claimant) was employed by Safelite Solutions, L.L.C. as a full-time Contact Center Representative from January 2019 until November 8, 2019, when the employer discharged her for attendance. If Ms. Swift needed to be absent from a shift, the employer's attendance policy

required that she call the designated absence reporting number at least an hour prior to the scheduled start of her shift and leave a voicemail message that included the reason for the absence. If the claimant need to be late for work, the employer's attendance policy required that she give notice as soon as possible.

The final absence that triggered the discharge occurred on November 7, 2019. On that day, Ms. Swift gave timely notice to the employer that she needed to be absent so that she could take her sister to the doctor. Ms. Swift did not explain why it was necessary for her to transport her sister to the doctor and why her sister could not get to the purported appointment by other means so that Ms. Swift could report for work.

The absence on November 7, 2019 followed many earlier absences and at least twelve written reprimands for attendance. On January 28, February 7, February 20, August 28, August 30, September 2, September 6, September 16, October 25, and November 6, Ms. Swift was absent for personal reasons. On September 9 and 10, Ms. Swift was a no-call/no-show. On May 4, May 6, July 15, July 16, July 18, July 26, July 30, July 31, August 1, August 6, September 5, September 6, September 12, September 23, October 21, October 22, October 28, October 29, November 4, and November 5, Ms. Swift was absent due to illness and properly reported the absences to the employer. Ms. Swift was also tardy for work for personal reasons 19 times between February 11 and October 30, 2019.

Ms. Swift established a claim for benefits that was effective August 11, 2019 and received \$931.00 in benefits for the seven weeks between December 1, 2019 and January 18, 2020. Safelite Solutions, L.L.C. is a base period employer in connection with the claim.

On December 3, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Swift's separation from the employment. On November 26, 2019, the employer's third-party representative of record, Corporate Cost Control, provided the Benefits Bureau with the name of an employer representative for the fact-finding interview, Annette Kohl, and that number at which Ms. Kohl could be reached for the fact-finding interview. Mr. Kohl is Operations Manager at Safelite Solutions, L.L.C. At the time of the fact-finding interview, the deputy did not call the designated number and instead called a different number for Corporate Cost Control. Ms. Swift also did not participate in the fact-finding interview.

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 evidence in the record establishes a discharge for misconduct in connection with the employment that was based on excessive unexcused absences. The absences on May 4, May 6, July 15, July 16, July 18, July 26, July 30, July 31, August 1, August 6, September 5, September 6, September 12, September 23, October 21, October 22, October 28, October 29, November 4, and November 5, Ms. Swift were due to illness, were properly reported the absences to the employer, and therefore were excused absences under the applicable law.

The weight of the evidence in the record fails to establish a reasonable basis for Ms. Swift to miss work on November 7, 2019 so that her sister could attend a purported medical appointment. The employer reasonably expected Ms. Swift to report for work as scheduled. This was especially true in light of the extensive history of unexcused absences. The absences on January 28, February 7, February 20, August 28, August 30, September 2, September 6, September 16, October 25, and November 6, Ms. Swift were all for personal reasons and were unexcused absences under the applicable law. The September 9 and 10 no-call/no-show absences were also unexcused absences under the applicable law. The 19 instances of tardiness between February 11 and October 30, 2019 were each an unexcused absence under the applicable law. These absences occurred in the context of a dozen reprimands for attendance. Ms. Swift is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Swift must meet all other eligibility requirements.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Swift received \$931.00 in benefits for the seven weeks between December 1, 2019 and January 18, 2020, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Swift received constitute an overpayment of benefits. The employer did not participate in the fact-finding interview because the deputy deprived the employer the opportunity to participate by not calling the number and representative the employer had designated. The claimant's receipt of benefits was not based on fraud or intentionally misleading statements. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid. The claimant is not required to repay the overpaid benefits.

DECISION:

The December 4, 2019, reference 05, decision is reversed. The claimant was discharged on November 8 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$931.00 in benefits for the seven weeks between December 1, 2019 and January 18, 2020. The claimant is not required to repay the overpaid benefits. The claimant's receipt of benefits was not based on fraud or intentionally misleading statements. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn