

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAVETTA CRIBBS (f/k/a LAVETTA CLARK)
Claimant

APPEAL NO. 12O-UI-10826-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FARMLAND FOODS
Employer

OC: 01/01/12
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

This matter was before the administrative law judge for a new appeal hearing based on an Employment Appeal Board remand in Hearing Number 12B-UI-03300. The lower decision being appealed is the March 23, 2012, reference 03 decision. The employer is the appealing party for purposes of that decision. After due notice was issued, a new hearing was held on October 16, 2012. Claimant Lavetta Cribbs participated. Michelle Rayburn represented the employer and presented additional testimony through Katie Halberg. Exhibits One through Seven were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits. The administrative law judge concludes that Ms. Cribbs was discharged for misconduct in connection with the employment based on excessive unexcused absences.

Whether the claimant has been overpaid benefits. She has been overpaid.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lavetta Cribbs (f/k/a Lavetta Clark) was employed by Farmland Foods as a full-time laborer from July 2011 until November 3, 2011, when the employer discharged her for attendance. Ms. Cribbs' scheduled start time was 8:00 a.m.

If Ms. Cribbs needed to be absent or late to work, the employer's policy required that she telephone the attendance line at least 30 minutes prior to the scheduled start of her shift. Ms. Cribbs was aware of the policy.

The final absence occurred on November 4, 2011, when Ms. Cribbs was late because she needed to go to court in connection with her license revocation. Ms. Cribbs provided proper

notice of the absence. Ms. Cribbs was late for work several days because she needed to appear for court because she was the defendant in a drug offense case.

The final absence that triggered the discharge occurred on November 2, 2011, when Ms. Cribbs was late because her car broke down on the way to work. Ms. Cribbs had been driving the car with knowledge that the car had problems that needed to be addressed. Ms. Cribbs lacked the funds to fix the vehicle. Ms. Cribbs was 20 minutes away from work when her car broke down.

The employer considered additional absences going back to July 15, 2011, when making the decision to discharge Ms. Cribbs from the employment. On that date, Ms. Cribbs left work early so that she could go get a restricted license after her license had been revoked. On July 20, Ms. Cribbs was late getting to work because she had to go to court. Ms. Cribbs provided proper notice of the absence. On August 18, Ms. Cribbs called in 15 minutes before the shift to indicate that she did not and would not be in. Ms. Cribbs appeared for work at 12:20 p.m. and completed her shift. On August 23, Ms. Cribbs notified the employer that she had to go to court that morning. Ms. Cribbs appeared later that morning and completed her shift. On August 29, Ms. Cribbs left work early with permission because she did not feel well. Ms. Cribbs had been the victim of domestic abuse the night before and was sore from being beaten. On September 20, Ms. Cribbs arrived at work wearing fake fingernails, which was against the employer's policy. The employer sent Ms. Cribbs home to remove the fake fingernails. While she was away for that purpose, Ms. Cribbs called back at 11:57 a.m. and told the employer she had received a call from her son's school regarding a medical emergency. There was no medical emergency. Instead, Ms. Cribbs son got into a physical altercation at school and authorities were threatening to arrest him. On September 27, Ms. Cribbs called in late to notify the employer that she was sick. Ms. Cribbs was not sick. Instead, she needed to go to court with her son. On October 10, Ms. Cribbs was absent with proper notice to the employer so that she could accompany her husband to Chicago. Her husband needed to go to Chicago because his brother had been shot. Ms. Cribbs was not needed in Chicago, but decided to go along to support her husband and his family. On October 12, Ms. Cribbs was late getting to work for personal reasons. On October 18, Ms. Cribbs was absent to attend a funeral. The employer excused this absence. On October 26, Ms. Cribbs was late getting to work because she had to go to court.

The employer issued attendance point warnings to Ms. Cribbs on August 24, September 22, and October 14, prior to discharging her for attendance on November 4.

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 unexcused absences on July 15 and 20, August 18 and 23, September 20 and 27, October 10, 12, and 26, and November 2 and 4, 2011. Each of these absences was either related to issues of personal responsibility or not properly reported to the employer. The absences on August 29 and October 18 were excused absences under the applicable law. Ms. Cribbs' unexcused absences occurred in the context of multiple written warnings for attendance. Ms. Cribbs' unexcused absences were excessive and constituted misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Cribbs was discharged for misconduct. Accordingly, Ms. Cribbs 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.

Because Ms. Cribbs was disqualified for benefits effective November 4, 2011, the benefits she received in connection with the claim that was effective January 1, 2012 constituted an overpayment of benefits. See Iowa Code section 96.3(7). The administrative law judge notes that an appropriate overpayment decision has already been entered by means of the July 25, 2012, reference 08 decision that indicated Ms. Cribbs was overpaid \$5,125.02 for 17 weeks between January 1, 2012 through April 28, 2012 based on an administrative law judge decision entered on April 18, 2012. The April 18, 2012 decision was entered in Appeal Number 12A-UI-03300-ET. The present decision merely replaces the April 18, 2012 decision, so there is no need for entry of another overpayment decision in connection with the present decision. The administrative law judge does note however that someone has erroneously authorized additional benefits for the two week period ending June 23, 2012.

DECISION:

The Agency representative's March 23, 2012, reference 03, decision is reversed. The claimant was discharged for misconduct on November 4, 2011. Effective November 4, 2011, 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.

An appropriate overpayment decision has already been entered by means of the July 25, 2012, reference 08 decision that indicated Ms. Cribbs was overpaid \$5,125.02 for 17 weeks between January 1, 2012 through April 28, 2012 based on an administrative law judge decision entered on April 18, 2012. The present decision merely replaces the April 18, 2012 decision, so there is no need for entry of another overpayment decision in connection with the present decision. The administrative law judge does note however that someone has erroneously authorized additional benefits for the two-week period ending June 23, 2012.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs