

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TANIA C ROBINSON
Claimant

ACRO SERVICE CORP
Employer

APPEAL NO. 20A-UI-12232-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/15/20
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 23, 2020, reference 02, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on June 1, 2020 for excessive unexcused absences. After due notice was issued, a hearing was held on December 29, 2020. Claimant, Tania Robinson, participated. Andrew Gangmei represented the employer. Exhibits 1 through 6 were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer, Acro Service Corporation, is a temporary employment agency that provides temporary workers to Iowa Workforce Development through another client agency, Omnia Partners. Acro does not directly communicate with IWD.

The claimant, Tania Robinson, performed work for the employer in a single full-time temporary work assignment. The claimant began the assignment on May 6, 2020 and last performed work on the assignment on May 29, 2020. The assignment involved performing customer service telephone work in the Benefits Bureau at Iowa Workforce Development. The workplace was 1000 East Grand Avenue in Des Moines. The work hours were 8:00 a.m. to 4:30 p.m., Monday through Friday. Unemployment Insurance Manager Nathan Bowden was the claimant's supervisor.

The final absence that triggered the discharge from the assignment and from the employment occurred on June 1, 2020. On June 1, 2020, the claimant was off work, based on arrangements she made with Acro and approval provided by Acro at the time the claimant accepted the IWD work assignment. The claimant was returning from a medical appointment in Iowa City when the Acro representative called her to ask where she was. On or before June 1, an IWD

representative had emailed to Omnia Partners a directive to end the claimant's assignment. In the same communication, the IWD representative alleged that the claimant "leaves early all of the time." The IWD representative had started her message by requesting that Omnia and/or Acro notify the claimant that a continuation of leaving early would lead to termination of the assignment. But in the next line, the IWD representative issued the directive to end the assignment. On June 1, 2020, an Acro Service Corp. representative notified the claimant that the assignment was ended. The Acro representative did not provide a reason for ending the assignment and did not mention whether additional assignments might be available. Nor did the claimant ask about additional assignments. Acro had no policy that would require the claimant to contact Acro at the end of an assignment to request a new one.

The claimant has other absences that factored in the assignment and the employment coming to an end. The claimant had left work early on May 28, 2020 due to malfunction of the orthodontic braces the claimant has just received a day earlier. The claimant was in pain, had an injury to the inside of her mouth that made it difficult to perform her telephone duties, and needed to consult with her orthodontist as soon as possible. The claimant properly notified her IWD supervisor and an Acro Employee Relations Specialist prior to leaving the workplace. On the morning of May 29, 2020, the claimant was late for work for personal reasons. Once the claimant arrived for work, she properly notified the Acro Employee Relations Specialist and the IWD supervisor that she would need to leave around lunch time for a dental appointment. The claimant's earlier absences had been pre-approved by Acro at the time the claimant accepted the assignment at IWD. Acro had not communicated the time-off approvals to Omnia or IWD and had not made it clear to Ms. Robinson that she needed to notify IWD of these previously authorized absences.

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 no disqualifying reason. The administrative law judge notes that the employer elected not to present testimony from anyone with personal knowledge of the claimant's employment or separation from the employment. The employer's evidence consisted primarily of hearsay within hearsay and speculation. The employer's evidence included email correspondence that fell far short of proof of misconduct. The final absence that triggered the discharge occurred on June 1, 2020, when the claimant

was absence due to the need to attend a medical appointment. The claimant had requested the time off weeks earlier and the employer had approved the request for time off weeks earlier. The June 1 absence was an excused absence under the applicable law. The earlier departure on May 28, 2020, was based on the claimant's reasonable determination that she had an orthodontic issue that hindered her ability to perform her duties and that required professional attention. The claimant properly notified her employer and her IWD supervisor of her need to leave prior to departing from the workplace. The earlier departure was an excused absence under the applicable law. Likewise, the claimant's departure for an orthodontic appointment midway through her shift on May 29 was due to the same pressing issue, was with proper notice to Acro and IWD, and was an excused absence under the applicable law. The evidence in the record establishes a single unexcused absence, when the claimant was late for work on May 29, 2020 for personal reason. The employer presented insufficient evidence to prove any additional unexcused absences. The evidence does not establish excessive unexcused absences or other misconduct in connection with the assignment or the employment. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The September 23, 2020, reference 02, decision is reversed. The claimant was discharged on June 1, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.



James E. Timberland
Administrative Law Judge

January 15, 2021
Decision Dated and Mailed

jet/mh