

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MARISELA VEGA
Claimant

ALLSTEEL INC
Employer

APPEAL NO. 21A-UI-22865-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/13/20
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant, Marisela Vega, filed a timely appeal from the October 7, 2021, reference 01, 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 August 19, 2021 for excessive unexcused absences. After due notice was issued, a hearing was held on December 7, 2021. Claimant participated personally and was represented by attorney Zeke McCartney. The employer did not comply with the hearing notice instructions to call the designated toll-free number at the time of the hearing and did not participate. Exhibits 1 and 2 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 claimant was employed by Allsteel, Inc. as a full-time assembler from 2015 until August 19, 2021, when the employer discharged her for attendance. The claimant's work hours were 4:00 a.m. to 2:30 p.m., Monday through Thursday. The final absence that triggered the discharge occurred on August 19, 2021. On August 9, 2021, the claimant had requested August 19, 2021 off. The claimant has a 10-year-old daughter with a significant mental health issue that negatively impacts the child's physical health. Upon the advice of the child's physician, the claimant made plans for an out-of-state trip to visit her cousin so that the claimant's daughter could experience positive social interaction prior to commencing the new school year. The claimant submitted a written request to the employer pursuant to the employer's time-off request protocol. The claimant expected to receive a written response the next day, but heard nothing from the employer until the afternoon of August 18, 2021, at which time the claimant learned her request for time off on August 19, 2021 was denied. Upon receipt of the employer's decision, the claimant attempted to locate a human resources representative to further discuss the basis for her request. The claimant was unable to locate the human resources representative and left a short note for that person in that person's in-box. Late that

day, the claimant notified the employer that she would not be reporting for work on August 19, 2021. The employer's absence reporting requirement required that the claimant give notice of her need to be absent at least 15 minutes prior to the start of the shift. The claimant was at all relevant times aware of the requirement. When the claimant did not appear for her shift on August 19, 2021, the employer elected to discharge the claimant from the employment. The employer advised the claimant that the claimant had used her final attendance point. The claimant's believes her next most recent absence was a month prior to the discharge.

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 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 evidence in the record establishes a discharge for no disqualifying reason. The absence that triggered the discharge was based on the claimant's need to be absent to attend to her young child's bona fide mental health issues pursuant to advice from the child's physician. The claimant provided proper notice of her need to be absent pursuant to the employer's absence reporting policy. The employer did not participate in the appeal hearing and did not present evidence to provide a final unexcused absence or any earlier unexcused absence. The evidence in the record establishes a final absence that was an excused absence under the applicable law. The evidence fails to establish a current act of misconduct. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 7, 2021, reference 01, decision is reversed. The claimant was discharged on August 19, 2021 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

A rectangular box containing a handwritten signature in cursive script that reads "James E. Timberland".

James E. Timberland
Administrative Law Judge

January 11, 2022
Decision Dated and Mailed

jet/mh