

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

BRENDA K REYERSON
Claimant

APPEAL NO. 18A-UI-09008-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 04/15/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Brenda Reyerson filed a timely appeal from the August 14, 2018, reference 07, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Reyerson was discharged on July 23, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on September 13, 2018. Ms. Reyerson participated in the hearing and presented additional testimony through Charis Ingram and Richie Ross. Austin Stewart, Store Counsel, represented the employer and presented testimony through Mary Nell Fullerton. Exhibits 5 through 8 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: Brenda Reyerson was employed by Menard, Inc., as a part-time cashier at the Menard's store in Mason City from May 16, 2018 until August 6, 2018, when the employer discharged her for attendance. Ms. Reyerson generally worked three or four shifts per week. Mary DeMarco, Front End Manager, was Ms. Reyerson's supervisor. If Ms. Reyerson needed to be absent from work, the employer's attendance policy required that she contact her supervisor prior to the scheduled start of the shift. The employer reviewed the policy with Ms. Reyerson at the start of the employment. The employer's attendance policy was set forth in the employee handbook the employer provided to Ms. Reyerson at the start of the employment. Ms. Reyerson did not read the handbook.

The employer's decision to end the employment followed two late arrivals and four full-day absences. On June 9, 2018, Ms. Reyerson was late for work for personal reasons. Ms. Reyerson was scheduled to start her shift at 3:00 p.m., but clocked in at 3:12 p.m. Ms. Reyerson was late because she lost her keys. On July 2, 2018, Ms. Reyerson was again late for personal reasons. Ms. Reyerson was scheduled to start work at 3:00 p.m., but clocked

in at 3:56 p.m. On that day, Ms. Reyerson erroneously believed her shift was to start at 4:00 p.m. On July 27 and July 28, Ms. Reyerson was absent from work because she felt too upset to report for work. Ms. Reyerson properly notified the employer both days. Ms. Reyerson's 19-year-old daughter, who does not live with Ms. Reyerson but instead lives in Ohio, was hospitalized on July 26, 2018 with a serious kidney infection. Between July 26 and July 28, Ms. Reyerson waited in Mason City to hear whether her daughter would need to undergo kidney surgery tentatively planned for July 28 and to hear whether Ms. Reyerson would need to travel to Ohio. When Ms. Reyerson contacted the workplace on July 27 and 28, she explained her circumstances to the employer. On the second day of the absence, the employer advised Ms. Reyerson that she would need to provide a doctor's note to support her need to be absent from work. Ms. Reyerson's daughter's condition improved and her daughter was discharged from the hospital to home on July 29 without undergoing surgery. Ms. Reyerson was scheduled to work at 2:00 p.m. on July 29, but was absent from that shift without notifying the employer. Ms. Reyerson was next scheduled to work at 3:00 p.m. on August 5, 2018, but was again absent without notifying the employer. On August 6, 2018, Ms. Reyerson contacted the employer to inquire about the status of her employment was notified that she was discharged for attendance.

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 evidence in the record establishes a discharge for misconduct in connection with the employment, based on excessive unexcused absences. The June 9 and July 2 late arrivals were each due to matters of personal responsibility within Ms. Reyerson's control and, therefore, were unexcused absences under the applicable law. The weight of the evidence establishes that the July 27 and 28 absences were also unexcused absences under the applicable law. While Ms. Reyerson's concern for her adult child's wellbeing is entirely understandable, nothing about that situation made it necessary for Ms. Reyerson to be absent from work. A reasonable person would either have requested the time off and traveled to Ohio or have reported for the scheduled shifts while awaiting further news. Ms. Reyerson elected to take a third, unreasonable approach, but requesting time off, but staying put, where she could be of no assistance to her daughter. Ms. Reyerson was then a no-call/no-show for consecutive

shifts on July 29 and August 5, 2018, both of which absences were unexcused under the applicable law. Even if one were to omit the July 27 and 28 absences, the evidence would still establish excessive unexcused absences during the brief employment. Ms. Reyerson's pattern of late arrivals and absences demonstrated an intentional and substantial disregard of the employer's interests in adequately staffing its store to meet business needs. Ms. Reyerson is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Reyerson must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The August 14, 2018, reference 07, decision is affirmed. The claimant was discharged for misconduct in connection with the employment based on excessive unexcused absences. The discharge occurred on August 6, 2018. 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 amount. Ms. Reyerson must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs