IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BARBARA WALTERS Claimant **MENARD INC** Employer	**APPEAL NO. 19A-UI-06571-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/28/19** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Barbara Walters filed a timely appeal from the August 12, 2019, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Ms. Walters was discharged on July 17, 2019 for violation of a known company rule. After due notice was issued, a hearing was held on September 12, 2019. Ms. Walters did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. James Anderson, Store Counsel, represented the employer and presented testimony through Dan Stoeckel and Chad Kjellen. Exhibits 1 through 5 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: Barbara Stoeckel was employed by Menard, Inc. as a part-time clerk from 2017 until July 18, 2019, when the employer discharged her for attendance. The final absence that triggered the discharge occurred on July 17, 2019, when Ms. Walters was a no-call/no-show for a mandatory staff meeting. Ms. Walters was aware of the meeting and offered no reason for her absence from the meeting when the employer addressed the matter with her the next day. If Ms. Walters needed to be absent or late for work, the employer attendance policy required that Ms. Walters phone the workplace prior to her scheduled start time and speak with her supervisor, a general manager, or the human resources coordinator. The employer reviewed the attendance policy with Ms. Walters at the start of the employment. Ms. Walters was at all relevant times aware of the attendance policy. The employer does not require employees to provide the reason for an absence.

The employer considered two earlier absences when making the decision to discharge Ms. Walters from the employment. On May 30, 2019, Ms. Walters was absent from her shift and properly notified the employer of the absence. The employer did not document whether Ms. Walters provided a reason for the absence or what that reason was. The employer issued a written reprimand to Ms. Walters in response to the absence. Ms. Walters was late for work on July 4, 2019 without notice to the employer that she would be late. Ms. Walters clocked in at 9:08 a.m. for a 9:00 a.m. shift. If Ms. Walters had arrived by 9:05 a.m., the employer would not have deemed her late. The employer issued a reprimand in response to the late arrival.

Under the employer's attendance policy, and employee is subject to discharge if the employee reaches 10 attendance points during a 90-day rolling period. Through the three absences referenced above, Ms. Walters incurred 10 attendance points.

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 evidence establishes absences on July 4, 2019 and July 17, 2019 that were unexcused absences based on Ms. Walters' failure to provide proper notice to the employer. However, the employer presented insufficient evidence to establish an unexcused absence on May 30 2019, when Ms. Walters properly notified the employer of her need to be absent. The employer presented insufficient evidence to prove that the May 30, 2019 absence was for a reason that would make it an unexcused absence under the applicable law. The absences on July 4 and July 17, 2019 are insufficient to established *excessive unexcused* absences. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The August 12, 2019, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge was effective July 18, 2019. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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