

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BROWN, TORI, R
Claimant

APPEAL NO. 13A-UI-01483-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLGENCORP LLC
Employer

OC: 12/23/12
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) - Discharge for Misconduct
871 IAC 26.8(5) - Decision on the Record

STATEMENT OF THE CASE:

Claimant appealed from an unemployment insurance decision dated February 4, 2013, reference 01, that denied benefits based on agency conclusion that she was discharged for excessive unexcused absences. A telephone hearing was scheduled for March 8, 2013. Neither party responded to the hearing notice instructions to provide a telephone number for the hearing and neither party participated in the hearing. Based on the parties' failure to participate in the hearing, the administrative file, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUE:

Whether the information contained in the administrative file is sufficient to establish a discharge for misconduct in connection with the employment that would disqualify the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Claimant Tori Brown is the appellant in this matter. The parties were properly notified of the scheduled hearing on this appeal by notice mailed on February 13, 2013. Neither Ms. Brown nor the employer, Dolgencorp, L.L.C., responded to the hearing notice instructions to provide a telephone number for the hearing. Neither party participated in the hearing and neither party requested a postponement of the hearing as required by the hearing notice. There is no evidence that the hearing notice mailed to either party was returned by the United States Postal Service as undeliverable for any reason.

The administrative law judge has conducted a careful review of the administrative file to determine whether the unemployment insurance decision should be affirmed. The employer's participation in the February 1, 2013 fact-finding interview was limited to submission of a boilerplate protest letter submitted by TALX. With regard to the claimant's separation from employment, information in that letter is limited to a start date of March 29, 2012, the last day of December 26, 2012, and the allegation that the claimant was discharged for excessive absenteeism. The employer offered no supporting documentation or statements. The claimant

did fully participate in the fact-finding interview. The claimant's statement, as documented by the Workforce Development representative, was as follows:

I was discharged by Ahmed, store mgr, on December 26, 2012 because of absenteeism. On December 24, 2012, I was late to work that day & I did call to inform the company & I was late because of the kids. I have received both written & verbal warnings for this & I was told that my job maybe [sic] in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 26.8(3), (4) and (5) provide:

Withdrawals and postponements.

(3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.

(4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.

(5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

The administrative law judge has carefully reviewed evidence in the record and concludes that the unemployment insurance decision previously entered in this case is not correct and should be reversed.

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 a discharge 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 employer presented no evidence at the fact-finding interview. The employer presented no evidence at the appeal hearing. The administrative file materials from the fact-finding interview are sufficient to establish, at most, a single instance of unexcused tardiness. That single unexcused absence would be insufficient to establish misconduct in connection with the employment that would disqualify the claimant for unemployment insurance benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). The only way the fact finder could have found misconduct in connection with the employment is if the fact-finder erroneously shifted the burden of proof to the claimant.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

Pursuant to the rule regarding reopening of appeal hearing records, if the employer disagrees with the present decision, the employer must make a written request to the administrative law judge that the hearing be reopened within 15 days after the mailing date of this decision. The written request should be mailed to the administrative law judge at the address listed at the beginning of this decision and must explain the emergency or other good cause that prevented the employer from participating in the hearing at its scheduled time.

DECISION:

The Agency representative's February 4, 2013, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits. This decision will become final unless a written request establishing good cause to reopen the record is made to the administrative law judge within 15 days of the date of this decision.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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