IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

KAREN K SCHEMMEL Claimant **WELLS ENTERPRISES INC** Employer	**APPEAL NO. 22A-UI-02393-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/05/21** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant, Karen Schemmel, filed a timely appeal from the December 20, 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 December 7, 2021 for excessive unexcused absences. After due notice was issued, a hearing was held on February 18, 2022. Claimant participated. Stacey Roupe represented the employer. Exhibits A and B 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, Karen Schemmel was employed by Wells Enterprises, Inc. as a full-time production worker from 2007 until December 7, 2021, when the employer discharged her for attendance. For the last several years of the claimant's employment, the employer had a no-fault attendance policy that subjected the claimant to discharge from the employment if she incurred 10 attendance "occurrences" within a rolling 12-month period. If the claimant needed to be absent from the employment, the attendance policy required that the claimant called the designated absence reporting telephone number prior to the start of her shift. The automated absence reporting system would prompt the claimant to provide identifying information and then would provide the claimant with a limited number of options to character the type of absence: personal, will be in later, using paid time off (PTO) and FMLA. The employer did not inquire further regarding the basis for the absence. The claimant was familiar with the absence reporting requirement.

The final absence that triggered the discharge occurred on December 5, 2021, when the claimant was absent without notice to the employer. The claimant had misread the schedule and did not realize she was scheduled to work on December 5, 2021. The claimant then

reported for work on December 7, 2021 and learned she was not scheduled to work on December 7, 2021.

The employer considered several other absences from the preceding 12-months when making the decision to discharge the claimant. Each of these prior absences was due to illness and was properly reported to the employer. The absence dates were December 20, 2020, and on March 10, March 23, April 6, April 27, May 26, July 28, October 3, and October 12, 2021. Many of these absences occurred in the context of the claimant's ongoing issue with migraine headaches. The claimant migraine treatment includes twice yearly medical appointments, along with a daily prescription medication and an as-needed prescription medication. Earlier in the employment, the claimant had been approved for intermittent leave based on the migraines. In mid-2021, the employer's third-party leave administrator declined to renew intermittent FMLA leave authorization.

The employer issued reprimands for attendance to the claimant prior to discharging the claimant from the employment. On July 8, 2021, the employer issued a "coaching and counseling" in connection with the claimant incurring her seventh occurrence. On October 3, 2021, the employer issued a written warning in connection with the claimant incurring her eighth occurrence. On October 12, 2021, the employer issued a "final written warning" in connection with the claimant incurring her ninth occurrence. The claimant understood at that time that her employment was in jeopardy.

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 December 7, 2021 discharge for no disqualifying reason. The final absence on December 5, 2021 was due to the claimant misreading the schedule, was without notice to the employer, and was an unexcused absence under the applicable law. The weight of the evidence indicates that all of the other absences that factored in the discharge was due to illness and were properly reported to the employer. Accordingly, each of those prior absences was an excused absence under the applicable law and cannot serve as a basis for disqualifying the claimant for benefits, regardless of whether the employer's third party leave administrator deemed them covered by the Family and Medical Leave Act.

The evidence fails to establish excessive unexcused absences or other misconduct in connection with the employment. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The December 20, 2021, reference 01, decision is reversed. The claimant was discharged on December 7, 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.

James E. Timberland
Administrative Law Judge

March 10, 2022
Decision Dated and Mailed

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