

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALESE L ADEBAYO
F/K/A ALESE L WESTMORELAND
Claimant

APPEAL NO. 15R-UI-05852-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RANDSTAD GENERAL PARTNER US LLC
Employer

OC: 11/03/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

This matter came before the administrative law judge for an appeal hearing based on the Employment Appeal Board's remand Hearing Number 15B-UI-00053. The Employment Appeal Board concluded that the claimant's appeal from the December 12, 2014, reference 05, decision (based on the November 3, 2013 original claim date) was a timely appeal and remanded for a hearing on the merits. The December 12, 2014, reference 05, decision had disqualified the claimant for benefits and had relieved the employer of liability for benefits, based on an Agency conclusion that the claimant had voluntarily quit a temporary job effective November 22, 2013, without good cause attributable to the employer. The claimant requested an in-person hearing. An in-person hearing was scheduled for December 7, 2015, at 1:00 p.m. at the Workforce Development in Cedar Rapids. Notice of the hearing was mailed to the parties on November 13, 2015. The claimant, Alese Adebayo (f/k/a Alese Westmoreland), appeared personally and was represented by attorney, James Kringlen. On the morning of December 7, 2015, the Appeals Bureau received written notice from the employer's representative of record, Equifax/Talx, that the employer waived participation in the hearing.

ISSUE:

Whether Ms. Adebayo separated from the employer in November 2013 for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Randstad General Partner U.S., L.L.C., is a temporary employment agency. Alese Adebayo (formerly known as Alese Westmoreland) began a full-time, temporary work assignment through Randstad on or about November 18, 2013 and performed work in the assignment for two days. The work hours were 7:00 a.m. to 3:00 p.m. The assignment was at Lean Corporation in North Liberty. Ms. Adebayo resided in Cedar Rapids. On the second day in the assignment, a supervisor at Lean Corporation warned workers, including Ms. Adebayo, of an impending ice storm. The supervisor told the workers that Lean Corporation would be open for business the next day, but did not want any of the workers to jeopardize their safety in an attempt to make it

to the workplace. On the next day, Ms. Adebayo reviewed the news and heeded the travel advisory against traveling in the Cedar Rapids area or on Interstate 380. Ms. Adebayo could see out her window that the weather was bad. Ms. Adebayo's roommate had left the home earlier that morning and had called Ms. Adebayo to counsel her against traveling due to icy driving conditions and the number of vehicles in the ditch. At about 8:00 a.m., the time when Randstad's office opened, Ms. Adebayo telephoned Randstad to let them know that she would be absent from the assignment that day. Randstad's absence reporting policy required that Ms. Adebayo contact Randstad, not the client business, if she needed to be absent. While Ms. Adebayo believed she was providing timely notice of her absence, the Randstad representative told Ms. Adebayo that she should have called prior to the scheduled start of her shift, prior to 7:00 a.m. The Randstad representative told Ms. Adebayo that it was not good that she was missing the third day in the assignment and that she need not return to the assignment. Ms. Adebayo had been biding her time in the assignment as she waited for a clerical assignment to become available. The Randstad representative told Ms. Adebayo that Randstad would not consider her for any further assignments. Based on that statement, Ms. Adebayo did not make any further contact with Randstad until the summer of 2014, when she asked the employer whether it was still unwilling to place her in an assignment.

REASONING AND CONCLUSIONS OF LAW:

The employer waived its participation in the hearing. Accordingly, the evidence in the record is limited to the testimony of Ms. Adebayo. The evidence in the record establishes that the employer discharged Ms. Adebayo from the employment on or about November 20, 2013.

Iowa Code § 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.

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 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 evidence in the record establishes a discharge based on attendance. The record establishes a single absence on or about November 20, 2013. The absence was due to inclement weather that made driving conditions hazardous. The hazardous driving conditions were beyond Ms. Adebayo's control. The client business had acknowledged on the previous day that the impending ice storm might make for treacherous driving conditions and had warned

Ms. Adebayo and others not to place themselves at risk by trying to make the trip in hazardous driving conditions. The evidence in the record establishes that Ms. Adebayo provided timely notice of her need to be absent on the date in question. Ms. Adebayo called the employer as soon as the employer's office opened. Though the employer apparently asserted at that time that Ms. Adebayo should have contacted the employer prior to 7:00 a.m., the employer did not present any evidence at the hearing to prove a policy that required notice prior to 7:00 a.m. or that the employer had provided notice to Ms. Adebayo of such policy prior to the date of discharge. The absence that triggered the discharge was an excused absence under the applicable law. Even if the evidence had established that the absence that triggered the discharge was an unexcused absence, the evidence failed to establish any other unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Adebayo was discharged on or about November 20, 2013 for no disqualifying reason. Accordingly, the November 2013 separation did not disqualify Ms. Adebayo for unemployment insurance benefits. Ms. Adebayo remained eligible for benefits, provided she met all other eligibility requirements. Based on the non-disqualifying separation in November 2013, the employer's account may be charged for benefits paid to Ms. Adebayo.

DECISION:

The December 12, 2014, reference 05, decision (11/03/13 original claim date) is reversed. The claimant was discharged on or about November 20, 2013 for no disqualifying reason. Accordingly, the November 2013 separation did not disqualify the claimant for unemployment insurance benefits. The claimant remained eligible for benefits, provided she met all other eligibility requirements. Based on the non-disqualifying separation in November 2013, the employer's account may be charged for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs