

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JENNIFER N GLAUNER

Claimant

APPEAL NO. 20A-UI-03038-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 03/08/20

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 31, 2020, reference 01, decision that allowed benefits to the claimant provided she met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on March 2, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on May 6, 2020. Claimant Jennifer Glauner did not provide a telephone number for the hearing and did not participate. Hayli Ohnemus represented the employer and presented additional testimony through Lora Gach. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 4 through 10 into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant voluntarily quit without good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jennifer Glauner was employed by Casey's Marketing Company as a full-time convenience store clerk from 2016 until March 3, 2020, when Store Manager Hayli Ohnemus discharged her for attendance. Ms. Ohnemus was Ms. Glauner's supervisor. On the evening of Sunday, March 1, 2020, Ms. Glauner notified Ms. Ohnemus that her face was swollen, that she needed to see a doctor, and that she would not be able to work 7:00 a.m. to 3:30 p.m. on March 2, 2020. The employer's written attendance policy directs employees to contact their immediate supervisor as far in advance as possible if they need to be absent. Though the written policy does not include a requirement that employees find their own replacement, Ms. Ohnemus imposed this additional requirement. Ms. Glauner attempted unsuccessfully to find someone to cover the shift and contacted at least two coworkers who declined her request to cover the shift. At 6:30 a.m. on March 2, 2020, Ms. Glauner notified Ms. Ohnemus that she had been unable to find someone to cover the shift. Ms. Glauner was absent from the March 2, 2020 and did not respond to

Ms. Ohnemus' attempts to contact her that day. Ms. Ohnemus called Ms. Glauner at 7:30 a.m. to see what the doctor had said about Ms. Glauner's swollen face. Ms. Ohnemus removed Ms. Glauner from the schedule and found another employee to cover Ms. Glauner's March 3 shift. Ms. Ohnemus had decided to discharge Ms. Glauner from the employment based on the March 2 absence and planned to carry out the discharge when Ms. Glauner attempted to appear for her shift on the morning of March 3.

When Ms. Glauner appeared for her scheduled shift on March 3, Ms. Ohnemus told Ms. Glauner she was no longer scheduled to work that day and that Ms. Ohnemus had covered the shift, based on the March 2 absence. Ms. Glauner departed from the workplace shortly thereafter. Before Ms. Glauner left, she uttered profanity and used a crude gesture to indicate her displeasure with the situation. Ms. Ohnemus had prepared a Corrective Action Statement that discharged Ms. Glauner for attendance. The discharge documentation makes no reference to the vulgar utterance or gesture that followed Ms. Ohnemus telling Ms. Glauner that she was removed from the work schedule and makes no reference to Ms. Glauner's sudden departure on March 3. The discharge document was not presented to Ms. Glauner for her signature. Twenty minutes after Ms. Glauner left the workplace on March 3, she returned to demand documentation of her discharge.

The employer considered earlier absences when making the decision to discharge Ms. Glauner from the employment. The next most recent absence was on January 29, 2020, when Ms. Glauner elected to stay home from work after suffering a workplace burn the previous day. Upon returning to work, Ms. Glauner dishonestly asserted that she had gone to the doctor. When pressed to produce a medical note, Ms. Glauner advised that she had not in fact gone to a doctor. Ms. Glauner had been tardy without notice to the employer on September 21 and 22, 2019.

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 discharge decision was based on attendance. The final absence that triggered the discharge occurred on March 2, 2020, when Ms. Glauner was absent due to illness and properly notified the employer. It was unreasonable for the employer to expect Ms. Glauner to report for work with a swollen

face. It was unreasonable for the employer to expect Ms. Glauner to appear for the shift if she was unable to find someone else to cover the shift. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). Ms. Glauner made a reasonable effort to find a replacement and it was unreasonable for the employer to shift managerial duties of conducting an exhaustive search for coverage onto Ms. Glauner as a pre-condition for being absent due to illness. The absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Ms. Glauner for unemployment insurance benefits. The vulgar utterance and gesture came after Ms. Ohnemus had made the decision to discharge Ms. Glauner, after she made plans to communicate the discharge decision to Ms. Glauner, and after she effectively communicated the discharge decision by telling Ms. Glauner she was removed from the schedule and that her shift had been given to someone else. There was no additional absence on March 3 and the disruptive utterance and gesture were not factors in the discharge decision. The evidence fails to establish a current act of misconduct as the basis for the discharge. Accordingly, the administrative law judge need not consider the earlier attendance concerns. Ms. Glauner is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The March 31, 2020, reference 01, decision is affirmed. The claimant was discharged on March 3, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.



James E. Timberland
Administrative Law Judge

May 8, 2020
Decision Dated and Mailed

jet/scn