

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STOTLER, KANDY, L
Claimant

APPEAL NO. 12A-UI-10046-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MANPOWER INTERNATIONAL INC
Employer

OC: 12/25/11
Claimant: Respondent (1-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 8, 2012, reference 02, decision that allowed benefits in connection with a June 19, 2012 separation. After due notice was issued, a hearing was held on September 11, 2012. Claimant participated. Gail Gonyaw represented the employer.

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 employer, Manpower International, Inc., is a staffing agency and supplies workers to Cobo International in West Burlington. In October 2011, the employer placed the claimant in a full-time temporary work assignment at Cobo International. The claimant's work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. The claimant last performed work in the assignment on June 12, 2012. The client business ended the assignment on June 19, 2012 due to attendance.

Manpower's attendance policy required that the claimant telephone Manpower at least two hours before the scheduled start of her shift if she needed to be absent from work. The claimant was aware of this requirement. The claimant was not advised that she also needed to notify Cobo International if she needed to be absent. However, in early June, Manpower notified the claimant that Cobo assigns attendance points to absences and could discharge her from the assignment if she had further absences.

On June 12, the claimant left work early to see a doctor regarding a chronic bronchial condition. On June 13, 14, 15, 18, and 19, the claimant was absent from work and provided proper notice to Manpower. The claimant had earlier been absent for personal reasons on April 17, absent for illness properly reported on May 4 and May 15, and was absent on May 21 in connection with a close friend's passing. On June 19, Manpower representative Kaitlin Orth notified the claimant that she was not to go to work the next day because her assignment had been ended due to

attendance. At that time, claimant notified the Manpower representative that she would be forced to relocate to Florida as a result of the discharge from the assignment. The Manpower representative did not discuss further work assignments with the claimant and the claimant did not express interest in further work assignments with Manpower. The claimant concluded, based on the comments of the Manpower representative that Manpower was ending her employment, not just the assignment. Shortly thereafter, the claimant relocated to Florida.

REASONING AND CONCLUSIONS OF LAW:

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 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). 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 that the final series of absences that triggered the discharge were absences due to illness and were properly reported to the employer. For that reason, those absences were excused absences under the applicable law and cannot be used as a basis for disqualifying the claimant from unemployment insurance benefits. The evidence fails to establish a current act of misconduct. In the absence of testimony from a Manpower witness with personal knowledge of the conversation with the claimant on June 19, the administrative law judge concludes that the claimant reasonably concluded that Manpower was discharging her from the employment on June 19. 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.

During the hearing, the claimant indicated that she has a chronic lung problem and a chronic back problem. Because no medical evidence was available at the time the appeal hearing, the administrative law judge concluded it was not appropriate to go into the issue of whether the claimant has been able to work and available for work since she filed her additional claim for benefits. That set of issues will be remanded to the Claims Division for investigation and initial adjudication.

DECISION:

The Agency representative's August 8, 2012, reference 02, decision is affirmed. The claimant was discharged on June 19, 2012 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Claims Division for investigation and adjudication of whether the claimant has been able to work and available for work since she established the additional claim for benefits that was effective July 1, 2012.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs