

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KANISHA HOLMES
Claimant

PACKERS SANITATION SERVICES INC
Employer

APPEAL NO. 19A-UI-08788-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/06/19
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 1, 2019, reference 04, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on October 6, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on December 3, 2019. Claimant Kanisha Holmes participated. Maria Garcia represented the employer. Exhibits 1 and 2 were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits paid to the claimant.

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: Kanisha Holmes was employed by Packers Sanitation Services, Inc. (PSSI) as a full-time Safety Janitor from March 2019 until October 3, 2019, when the employer notified her that she was discharged for attendance. Ms. Holmes was assigned to the overnight shift at the JBS plant in Marshalltown. Ms. Holmes' shift usually started at 11:00 p.m. and ended at 7:00 a.m. One or two days per week the employer would have Ms. Holmes start at midnight or 1:00 a.m. Ruven Kmaya, Kill Floor Foreman, was Ms. Holmes supervisor. Ms. Holmes last performed work for the employer on Sunday, September 29, 2019, when she worked a midnight to 8:00 a.m. or 9:00 a.m. shift. Ms. Holmes was next scheduled to work at 11:00 p.m. on Monday, September 30, 2019. Ms. Holmes suffers from chronic thyroid issues that periodically flare up and interfere with her ability to swallow. On September 30, 2019, Ms. Holmes was suffering from such issues. Ms. Holmes went to the emergency room. In connection with that visit, Ms. Holmes obtained a medical note that took her off work for three days. At 9:00 p.m. on September 30, 2019, Ms. Holmes called the designated workplace absence reporting number to give notice of her need to be absent for three days. When no one answered, Ms. Holmes left a voicemail message. Based on prior instructions Ms. Holmes had received from the employer,

Ms. Holmes believed she had provided proper notice of her need to be absent for her next three work days. Ms. Holmes was absent from her shifts on Tuesday, October 1, and Wednesday, October 2. Ms. Holmes did not contact the employer on those days. On the morning of Thursday, October 3, Ms. Holmes went to the PSSI office for the purpose of turning in her medical excuse and completing absence paperwork in anticipation of returning to work that evening. Ms. Holmes spoke with an office assistant who notified her that the employer had terminated the employment.

The employer has a written attendance policy that the employer did not provide to Ms. Holmes in connection with her employment. The written policy states that employees are required to notify their supervisor at least 30 minutes prior to the scheduled start of the shift if they need to be absent and that employees are required to notify the employer each day of the absence. The written policy states that an employee who is absent three days without notifying the employer will be deemed to have voluntarily quit the employment.

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 employer presented insufficient evidence to prove Ms. Holmes voluntarily quit, to prove that she was absent without proper notice to the employer or for a reason other than illness, to prove that she received a written attendance policy, or to prove that she engaged in any other disqualifying misconduct in connection with the employment. The employer elected not to present testimony from anyone with personal knowledge of Ms. Holmes employment. The employer failed to present sufficient evidence to rebut Ms. Holmes testimony regarding the absence reporting policy that was conveyed to her, the notice she provided on September 30, and the discharge decision she learned about on October 3, 2019. The evidence establishes a discharge based on a three-day absence due to illness and that was properly reported to the employer on the first day of the absence. Ms. Holmes is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The November 1, 2019, reference 04, decision is affirmed. The claimant was discharged for no disqualifying reason. The discharge was effective October 3, 2019. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn