

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANNA M GRAVES

Claimant

APPEAL NO. 17A-UI-13252-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEABOARD FOODS SERVICES INC

Employer

OC: 11/26/17

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 14, 2017, reference 01, 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 Benefits Bureau deputy's conclusion that the claimant was discharged on October 13, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on January 9, 2018. Claimant Anna Graves did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Erin Hyde, Human Resources Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO) and received Exhibits 1 through 5 into evidence. The administrative law judge took official notice of the materials submitted for and generated in connection with the December 11, 2017 fact-finding interview.

ISSUES:

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

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Anna Graves was employed by Seaboard Foods Services, Inc., as a full-time Team Member 2 from July 18, 2017 until October 13, 2017, when Gary Osborn, Farm 87 Supervisor, and Erin Hyde, Human Resources Supervisor, discharged her for attendance. Mr. Osborn was Ms. Graves' supervisor. Ms. Graves' duties involved caring for hogs at a hog facility. Ms. Graves' work hours were 6:00 a.m. to 3:00 or 3:30 p.m., Monday through Friday and alternating weekends.

The employer has a written attendance policy that the employer reviewed with Ms. Graves at the time of hire. The policy appears in the employee handbook that the employer provided to Ms. Graves at the start of the employment. The policy also appears in orientation materials. The employer had Ms. Graves sign to acknowledge receipt of the employee handbook and review of the orientation materials. Under the attendance policy, Ms. Graves was required to call the employer and speak with Mr. Osborn at least 30 minutes prior to the scheduled start of

her shift if she needed to be absent. Under the policy, Ms. Graves was subject to discharge from the employment if she incurred three unexcused absences within the first 90 days of her employment.

The final absence that triggered the discharge occurred on October 12, 2017. On that day, Ms. Graves was absent from work due illness. At 5:45 a.m., Ms. Graves provided late notice to Mr. Osborn that she was ill and might not be able to make it to work that day. Mr. Osborn told Ms. Graves that if she did not appear for her shift, she would face discharge from the employment. Ms. Graves did not appear for the shift and did not make further contact with Mr. Osborn that day. Ms. Graves returned to work on October 13, 2017. Ms. Graves brought a medical excuse regarding her absence on October 12, 2017. The medical excuse indicated that Ms. Graves had been examined by a nurse practitioner for a medical condition on October 12, 2017 and that her absence on October 12, 2017 should be excused. Under the employer's written attendance policy, the employer does not deem a medical excuse a basis for excusing an employee absence. Mr. Osborn notified Ms. Graves on October 13, 2017 that she was discharged from the employment.

In making the decision to discharge Ms. Graves from the employment, the employer considered two prior absences and associated written warnings. Ms. Graves was absent on August 9, 2017 due to illness and properly notified the employer. On August 10, 2017, the employer issued a written warning to Ms. Graves in connection with the absence. Ms. Graves was absent on August 28, 2017 due to illness and properly notified the employer. On August 28, 2017, Mr. Osborn prepared a written reprimand that Mr. Osborn presented to Ms. Graves on September 5, 2017. The reprimand referenced the two absences in August and warned that if Ms. Graves was absent one more time during her probation period, the employer would terminate the employment.

Ms. Graves established an original claim for unemployment insurance benefits that was effective November 26, 2017. Ms. Graves has received \$1,060.00 in benefits for the four-week period of December 10, 2017 through January 6, 2018. Ms. Graves' base period for purposes of the claim consists of the third and fourth quarter of 2016 and the first and second quarter of 2017. Seaboard Foods is not a base period employer for purposes of the claim year that started on November 26, 2017 and that will end on November 24, 2018. Because Seaboard Foods is not a base period employer, the employer account of Seaboard Foods has not been charged for benefits paid to Ms. Graves in connection with the unemployment insurance and would not be charged under any circumstances for benefits paid to Ms. Graves during her current benefit year.

On December 11, 2017, a Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Graves' separation from Seaboard Foods. Erin Hyde, Human Resources Manager, represented the employer at the fact-finding interview and provided an oral statement to the Benefits Bureau deputy.

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). 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 an October 13, 2017 discharge for no disqualifying reason. The evidence in the record establishes a final absence on October 12, 2017 that was due to bona fide illness, but that was not properly reported to the employer. The employer's policy required notice at least 30 minutes prior to the scheduled start of the shift, but Ms. Graves provided notice closer to her start time. For that reason, the final absence was an unexcused absence under the applicable law. The August 9 absence and the August 28 absence were due to illness and were properly reported to the employer. Accordingly, each was an excused absence under the applicable law and cannot serve as a basis for disqualifying Ms. Graves for unemployment insurance benefits. The evidence fails to establish excessive unexcused absences or any other misconduct in connection with the employment. Accordingly, Ms. Graves is eligible for benefits provided she meets all other eligibility requirements and the employer's account may be charged for benefits. Because the employer is not a base period employer for purposes of the current claim year, the employer's account will not be charged for benefits paid to Ms. Graves during the current claim year. The employer's account may be charged in the event that Ms. Graves establishes a claim as part of a future claim year, is deemed eligible for benefits in connection with that future claim, and if the employer is deemed a base period employer in connection with the future claim year.

DECISION:

The December 14, 2017, reference 01, decision is affirmed. The claimant was discharged on October 13, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged as outlined above.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs