

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LOWANDA L BUTCHER
Claimant

APPEAL NO. 15A-UI-05763-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 04/25/15
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) - Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

Lowanda Butcher filed a timely appeal from the May 13, 2015, reference 01, decision that that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Ms. Butcher had been discharged for excessive unexcused absences. After due notice was issued, a hearing was held on June 25, 2015. Ms. Butcher participated. Julie Harris represented the employer. Exhibits One through Five, and A through I were received into evidence.

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: Lowanda was employed by Casey's in Northwood as a kitchen worker from September 2014 until April 16, 2015, when Julie Harris, Store Manager, discharged her for attendance. Ms. Harris was Ms. Butcher's supervisor. If Ms. Butcher needed to be absent from the employment, the employer's policy required that she notify a supervisor prior to the scheduled start of her shift and finding someone to replace her during the shift. Ms. Butcher was aware of the policy. Ms. Butcher became a full-time employee in January 2015. Ms. Butcher's shift usually started at 4:00 p.m. On March 10, 2015, Ms. Butcher suffered an off-duty injury to her left wrist. Ms. Butcher continued to have problems with her left wrist until the time she was discharged from the employment. Ms. Butcher sought medical attention for her wrist on multiple occasions and provided the employer with written medical excuses. Ms. Butcher's primary care physician had referred Ms. Butcher to an orthopedic clinic. Ms. Butcher's regular duties involved constant use of her wrists to lift and manipulate equipment and supplies.

The final absence that triggered the discharge occurred on April 16, 2015. Ms. Butcher had just returned to work the previous day after being absent April 8-14 due to her wrist. Ms. Butcher had properly reported that prior absence and, on April 8, had provided the employer with a

medical excuse to cover all of the absence dates between April 8 and April 14. After Ms. Butcher worked a full shift on April 15, she once again was experiencing pain in her wrist. On the morning of April 16, Ms. Butcher telephoned Ms. Harris at home regarding her need to be absent from work that evening due to her wrist pain. Ms. Harris told Ms. Butcher to contact Assistant Manager Megan Colby. Ms. Butcher complied. Ms. Colby told Ms. Butcher that she would have to find a replacement or work the shift. Ms. Butcher attempted to contact several coworkers, but was unable to find a replacement. Ms. Butcher reported by to Ms. Colby that she had been unable to find a replacement. Ms. Colby then contacted an employee who was scheduled to assist Ms. Butcher in the kitchen that evening. After Ms. Colby spoke with that employee, Ms. Colby told Ms. Butcher that the other employee would perform the primary kitchen duties that night, that Ms. Butcher would be required to assist, that Ms. Butcher would be on her own from 9:00 p.m. onward, and that Ms. Butcher would have to perform the kitchen closing duties. Ms. Butcher did not agree to appear. Ms. Butcher contacted her primary care physician for a medical excuse. The primary care doctor deferred to the orthopedic clinic staff for determination of whether Ms. Butcher was able to work. Ms. Butcher attempted to reach the provider at the orthopedic clinic, but that person was unavailable. At about 8:30 a.m. a store employee notified Ms. Harris that Ms. Butcher had not appeared. Ms. Harris left a message for Ms. Butcher at 8:50 p.m. In her message, Ms. Harris told Ms. Butcher that she would be discharged if she did not appear for the shift. When Ms. Butcher did not appear for the shift, Ms. Harris discharged Ms. Butcher from the employment.

Ms. Butcher had previously mentioned to the employer that she would likely be leaving the employment to relocate in June, but Ms. Butcher had not given notice of a date certain when she expected to leave. Ms. Butcher first needed to secure a new apartment in Peoria, Illinois.

Ms. Harris considered earlier absences when making the decision to discharge Ms. Butcher from the employment. Most of these absences were due to illness and were properly reported to the employer. Ms. Harris was absent multiple days in January because she lacked a ride to return from visiting family in Chicago.

REASONING AND CONCLUSIONS OF LAW:

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 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 absence was due to bonafide illness and was properly reported to the employer. The employer's decision to attempt to coerce Ms. Butcher to come to work with an injured wrist, and Ms. Butcher's decision not to do that, did not give rise to an unexcused absence under the applicable law. The employer's requirement that Ms. Butcher appear for work with an injured wrist was unreasonable. The employer's requirement that Ms. Butcher appear for work because she had not found a replacement is the sort of tacked on requirement that the Iowa Court of Appeals rejected in the Gaborit case. Because the final absence that triggered the discharge was an excused absence under the applicable law, the evidence fails to establish a current act of misconduct. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not consider the prior absences. However, the administrative law judge notes that almost all of those period absences were also excused absences. One has to go back to January to find unexcused absences in connection with the return trip from Chicago.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Butcher was discharged for no disqualifying reason. Accordingly, Ms. Butcher is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The May 13, 2015, reference 01, decision is reversed. The claimant was discharged 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

Decision Dated and Mailed

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