

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KIARRA S PEARSON
Claimant

D OF S FOODS INC
Employer

APPEAL NO. 19A-UI-09156-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/13/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Kiarra Pearson filed a timely appeal from the November 19, 2019, reference 07, decision that disqualified her for benefits and that held the employer's account would not be charged for benefits, based on the deputy's conclusion that Ms. Pearson voluntarily quit on November 5, 2019 without good cause attributable to the employer. After due notice was issued, a hearing was held on December 16, 2019. Ms. Pearson participated. Kelly Henrich represented the employer. Exhibits A and B were received into evidence.

ISSUES:

Whether the claimant voluntarily quit without good cause attributable to the employer.
Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kiarra Pearson was employed by D of S Foods, Inc., doing business as McDonalds, as a part-time crew member and last performed work for the employer on October 24, 2019. Ms. Pearson worked at the employer's restaurant on Lower Muscatine Avenue in Iowa City. Donny Thepvong is the General Manager at that location and was Ms. Pearson's supervisor. Ms. Pearson usually worked a shift that started at 5:00 p.m. and that ended at 1:00 a.m. or 2:00 a.m.

On October 24, 2019, Ms. Pearson left work early due to illness. Ms. Pearson notified the manager on duty of her need to leave work early before she departed from the workplace. Ms. Pearson was suffering from a pilonidal cyst that burst during her shift and that was causing her significant pain.

Ms. Pearson was next scheduled to work at 5:00 p.m. on October 25, 2019, but did not report for the shift. On the morning of October 25, 2019, Ms. Pearson sought evaluation and treatment for her pilonidal cyst at an emergency room. Ms. Pearson was discharged from the emergency room to home sometime between 7:00 p.m. and 8:00 p.m. Emergency room staff lanced the cyst and provided Ms. Pearson with pain medication. Ms. Pearson was aware from the start of

the employment that the employer's absence reporting policy required that she call the workplace at least two hours prior to the scheduled start of her shift and speak with a manager to give notice of her need to be absent. Ms. Pearson was still receiving medical treatment during the time when she was supposed to have given notice to the employer of her need to be absent. An emergency room case worker contacted the workplace on Ms. Pearson's behalf, was told Mr. Thepvong was busy, and left a message for Mr. Thepvong to return the call. Mr. Thepvong did not return the call.

Ms. Pearson was next scheduled to work on the evening of October 27, 2019, but did not report for the shift. On that morning, Ms. Pearson called the workplace and spoke to Mr. Thepvong regarding her need to be absent due to illness.

Ms. Pearson did not know what further shifts the employer had scheduled for her until the employer communicated with Ms. Pearson by text message concerning specific scheduled shifts. Ms. Pearson would ordinarily learn her work schedule by reviewing the schedule posted in the workplace.

Ms. Pearson was next scheduled to work at 4:00 p.m. on October 28. On that day, Ms. Pearson returned to the emergency room for evaluation and packing of her wound site. At 2:30 p.m., Ms. Pearson sent a text message to Mr. Thepvong. She wrote:

I keep getting sick in its really annoying when im trying to prove that i have what it take [sic] to move to the top in life bring methis i down with some type of cold or something. This is too many life changing events happening at once.

Ms. Pearson intentionally avoided calling Mr. Thepvong. Ms. Pearson did not in fact have a cold and was instead too embarrassed to return to work while still dealing with matters related to the cyst. At 4:15 p.m., Mr. Thepvong responded by text message as follows:

Best thing would be come to work when your [sic] schedule [sic]. Today you work 4-closing if you want to prove to me that you want to be manager need to be help [sic] customer and be responsible/reliable.

Ms. Pearson did not respond to Mr. Thepvong's message.

On the morning of October 29, Mr. Thepvong sent Ms. Pearson a text message asking her to call him. Mr. Thepvong stated that Ms. Pearson had missed two days in a row and that it was very important that she called him that day. Ms. Pearson did not respond to Mr. Thepvong's text message.

Ms. Thepvong was next scheduled to work at 5:00 p.m. on October 30. At 5:21 p.m. on October 30, Mr. Thepvong sent another text message to Ms. Pearson: "Hello this Donny at McDonald's. You're scheduled at 5pm are you on your way? Do [you] need help with transportation?" Ms. Pearson did not respond to Mr. Thepvong's message.

Ms. Pearson returned to the emergency room on November 2 for further evaluation and to have her wound site packed. The medical provider released Ms. Pearson to return to work and scheduled a return appointment for November 10.

At 4:12 p.m. on November 2, 2019, Ms. Pearson sent Mr. Thepvong the following text message:

Hello Donny kiarra here i wanted to let you know i been dealing with personal issues that im very embarrassed about i dealing wit a plionidal cyst in didnt want to tell nobody its pain in have to get packed I go back to doctor Monday I wanted to come to the open interviews but. my butt is in so much pain in the odor is ridulous im so ashamed im really trying to get my job back too I just didn't want the whole store knowing my business its a big problem with gossip there

On November 3 or 4, Ms. Pearson walked to the workplace with the intention of speaking with Mr. Thepvong. When she arrived Mr. Thepvong was not there. Ms. Pearson asked whether she was on the work scheduled and learned that she was not on the work schedule. A few days later, Ms. Pearson sent a text message to Mr. Thepvong asking whether she could have her job back. Mr. Thepvong responded that the employment was done.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See Iowa Administrative Code rule 871-24.25.

The weight of the evidence in the record establishes a discharge for attendance, not a voluntary quit. The employer witness had no personal knowledge regarding the events leading to Ms. Pearson's separation from the employment. The employer elected not to present testimony from anyone with personal knowledge of the relevant matters. At no time did Ms. Pearson tell the employer that she wished to separate from the employment. The employer elected to remove Ms. Pearson from the work schedule on or about October 30, 2019, based on Ms. Pearson's attendance issues.

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 a discharge 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 weight of the evidence establishes a discharge for no disqualifying reason. The evidence in the record establishes a discharge that followed a series of absences, some of which were excused absences under the applicable law and others of which were unexcused absences under the applicable law. On October 24, 2019, Ms. Pearson left work early due to illness and with proper notice to the employer. The absence was excused under the applicable law. On October 25, 2019, Ms. Pearson was absent due to illness, was unable to comply with the employer's absence reporting requirement due to receiving medical treatment, and took reasonable steps to have hospital staff notify the employer of the absence. The absence was an excused absence under the applicable law. On October 27, 2019, Ms. Pearson was absent due to illness and properly notified the employer. The absence was excused under the applicable law. Ms. Pearson was responsible for knowing her work schedule, but elected not to take reasonable steps to learn her work schedule for scheduled shifts on and after October 28, 2019. On October 28, Ms. Pearson was absent due to illness, but without proper notice to the employer. Ms. Pearson's embarrassment regarding her health issue did not provide a reasonable basis for failing to call the work place in a timely manner to speak to the employer or for failing to respond to Mr. Thepvong's 4:15 p.m. message regarding the missed shift. The absence was an unexcused absence under the applicable law.

Ms. Pearson was again a no-call/no-show for her October 30, 2019 scheduled shift. Ms. Pearson unreasonably failed to respond to Mr. Thepvong's text message. The evidence fails to establish any other absences that factored in the separation. The two illness-related unexcused absences were not excessive and therefore did not rise to the level of misconduct in connection with the employment that would disqualify Ms. Pearson for unemployment insurance benefits. Ms. Pearson is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The November 19, 2019, reference 07, decision is reversed. The claimant was discharged on or about October 30, 2019 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

jet/scn