

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JULIA A LEINEN
Claimant

APPEAL NO. 17A-UI-10180-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CITY OF HARLAN
Employer

OC: 09/03/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Julia Leinen filed a timely appeal from the September 25, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Leinen was discharged on August 16, 2017 for violation of a known company rule. After due notice was issued, a hearing was commenced on October 23, 2017 and concluded on October 24, 2017. Ms. Leinen participated. Jane Smith represented the employer and presented additional testimony through Gene Gettys, Ashley Schleis and Rene Hansen. Exhibits 1 through 14 and A through V were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Julia Leinen was employed by the City of Harlan as a full-time bookkeeper from 2011 until August 16, 2017, when Gene Gettys, City Administrator, Sharon Kroger, City Council Member, and Jane Smith, City Clerk, discharged her from the employment for failure to perform time-sensitive assigned duties in a timely manner, for repeated tardiness, for working unauthorized overtime, and for sleeping on the job. Ms. Smith was City Clerk/Finance Director and Ms. Leinen's immediate supervisor from February 2016 until the end of the employment. Ms. Leinen's scheduled work hours were 8:00 a.m. to 5:00 p.m. Ms. Leinen was allotted an hour for lunch.

Ms. Leinen was habitually late to work. Between May 11, 2017 and August 14, 2017, Ms. Leinen was late for personal reasons more than two dozen times. The location of Ms. Smith's office within the office suite and the bell attached to the office suite's front door enabled Ms. Smith to observe the late arrivals when they occurred. Ms. Smith marked the late arrive dates on her calendar, but did not document the specific time of arrival. Pursuant to the employer's timekeeping and payroll protocol, if Ms. Smith arrived at or before 8:07 a.m., she was allowed to round her time of arrival as 8:00 a.m. for payroll purposes. If Ms. Smith arrived at 8:08 a.m. she was required to round her time of arrival to 8:15 a.m. for payroll purposes. Accordingly, in many instances in which Ms. Leinen arrived late for work, she submitted payroll information indicating an 8:00 a.m. arrival and received pay for the period beginning 8:00 a.m.

Ms. Leinen was habitually late in preparing monthly bank statement reconciliation duties that were central to the city council's ability to monitor and safeguard the City's finances. Ms. Leinen understood throughout the employment that the monthly reconciliation was a high-priority task. Ms. Leinen would receive the monthly bank statement on or about the first of the month and was expected to complete the reconciliation process by the tenth of the month so that the city treasurer could approve the monthly financial report and so that the city council would be able to review the report during its meeting on the third Tuesday of the month. The monthly reconciliation process took three hours or less if there were not discrepancies between the bank statement and the city's financial records. If there were discrepancies, resolving the discrepancies and balancing the city's monthly books generally only took a few hours more. Ms. Leinen completed the March 2017 reconciliation and the April 2017 in August 2017. When Ms. Smith met with Ms. Leinen on August 2, 2017 to present a written reprimand, Ms. Leinen advised that the March and April reconciliation would be complete by August 7 and that the May and June reconciliation would be complete by August 11, 2017. At the time the employer discharged Ms. Leinen on August 16, 2017, she had not yet concluded the monthly reconciliations for May or June 2017. Ms. Leinen had reduced her work hours by approximately half in Spring 2017, due to a medical issue, but had returned to full-time hours on or about May 1, 2017. Between May and the discharge in August, Ms. Smith spoke with Ms. Leinen a number of times regarding the need to prioritize and complete the monthly bank reconciliation and reports. Ms. Smith relieved Ms. Leinen of some assigned duties to facilitate Ms. Leinen's completion of the monthly reconciliation and reports.

Ms. Leinen was in the habit of working unauthorized overtime hours. Between January 1, 2017 and July 2017, Ms. Leinen was paid for 232 hours of overtime. Ms. Leinen continued to accumulate unauthorized overtime even after Ms. Smith specifically directed her on July 24, 2017 to cease the practice.

In 2017, Ms. Leinen was diagnosed with a sleep disorder and was fitted with a CPAP device to assist her in getting adequate sleep at night. Despite use of the CPAP at night, Ms. Smith and/or others discovered dozed asleep at her desk on multiple occasions, with the last such instance occurring on August 14, 2017. None of the incidents involved an intentional decision to sleep on the job.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

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 weight of the evidence in the record establishes misconduct in connection with the employment based on habitual unexcused tardiness, on habitual neglect of high-priority duties during the last several months of the employment and based on insubordination. The employer presented sufficient evidence, including testimony elicited from Ms. Leinen, to establish that Ms. Leinen was indeed tardy for personal reasons more than two dozen times between May 2017 and August 14, 2017. The employer presented sufficient evidence to establish that Ms. Leinen had appropriate and reasonable time to perform the monthly reconciliations in a timely manner, but that Ms. Leinen neglected those high-priority duties for several months up to the date she was discharged from the employment. Ms. Leinen's failure to perform tasks as reasonably directed and in a timely manner was unreasonable and constituted insubordination. Ms. Leinen's continued accrual of unauthorized overtime hours, without much to show for that time, also constituted insubordination. The weight of the evidence establishes an intentional and substantial disregard for the employer's interests.

The weight of the evidence establishes that the sleeping behavior was not intentional and, therefore, was not misconduct in connection with the employment.

Because the administrative law judge concludes that Ms. Leinen was discharged for misconduct in connection with the employment, she is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Leinen must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The September 25, 2017, reference 01, decision is affirmed. The claimant was discharged on August 16, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs