

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

LAURIE A HARRISON
Claimant

APPEAL NO. 18A-UI-03073-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STAPLES CONTRACT AND COMMERCIAL
Employer

OC: 02/11/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Laurie Harrison filed a timely appeal from the February 26, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Harrison was discharged on February 6, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on April 2, 2018. Ms. Harrison participated. The employer did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate.

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: Laurie Harrison was employed by Staples Contract and Commercial as a full-time Special Order Senior Account Representative from 2013 until February 6, 2018, when Susan Klinge, Manager, and Tammy Meier, Human Resources Representative, discharged her for attendance. Ms. Harrison's regular work hours were 7:00 a.m. to 3:00 p.m., Monday through Friday. Ms. Klinge was Ms. Harrison's immediate supervisor. Ms. Harrison suffers from colitis and irritable bowel syndrome (IBS). Ms. Harrison's health conditions include flare-ups that can be triggered by stress.

The employer had an online employee handbook that contained an attendance policy. Ms. Harrison received online access to the employee handbook at the start of her employment. Under the attendance policy, the employer deemed any absence for which there was not 24 hours advance notice and 24 hours advance approval to be an unexcused absence. The employer limited employees to five such "unexcused" absences per calendar year. If an employee was unable to provide 24-hour advance notice of the need to be absent from work, the employer expected notice as soon as possible. The employer accepted text messages as an appropriate form of notice.

In October 2017, Ms. Harrison was diagnosed with clostridium difficile (C. difficile) that took her completely off work for a number of days and that caused Ms. Harrison to exceed the employer's five-absence per calendar year limit for absences without 24 hours of notice. Ms. Harrison had provided the employer with medical notes to support her need to be absent during that period.

The final absence that triggered the discharge occurred on Wednesday, January 31, 2018 through Friday, February 2, 2018. On each day, Ms. Harrison was absent due to illness and notified Ms. Klinge by text message at or before 6:00 a.m. Prior to these absences, Ms. Harrison had most recently been absent on January 11, 2018.

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 a discharge for no disqualifying reason. The employer had appropriate notice of the appeal hearing, but failed to participate in the hearing to meet its burden of proving, by a preponderance of the evidence, that Ms. Harrison's discharge was based on misconduct in connection with the employment. The evidence in the record establishes that the final absences that triggered the discharge were due to illness, were appropriately reported to the employer and, therefore, were excused absences under the applicable law. Under the circumstances, the employer's requirement of 24 hours advance notice and approval was unreasonable. Under the circumstances, Ms. Harrison provided reasonable notice of her need to be absent. Because the three final absences that triggered the discharge were excused absences under the applicable law, those absences cannot serve as a basis for disqualifying Ms. Harrison for unemployment insurance benefits. Because those final three absences were excused absences under the applicable law, and because the next most recent absence occurred 26 days prior to the discharge, the evidence fails to establish a current act of misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Harrison was discharged for no disqualifying reason. Accordingly,

Ms. Harrison is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The February 26, 2018, reference 01, decision is reversed. The claimant was discharged on February 6, 2018 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/rvs