

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ESTHER P WILONDJIA
Claimant

APPEAL NO. 21A-UI-07327-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PACKERS SANITATION SERVICES INC
Employer

**OC: 01/10/21
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 4, 2021, reference 01, decision that allowed benefits to the claimant provided the claimant met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on January 6, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on May 20, 2021. The claimant did not provide a telephone number for the appeal hearing and did not participate. Angel Montelongo represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 8 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

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: The claimant, Esther Wilondja, was employed by Packers Sanitation Services, Inc. (PSSI) as a full-time food safety sanitation worker. The claimant began the employment in May 2020. The claimant's work schedule was 8:00 p.m. to 7:00 a.m. seven days a week. Juan Alvarado, Kill Foreman, was the claimant's supervisor. The claimant last performed work for the employer on January 8, 2021.

The employer alleges the claimant refused to perform assigned work on January 8, 2021. The employer witness was not present for the alleged incident and is unable to provide details regarding the alleged refusal to perform assigned work.

On January 8, 2021, the employer issued a written reprimand to the claimant for attendance. The claimant had been absent on January 7, 2021 because she lacked a ride to work. The

written reprimand issued on January 8, 2021 included a three-day suspension. The suspension dates were January 8, 9 and 11, 2021. The employer presented the written reprimand to the claimant for her signature. Signing the reprimand would indicate agreement with the reprimand. The employer does not require employees to sign reprimands and does not deem refusal to sign a reprimand a matter that would subject an employee to discharge. The claimant refused to sign the reprimand. The employer alleges the claimant became angry and began yelling at Donte Guzman, Acting Site Manager. The employer witness was not present and did not witness the alleged conduct.

On January 11, 2021, Mr. Guzman sent an email message to PSSI management in which he referenced the claimant being angry and yelling in response to the suspension, as well as the claimant's assertion that she was going to remain onsite until human resources personnel arrived in the morning. Mr. Guzman wrote that he escorted the claimant out of the plant. Mr. Guzman indicated he had concerns about the claimant returning to the employment and wanted to know his options. The employer has not provided management's response to Mr. Guzman's message.

The employer has provided a written reprimand, dated June 17, 2020. The document indicates the claimant was absent on June 5, 2020, but provides no information regarding the reason or the absence or whether the claimant provided notice of the absence.

The employer has provided a written reprimand, date November 16, 2020. The document asserts the claimant refused to follow food safety quality assurance on November 16, 2020, but provides no information regarding any directive issued to the claimant or any other information regarding the incident.

The employer alleges the claimant failed to return to work on January 12, 2021. The employer has provided a discharge document, dated February 20, 2021, more than a month after the separation. The document indicates the claimant was discharged for attendance.

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).

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 evidence in the record establishes a discharge for no disqualifying reason. The employer did not present testimony from anyone with personal knowledge of the events that factored in separation. The employer presented insufficient evidence to prove either a voluntary quit or a discharge for misconduct in connection with the employment. The weight of the evidence establishes an unexcused absence on January 7, 2021 that was followed by a three-day suspension issued on January 8, 2021. The employer presented insufficient evidence to prove other unexcused absences. The purported discharge document, drafted more than a month after the separation, is not a contemporaneous business record and is not reliable evidence. The employer presented insufficient evidence to prove conduct on January 8, 2021 that would rise to the level of misconduct in connection with the employment. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The March 4, 2021, reference 01, decision is affirmed. 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

September 16, 2021
Decision Dated and Mailed

jet/scn