

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KANDY J KANE-GRADERT
Claimant

APPEAL NO. 15A-UI-10554-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DM SERVICES INC
Employer

OC: 08/23/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 11, 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 the claimant had been discharged on August 21, 2015 for excessive unexcused absences. After due notice was issued, a hearing was held on October 6, 2015. The claimant participated. Rachel Ottens represented the employer and waived formal notice of the hearing. Exhibits D-3, D-4, D-5, D-8, and D-10 through D-13 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: Kandy Kane-Gradert was employed by DM Services, Inc., as a full-time Credit Specialist Lead until August 25, 2015, when Rachel Ottens, Human Resources Administrator, discharged her for attendance. Ms. Kane-Gradert's employment had started in 2004. Ms. Kane-Gradert's work hours were 4:00 p.m. to midnight, Monday through Friday. If Ms. Kane-Gradert needed to be absent from work, the employer's established protocol required that she telephone the workplace prior to the scheduled start of her shift and speak with a member of the management team or leave a voice mail message if no one was available. Ms. Kane-Gradert was aware of the policy.

All but one of the absences that factored in the discharge was an absent due to illness and was properly reported to the employer. The final absence that triggered the discharge occurred on August 24, 2015, when Ms. Kane-Gradert was absent due to illness and properly reported the absence to the employer. Ms. Kane-Gradert was also absent due to illness 18 additional times between July 20, 2015 and August 21, 2015 and properly reported the absences to the employer. Ms. Kane-Gradert had been diagnosed with Celiac Disease in September 2014 and continued to miss work in connection with flare ups of that disease through the end of the employment. Ms. Kane-Gradert was diagnosed with severe depression after her mother

passed away in October 2014. Ms. Kane-Gradert's depression aggravated her Celiac Disease. The employer was aware of the Celiac Disease. Ms. Kane-Gradert had exhausted available FMLA leave in January 2015.

The employer issued a written reprimand to Ms. Gradert-Kane on July 14, 2015 and placed her on a 90-day probationary period. Thereafter, Ms. Gradert-Kane was absent on July 17, 2015 so that she could assist her step-father in getting to a medical appointment. The step-father does not live with Ms. Kane-Gradert. When Ms. Kane-Gradert had the additional absences referenced above, the employer concluded there was no way she could meet the employer's attendance requirement during the 90-day probation and moved forward with discharging her from the employment.

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.

All but one of the absences that factored in the discharge was an absence due to illness, was properly reported to the employer and, therefore, was an excused absence under the applicable law. The only absence that does not fit that characterization is the absence on July 17, 2015. However, that absence occurred more than a month before the discharge and did not constitute a “current act.” Because the evidence fails to establish a more recent absence that would be an unexcused absence under the applicable law, the evidence fails to establish a current act of misconduct upon which a disqualification for unemployment benefits might be based.

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

DECISION:

The September 11, 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

jet/pjs