

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

SASHA M HENRICKSON
Claimant

APPEAL NO. 18A-UI-09058-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LINC LEASING COMPANY
Employer

OC: 07/29/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Sasha Henrickson filed a timely appeal from the August 27, 2018, reference 02, 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. Henrickson was discharged on July 30, 2018 for failure to follow instructions in the performance of her job. After due notice was issued, a hearing was held on September 18, 2018. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-09059-JTT. Ms. Henrickson participated. Jay Barrett represented the employer. Exhibit A was received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to Ms. Henrickson (DBRO).

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: Linc Leasing Company owns and operates 21 stores that sell sex-related products to retail customers. Sasha Henrickson was employed by Linc Leasing Company as a full-time Store Manager from 2015 until July 30, 2018, when Jay Barrett, District Manager, discharged her from the employment. Mr. Barrett was Ms. Henrickson's immediate supervisor. Ms. Henrickson managed the employer's Des Moines location.

The final incident that triggered the discharge was the periodic inventory audit that Ms. Henrickson and Mr. Barrett completed on July 18, 2018. The audit revealed that six percent of the store's merchandise had gone missing during the preceding four months. It was the duty of Ms. Henrickson and other store employees to monitor store operations to hinder theft. The store had surveillance cameras, but the cameras did not cover the entire sales floor. Ms. Henrickson spoke to Mr. Barrett about this issue and requested upgraded surveillance equipment. Usually only one employee would be on duty at a time. These factors, and the nature of the business, hindered efforts to deter and detect theft as it occurred. The store's next

most recent problematic inventory audit had been in September 2017, at which time the audit indicated a six percent shrinkage. After that audit, Ms. Henrickson implemented a daily check of merchandise on the sales floor to more quickly detect evidence of theft. A follow-up inventory audit in November 2017 indicated zero shrinkage. Other periodic audits of the Des Moines store showed zero shrinkage.

In making the decision to discharge Ms. Henrickson from the employment, the employer also considered Ms. Henrickson's early departures without notice on March 2, April 4, April 13, June 8, July 12, and July 19, 2018. As store manager, Ms. Henrickson had discretion to leave work as needed, but was required to notify Mr. Barrett that she was leaving. On the days in question, Ms. Henrickson had another employee come in early. Ms. Henrickson had at one point made a general statement to Mr. Barrett that she would need to leave work early for medical appointments, but did not give notice on these specific dates. Ms. Henrickson had received no prior warnings for attendance.

In making the decision to discharge Ms. Henrickson from the employment, the employer also considered dress code violations. In October 2017, Mr. Barrett issued a verbal warning to Ms. Henrickson about adhering to the dress code requirement that she wear a black, white or red polo or button-down shirt as part of her workplace attire. Ms. Barrett had worn a plaid patterned shirt to work. When Mr. Barrett visited the Des Moines store on June 14, 2018, he found Ms. Henrickson wearing a T-shirt. Ms. Henrickson was short on clothes at the time due to a basement flooding incident. When Mr. Barrett reviewed surveillance video at the end of July 2018, he observed Ms. Henrickson again wearing a T-shirt.

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 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 legitimate employer concern regarding the inventory shrinkage. The weight of the evidence indicates an environment in which it was at times challenging to hinder and detect theft. Ms. Henrickson took some good faith measures to detect and deter theft. Ms. Henrickson could not be at the store during all hours of operation and was

not in a position to personally deter theft during those times when she was not at work. The weight of the evidence establishes that the daily check that Ms. Henrickson implemented after the September 2017 audit was not consistently followed during the last months of the employment. Otherwise the shrinkage would have been detected prior to the July 18, 2018 inventory audit. The inventory issue by itself would be insufficient to establish misconduct in connection with the employment.

The evidence does establish misconduct in connection with the employment based on the excessive unexcused absences. Ms. Henrickson had discretion to leave early as needed, but was well aware that she was required to notify Mr. Barrett each day she left work earlier than scheduled. Ms. Henrickson failed to provide such notice on six occasions between March 2 and July 19, 2018. Accordingly, each of these absences was an unexcused absence under the applicable law.

The evidence establishes a legitimate employer concern in connection with the dress code issues. The warning in the fall of 2017 arose from a misunderstanding. There were extenuating circumstances attending the June 2018 incident. There was no reasonable justification for the dress code violation during the last week of the employment. The July 2018 dress code violation would not by itself be enough to establish misconduct.

The weight of the evidence establishes a pattern of conduct toward the end of the employment that did indeed indicate an intentional and substantial disregard of the employer's interests. The pattern included the relaxed inventory monitoring, the July dress code issue, and the repeated early departures without providing the required notice. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Henrickson was discharged for misconduct in connection with the employment. Accordingly, Ms. Henrickson 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. Henrickson must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The August 27, 2018, reference 02, decision is affirmed. The claimant was discharged on July 20, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been 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 for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs