

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

NICOLE LINGELBACH

Claimant

APPEAL NO. 18A-UI-09322-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 08/05/18

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Nicole Lingelbach filed a timely appeal from the August 31, 2018, reference 03, 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. Lingelbach was discharged on August 4, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on September 25, 2018. Ms. Lingelbach participated. Jason Douma represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-09323-JTT. Exhibits 1 through 6 and A were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to Ms. Lingelbach.

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: Nicole Lingelbach was employed by Casey's Marketing Company as a part-time kitchen employee at a Casey's store in Waukee from December 2017 until August 4, 2018, when Jason Douma, Store Manager, discharged her for attendance. Mr. Douma became Store Manager and Ms. Lingelbach's immediate supervisor in January 2018. Melissa Stockman was and is Kitchen Manager at the Waukee store. Chris Wilkins was and is Assistant Manager at the Waukee store. At the start of the employment, the employer had Ms. Lingelbach electronically acknowledge the employee handbook. The employer provided Ms. Lingelbach with access to an electronic version of the employee handbook via an ADP website. The employer kept a hard copy of the employee handbook in the office at the store. The employee handbook included an attendance policy. Under the policy, Ms. Lingelbach was required to call and speak with a manager or supervisor prior to the scheduled start of her shift if she needed to be absent. Ms. Lingelbach was at all relevant times aware of the absence reporting policy.

Ms. Lingelbach last performed work for the employer on August 1, 2018. On that day, Ms. Lingelbach left work early due to pain in her right arm. Ms. Lingelbach is right-handed. Mr. Wilkins was the manager on duty at that time and approved Ms. Lingelbach's early departure.

Ms. Lingelbach was next scheduled to work at 5:00 a.m. on August 2, 2018. Mr. Wilkins was the manager on duty at that time. Between 4:00 a.m. and 4:30 a.m., Ms. Lingelbach called Mr. Wilkins at his cell phone number. Ms. Lingelbach did not call the store number because she knew the staff did not answer the store phone before the store opened for business. When Mr. Wilkins did not answer his phone, Ms. Lingelbach left a voice mail message for Mr. Wilkins. Ms. Lingelbach then sent Mr. Wilkins a text message indicating that she would be absent from her August 2 shift. Pursuant to the employer's attendance policy, the employer does not accept text messages as appropriate notice of a need to be absent from work. When Mr. Douma arrived for work at 6:00 a.m., Mr. Wilkins shared Ms. Lingelbach's text message with Mr. Douma and Mr. Douma made his decision to discharge her from the employment.

Ms. Lingelbach was next scheduled to work on August 4, 2018. On August 3, Ms. Lingelbach sought medical evaluation and treatment for her continued arm pain at the Mercy West Medical Clinic in Clive. The nurse practitioner who treated Ms. Lingelbach diagnosed nerve pain, gave Ms. Lingelbach an injection, prescribed medication, and provided her with a Return to Work/School Report that indicated Ms. Lingelbach should be excused from work on August 1, 2 and 3 due to a medical issue. Ms. Lingelbach took the note to the workplace on August 3 and left it with Mr. Wilkins. Ms. Lingelbach told Mr. Wilkins that she would see him the following morning and Mr. Wilkins said "okay."

When Ms. Lingelbach reported for her shift on August 4, Mr. Wilkins notified Ms. Lingelbach that she was discharged for attendance. Mr. Douma subsequently documented on August 6, 2018 that Ms. Lingelbach had been discharged for attendance. Mr. Douma further documented that the final absence on August 2, 2018 had been a no-call/no-show, though he knew Ms. Lingelbach had made contact on August 2.

Mr. Douma considered prior absences and reprimands when making the decision to discharge Ms. Lingelbach from the employment. On May 15, 2018, Ms. Lingelbach was almost four hours late for her 5:00 a.m. shift because she overslept. On May 16, 2018, Mr. Douma issued a written reprimand to Ms. Lingelbach in which he stated that further similar conduct would result in suspension or termination of the employment. On July 29, 2018, Ms. Lingelbach was just over five hours late for her 5:00 a.m. shift because she misread the schedule and did not realize she was on the schedule to work that day. On July 30, 2018, Ms. Stockman issued a written reprimand to Ms. Lingelbach in which she stated that further similar conduct would result in a three-day unpaid suspension.

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163

(Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

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 weight of the evidence in the record establishes a discharge for no disqualifying reason. The final absence that triggered the discharge was an excused absence under the applicable law and, therefore, cannot serve as a basis for disqualifying Ms. Lingelbach for unemployment insurance benefits. The absence was due to illness. The employer presented insufficient evidence to rebut Ms. Lingelbach's testimony that she called Mr. Wilkins prior to her shift on August 2, 2018 to give notice of her need to be absent that day. The employer had the ability to present testimony from Mr. Wilkins on this decisive issue of fact, but elected not to present testimony from Mr. Wilkins. The employer omitted reference to the August 2 text message during its testimony in chief. Only after Ms. Lingelbach testified regarding her call to Mr. Wilkins on the morning of August 2 did the employer bring up on rebuttal that Ms. Lingelbach had sent a text message to Mr. Wilkins on the morning on August 2. The weight of the evidence establishes that Ms. Lingelbach called and sent the text message. The employer's decision to omit reference to the text message during its evidence in chief, raises the question of what other material facts may have been omitted at the hearing. Mr. Douma documented that Ms. Lingelbach had been a no-call/no-show on August 2 despite his knowledge that she had made contact with Mr. Wilkins prior to her shift on that date. Ms. Lingelbach testified candidly regarding the attendance matters and reprimands that factored in the discharge. Ms. Lingelbach's assertion that she called Mr. Wilkins prior to the scheduled start of her shift on August 2 is consistent with her statement at the August 30, 2018 fact-finding interview and other indications in the record that Ms. Lingelbach was acting in good faith to preserve the employment. Ms. Lingelbach's testimony is credible and more reliable than Mr. Douma's testimony regarding the events of August 2 through 4. Because the final absence that triggered the discharge was an excused absence under the applicable law, Ms. Lingelbach is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The August 31, 2018, reference 03, decision is reversed. The claimant was discharged on August 4, 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