

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ROBYN K CROUSE
Claimant

APPEAL NO. 19R-UI-02987-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AT&T MOBILITY SERVICES LLC
Employer

OC: 01/27/19
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Administrative Code Rule 871-24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

This matter is before the administrative law judge based on an Employment Appeal Board remand in Hearing Number 19B-UI-01919. Robyn Crouse filed a timely appeal from the February 21, 2019, reference 01, decision that held she was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Ms. Crouse was discharged on January 17, 2019 for excessive unexcused absences. After due notice was issued, a hearing was held on April 30, 2019. Ms. Crouse participated. Karen Stonebraker of Equifax represented the employer and presented testimony through Garrett Blake. Exhibits A through J were received into evidence. Exhibits C through F are confidential medical records and shall be sealed from public view.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Robyn Crouse was employed by AT&T Mobility Services, L.L.C. as a full-time Customer Service Representative from 2014 until January 16, 2019, when the employer discharged her exceeding the allowable number of attendance points under the employer's attendance policy. Garrett Blake, Team Sales Manager, was Ms. Crouse's immediate supervisor and notified Ms. Crouse of the discharge decision.

The final absence that triggered the discharge occurred on October 10, 2018. That absence was based on Ms. Crouse's need to attend a medical appointment regarding an ongoing serious medical issue. The employer assigns attendance points to absences due to illness that are not covered by the Family and Medical Leave Act or the Americans with Disabilities Act. Under the employer's attendance policy, Ms. Crouse was required to submit a schedule trade request in

advance of the appointment date. Ms. Crouse was otherwise required to give notice of the absence prior to the scheduled start of her shift by calling a designated absence reporting number or by using a software application downloaded to her phone. A few days prior to the absence, Ms. Crouse verbally told Mr. Blake of her need to be absent for the medical appointment. Prior to the scheduled start of the shift, Ms. Crouse gave notice of her need to be absent via the software application. Ms. Crouse had not submitted a schedule trade request.

The employer waited until November 29, 2018 to tell Ms. Crouse that the October 10, 2018 absence could or would prompt her discharge from the employment. Ms. Crouse denies that the employer provided any such notice. Between the final absence date and the discharge date, Ms. Crouse attempted in good faith to secure FMLA approval to cover the absence, but her application was rejected. Between the October 2018 final absence and the discharge date, Ms. Crouse continued to report for work and perform her regular duties.

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 discharge was not based on a current act. The final absence that triggered the discharge occurred on October 10, 2018 and occurred with the employer's knowledge. The employer unreasonably waited until more than a month later to tell Ms. Crouse that the absence could or would result in her discharge from the employment. Ms. Crouse then continued to perform work for the employer until January 16, 2019. Because the discharge was not based on a current act, the discharge cannot disqualify Ms. Crouse for unemployment insurance benefits. Because the discharge was not based on a current act, the administrative law judge need not rule on whether the final absence or any earlier absence was an excused or unexcused absence under the applicable law. Ms. Crouse is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The February 21, 2019, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge was not based on a current act. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs