

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRACI J RAMER
Claimant

APPEAL NO. 16A-UI-04505-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NATIONWIDE MUTUAL INSURANCE CO
Employer

OC: 03/27/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Traci Ramer filed a timely appeal from the April 15, 2016, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Ms. Ramer had been discharged on March 30, 2016 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on May 2, 2016. Ms. Ramer participated. Bernadine Bratovich represented the employer.

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: Traci Ramer was employed by6 Nationwide Mutual Insurance Company as a full-time Member Care Representative 2 from May 2015 until March 30, 2016, when Adam Chapman, Personal Lines Customer Service Manager, discharged her for attendance. Mr. Chapman was Ms. Ramer's immediate supervisor. Ms. Ramer's usual work hours were 11:30 a.m. to 10:00 p.m., Sunday through Wednesday. If Ms. Ramer needed to be absent, the employer policy required that Ms. Ramer call the employer Workforce staff at least 30 minutes prior to the start of her shift. The employer's policy also required that Ms. Ramer document the absence in the employer's MyTime system. The establish practice was to make the MyTime entry upon return to the employment after the absence.

The final absence that triggered the discharge occurred on Wednesday, March 30, 2016, when Ms. Ramer did not appear for scheduled overtime at 9:00 a.m. Ms. Ramer had signed up for voluntary overtime on March 28, 2016. Ms. Ramer did not appear for the scheduled overtime because she had been the victim of a burglary the previous evening and had been dealing with the police until 3:00 a.m. Ms. Ramer learned of the burglary when she arrived home at about 11:30 p.m. on March 29, 2016 after getting off work at 10:30 p.m. When she arrived home, she discovered that her sliding glass door had been forced open. The police were able to determine that Ms. Ramer's neighbor had committed the burglary. After addressing the burglary situation

with the police into the early hours of the morning, Ms. Ramer knew she would not be sufficiently rested to appear for the overtime work at 9:00 a.m. Before 8:00 a.m. on March 30, Ms. Ramer telephoned the employer's Workforce staff to advise that she would be absent for the overtime work, but would appear for her normal shift. Ms. Ramer actually appeared at the workplace at 10:30 a.m., an hour prior to the scheduled start of her regular shift. At that time, Ms. Ramer sent an email message to Mr. Chapin to let him know the circumstances under which she had not appeared for the overtime work and to request a meeting to discuss the absence. Mr. Chapman told Ms. Ramer that she would likely be discharged as a result of the absence and that he would need to review the matter with the employer's human resources staff. Mr. Chapman reviewed the absence and Ms. Ramer's attendance history with Bernadine Bratovich, Associate Relations Consultant, and then notified Ms. Ramer that she was discharged for attendance.

The next most recent absence that factored in the discharge occurred on March 16, 2016, when Ms. Ramer left work early due to chest pain. Ms. Ramer suffers from heart disease. Ms. Ramer spoke to Mr. Chapman about her need to leave before she left early and Mr. Chapman approved the early departure. Ms. Ramer went from the workplace directly to Mercy Hospital.

The employer considered additional earlier absences in making the decision to end Ms. Ramer's employment. The next most recent absence occurred on March 2, 2016, when Ms. Ramer was absent so that she could go to a medical appointment. Ms. Ramer had forgotten about the appointment and made a late request to Mr. Chapman for the time. Ms. Ramer believed the absence was covered by her use of "flex time." Ms. Chapman had additional earlier absences that factored in the discharge. Most of those prior absences were attributable to weather or Ms. Ramer's bonafide mental health issues relating to the recent passing of her husband and were properly reported to the employer.

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.

The weight of the evidence fails to establish a current act of misconduct. The final absence that triggered the discharge was an excused absence under the applicable law. That absence occurred because Ms. Ramer had been the victim of a crime. The crime and police investigation were matters beyond Ms. Ramer's control. Ms. Ramer did not finish her involvement in the police investigation until 3:00 a.m. Ms. Ramer reasonably concluded that she would not be sufficiently rested to appear for the 9:00 a.m. overtime that she signed up for two days earlier. Ms. Ramer provided proper notice to the employer of her need to be absent from the 2.5 hours of overtime. Ms. Ramer appeared on time for her regular shift. The absence from the overtime on March 30, 2016 cannot serve as the basis for disqualifying Ms. Ramer for unemployment insurance benefits. The next most recent absence occurred on March 16, 2016 and was also an excused absence under the applicable law. The absence was due to illness and was properly reported to the employer. The next most recent absence occurred on March 2, 2016 and would not constitute a current act for purposes of determining Ms. Ramer's unemployment insurance benefit eligibility.

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

DECISION:

The April 15, 2016, reference 01, decision is reversed. The claimant was discharged on March 30, 2016 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

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