

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AUTUMN L BUCK

Claimant

APPEAL NO. 16A-UI-06080-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC

Employer

OC: 05/08/16

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Autumn Buck filed a timely appeal from the May 25, 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. Buck was discharged on April 21, 2016 for excessive unexcused absenteeism. After due notice was issued, a hearing was held on June 17, 2016. Ms. Buck participated. Sarah Ochoa, Community Liaison, represented the employer. Exhibits One through Six 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: Autumn Buck was employed by Tyson Fresh Meats, Inc. as a full-time security officer from 2013 until April 21, 2016, when Will Sager, Complex Human Resources Manager, discharged her from the employment for attendance. During the last few months of the employment, Ms. Buck was assigned to the first shift of 5:00 a.m. to 1:00 p.m. Before then, Ms. Buck was assigned to the overnight shift of 11:00 p.m. to 7:00 a.m. Ms. Buck's immediate supervisor was Fanny Duarte, Security Chief. The employer has a written attendance policy that was conspicuously posted in the workplace. That attendance policy required that employees report the need to be absent or late at least 30 minutes before the scheduled start of the shift. The employer provided Ms. Buck with Ms. Duarte's cell phone number. The employer expected Ms. Buck to call or send a text message to Ms. Duarte if she needed to be absent or late. Ms. Duarte was aware of that expectation.

The final absence it triggered the discharge occurred on April 19, 2016. On that day, Ms. Buck sent a text message to Ms. Duarte at 4:49 a.m. to notify Mr. Duarte that she would be absent from her shift. Ms. Buck had been arguing with her boyfriend in the early hours of the morning and was too tired to report for work. Ms. Buck suffers from bipolar disorder and was experiencing increased anxiety in connection with the relationship issues with her boyfriend.

Ms. Buck had also been absent the day before, April 18, for personal reasons and had sent Ms. Duarte a text message at 9:41 a.m. to indicate that she would be absent from the shift that had started at 5:00 a.m. Ms. Buck had also been late getting to work on April 17, 2016, due to transportation issues. Ms. Buck had traveled to Sioux City on the evening of April 16 to visit family and with the intent to return to Storm Lake the next morning in time to report for a shift scheduled to start at 7:00 a.m. Ms. Buck's residence was ten minutes from the workplace. On the morning of April 17, Ms. Buck's vehicle had problems with its starter. At 6:30 a.m., Ms. Buck sent a text message to Ms. Duarte to let her know that she was stranded out of town. Ms. Buck reported to work at 10:12 a.m.

The employer considered earlier absences when making the decision to end Ms. Buck's employment. On July 14, 2015, Ms. Buck left work early due to illness and properly reported her need to leave to her supervisor. The supervisor approved the early departure. On July 30, 2015, Ms. Buck reported for work later than her usual start time, but had previously notified the employer of her need to be late and the employer had excused the late arrival. On November 6, 2015, Ms. Buck was scheduled to work at 11:00 p.m. Ms. Buck sent a text message to the supervisor at 10:48 p.m. indicating that she would be late due to transportation problems. Ms. Buck found someone to cover the shift for her and did not report for any part of the shift or give notice to the supervisor that she would be absent for the entire shift. On March 7, 2016, Ms. Buck was absent due to illness and properly reported the absence to the employer.

The employer's decision to discharge Ms. Buck followed multiple reprimands that the employer issued to Ms. Buck for attendance. The employer issued two such reprimands to Ms. Buck in November 2015. The employer additional reprimands in January 2016 and March 25, 2016.

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 evidence in the record establishes excessive unexcused absences. The evidence indicates that the employer's decision to discharge Ms. Buck on April 21, 2016 followed three consecutive unexcused absences on April 17, 18 and 19. On the evening of April 16, Ms. Buck elected to travel out of town despite the fact that she was scheduled to work early the next morning.

Ms. Buck's transportation to the employment was a matter of personal responsibility. On April 18 and 19, Ms. Buck was absent for personal reasons and notified the employer late of her need to be absent. Even without taking into consideration any of the earlier absences, these three in April 2016 are enough to constitute excessive unexcused absences. Each of these absences occurred in the context of multiple prior warnings for attendance. The evidence fails to establish that Ms. Buck's mental health issues prevented her from providing proper notice to the employer of her need to be absent. The evidence establishes one additional unexcused absence in November 2015, when Ms. Buck was absent due to transportation issues and provided late notice to the employer of her need to be absent.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Buck was discharged for misconduct in connection with the employment. Accordingly, Ms. Buck is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged.

DECISION:

The May 25, 2016, reference 01, decision is affirmed. The claimant was discharged for misconduct. 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 allowance. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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