

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**NICOLE F SILBAUGH**  
Claimant

**APPEAL NO. 18A-UI-10411-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GENESIS DEVELOPMENT**  
Employer

**OC: 09/23/18**  
**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.5(1) – Voluntary Quit

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the October 11, 2018, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged for no disqualifying reason. After due notice was issued, a hearing was held on November 1, 2018. Claimant Nicole Silbaugh did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Melinda Austin represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO) and received Exhibits 1 through 7 into evidence.

**ISSUES:**

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

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Genesis Development provides home and community based support for intellectually disabled adults. Nicole Silbaugh was employed by Genesis Development as a full-time Team Leader until September 21, 2018, when the employer discharged her for attendance. Ms. Silbaugh began with Genesis Development in 2009. As a Team Leader, Ms. Silbaugh supervised a group home where Genesis Development clients resided. Ms. Silbaugh supervised five to eight employees and shared responsibility for enforcing the employer's policies, including the attendance policy. Maureen Burkowski, Residential Director, was Ms. Silbaugh's immediate supervisor. If Ms. Silbaugh needed to be absent from work, the employer's written attendance policy required that Ms. Silbaugh contact and speak with Ms. Burkowski or the on-call supervisor at least two hours prior to the scheduled start of her shift. Under the employer's written attendance policy, an absence for three consecutive days without notice to employer was deemed job

abandonment. The attendance police was contained in the staff handbook that Ms. Silbaugh reviewed and acknowledged on an annual basis. Ms. Silbaugh most recently reviewed and acknowledged the staff handbook on September 12, 2018.

On the weekend that preceded Monday, September 17, 2018, Ms. Silbaugh contacted Team Leader Beverly Rosenow and asked whether Ms. Rosenow could take her off the schedule for the next week. Ms. Rosenow creates the schedules for the group homes operated by Genesis Development. Ms. Silbaugh told Ms. Rosenow that she needed to be taken off the scheduled for the week because her husband had injured his back and could not drive. Ms. Rosenow told Ms. Silbaugh that she would make appropriate changes to the schedule, but reminded Ms. Silbaugh that she was responsible for notifying the supervisor of her need to be absent. Ms. Silbaugh did not contact Ms. Burkowski to request time off. Ms. Silbaugh was absent from her 6:00 a.m. to 2:00 p.m. on Monday, September 17 without notifying Ms. Burkowski. On that evening, Ms. Silbaugh contacted Ms. Burkowski to ask whether she needed to respond to an after-hours call for assistance from a group home staff member and asked whether she had to respond to the call. Ms. Silbaugh was the designated on-call person at that time. Ms. Silbaugh advised Ms. Burkowski at that time that she had not worked her shift that day due to medical issues. Ms. Silbaugh was thereafter absent on September 18, 19 and 20 without providing notice to Ms. Burkowski. On September 21, Ms. Burkowski notified Ms. Silbaugh that she was discharged from the employment for being absent without proper notice.

Ms. Silbaugh established an original claim for benefits that was effective September 23, 2018, but has received no benefits in connection with the claim.

#### **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 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 in the record establishes a discharge for misconduct in connection with the employment. Ms. Silbaugh was absent four consecutive days without providing appropriate notice to the employer as required by the employer's absence reporting policy. Each of the absences was an unexcused absence under the applicable law. Ms. Silbaugh's

four consecutive unexcused absences were excessive and were sufficient to demonstrate an intentional and substantial disregard of the employer's interests. Ms. Silbaugh 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. Silbaugh must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

The case could also be analyzed as a voluntary quit.

Iowa Code section 96.5(1) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

Ms. Silbaugh's three consecutive no-call/no-show absences on September 18, 19 and 20 were in violation of the employer's policy and were sufficient to establish a voluntary quit without good cause attributable to the employer under Iowa Administrative Code rule 871-24.25(4). Accordingly, Ms. Silbaugh 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. Silbaugh must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

Because Ms. Silbaugh has not received any unemployment insurance benefits in connection with the claim, there is no overpayment of benefits to address in this decision.

**DECISION:**

The October 11, 2018, reference 01, decision is reversed. The claimant was discharged on September 21, 2018 for misconduct in connection with the employment based on excessive unexcused absences. In the alternative, the claimant voluntarily quit effective September 20, 2018 without good cause attributable to the employer. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs