

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

REBECCA A OWENS
Claimant

APPEAL NO. 13A-UI-14278-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLAZIN WINGS INC
Employer

OC: 12/01/13
Claimant: Appellant (5)

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

STATEMENT OF THE CASE:

Rebecca Owens filed a timely appeal from the December 18, 2013, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on January 22, 2014. Ms. Owens participated. Roxanne Rose of ADP represented the employer and presented testimony through Rodney Jones.

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: Rebecca Owens was employed by Blazin Wings, Inc., doing business as Buffalo Wild Wings, as a part-time food server from July 31, 2013 until December 1, 2013, when Mitch Maffin, General Manager, discharged her from the employment for attendance.

The employer's policy required that Ms. Owens notify the employer at least two hours prior to scheduled start of her shift if she needed be absent. That policy was in the employer's handbook. The employer provided Ms. Owens with a copy of the handbook on her first day of employment. The employer had an unwritten policy that required Ms. Owens to contact the employer if she needed to be late for work. Ms. Owens was aware of the policy.

The final incident that triggered the discharge occurred on November 30, 2013. On that day, Ms. Owens overslept and missed a shift that was supposed to start at 4:00 p.m. At around 5:30 p.m., Ms. Owens telephoned the workplace and spoke to manager Rodney Jones, who told Ms. Owens that she was not needed that evening and that she would need to come in the next day to speak with Mr. Maffin about her employment status.

Ms. Owens subsequently heard from a coworker that she was to be discharged from the employment. On December 1, 2013, Ms. Owens contacted the workplace prior to the scheduled start of her shift and spoke with Mr. Maffin. Mr. Maffin initially indicated to

Ms. Owens that she needed to come to the workplace and meet with him to discuss her employment status. However, because Ms. Owens would have to bear the expense of a cab to get to the workplace, Mr. Maffin went ahead and told Ms. Owens during the telephone call that she was discharged from the employment for attendance.

Ms. Owens had additional absences during the employment. On August 17 and September 30, Ms. Owens was absent from her shift. The employer documented the absences as unexcused absences under the employer's policy, meaning, at minimum, that Ms. Owens had not provided proper notice of the absences. On October 24, Ms. Owens was absent from her shift. The employer documented the absence as an excused absence under the employer's policy, but the employer has no additional information about the absence. On November 1, Ms. Owens was absent from her shift and did not properly notify the employer of her need to be absent.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). 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.

The weight of the evidence establishes that Ms. Owens was discharged by Mr. Maffin as part of the telephone call on December 1, 2013.

Iowa Code section 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.

871 IAC 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.

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 is sufficient to establish four absences that would be unexcused absences under the applicable law. Those absences include the final absence on November 30, 2013, when Ms. Owens was absent because she overslept and contacted the employer an hour and a half into her shift. The additional unexcused absences occurred on August 17, September 30 and November 1, 2013, when Ms. Owens was absent and failed to provide proper notice to the employer. The absence on October 24 was due to illness, was

properly reported to the employer and was an excused absence under the applicable law. Ms. Owens' unexcused absences were excessive and constituted misconduct in connection with the employment. Accordingly, Ms. Owens 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 for benefits.

DECISION:

The Agency representative's December 18, 2013, reference 02, decision is modified as follows. 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, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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