

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TONYA L MORGAN
Claimant

APPEAL NO. 19A-UI-09823-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PALMER COMPANIES INC
Employer

OC: 07/07/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Tonya Morgan filed a timely appeal from the December 2, 2019, reference 03, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Ms. Morgan was discharged on November 6, 2019 for repeated tardiness in reporting for work after being warned. After due notice was issued, a hearing was held on January 9, 2020. Ms. Morgan participated. Paul Dudley 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: The employer, Palmer Companies, Inc., is a temporary employment agency that does business as Palmer Group. Tonya Morgan established her employment with the Palmer Group in July 2019. Recruiter Paul Dudley was Ms. Morgan principal point of contact at Palmer Group. Before Mr. Dudley placed Ms. Morgan in an assignment, he told her that if she needed to be absent from work or late for work, she needed to contact him before the start of her shift so that Palmer Group would have sufficient time to notify the client business of the absence. Mr. Dudley also encouraged Ms. Morgan to notify the client business directly.

On August 12, 2019, Ms. Morgan began a full-time, temp-to-hire work assignment at Wells Fargo in West Des Moines. The Wells Fargo campus is located west of the Interstate 35-Mills Civic Parkway Intersection. At all relevant times, Ms. Morgan resided in Des Moines in a neighborhood north of the State Capitol. Ms. Morgan's home was approximately 15 miles from the workplace. The contract period for the temp-to-hire assignment was three months. By the end of the contract period, Wells Fargo was to make a decision regarding whether to hire Ms. Morgan as a direct employee. Ms. Morgan spent several weeks in training before she transitioned to her regular duties as a card services worker in Wells Fargo's fraud department. While Ms. Morgan was in training, her work hours were 8:00 a.m. to 5:00 p.m., Monday through

Friday. Effective September 22, 2019, Ms. Morgan's work hours became noon to 11:00 p.m., Sunday, Monday, Thursday and Friday.

Ms. Morgan last performed work in the Wells Fargo assignment on November 6, 2019. On November 6, Mr. Dudley notified Ms. Morgan that Wells Fargo had elected to end the assignment and to not hire Ms. Morgan as a direct employee due to her history of tardiness during the assignment. Ms. Morgan left work early on October 31, 2019 due to illness and with proper notice to the Wells Fargo supervisor. The Wells Fargo supervisor specifically told Ms. Morgan that the earlier departure would not factor in the determination of whether she would be hired by Wells Fargo.

The final incident of tardiness that factored in Wells Fargo's decision to end the assignment was Ms. Morgan's late arrival on October 27, 2019, when Ms. Morgan reported for work 13 minutes late. Ms. Morgan had not budgeted sufficient commuting time in the context of the first snow of the season. There were no travel advisories in place for the Des Moines metropolitan area on that day. Ms. Morgan called the Wells Fargo absence reporting line, but did not notify Palmer Group of her late arrival.

Ms. Morgan had previously been late for work for personal reasons on many occasions. Those late arrivals occurred on August 12, August 13, August 14, August 23, August 29, September 9, September 16, September 17, September 19, September 20, September 27, and October 3, 2019. Ms. Morgan had also been late on August 22, so that she could take her son to a morning medical appointment. Ms. Morgan notified Wells Fargo, but did not notify Palmer Group. Ms. Morgan had also been late on September 4, when her daughter's medical appointment ran long. On that day, Ms. Morgan contacted Wells Fargo to advise she would be late, but did not contact Palmer Group.

Before Wells Fargo's decision to terminate the assignment, Mr. Dudley had twice spoken with Ms. Morgan about the need to be punctual in reporting to the assignment. These discussions occurred on August 15, 2019 and October 11, 2019.

At the time Ms. Morgan was discharged from the Wells Fargo assignment, Palmer Group did not have other work for her, but was willing to pursue additional assignments for her.

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 misconduct in connection with the employment. Each of the late arrivals that factored in the discharge from the assignment was an unexcused absence under the applicable law. All but two were for personal reasons within Ms. Morgan's control. The two late arrivals associated with the children's medical appointments were not properly reported to the employer. Ms. Morgan's unexcused tardiness was excessive and demonstrated an intentional and substantial disregard both for her employer and for Wells Fargo. Ms. Morgan is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Morgan must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The December 2, 2019, reference 03, decision is affirmed. The claimant was discharged on November 6, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. 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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