

IOWA DEPARTMENT OF INSPECTIONS & APPEALS
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

Appeal Number: 13IWDUI325
OC: 5/19/13
Claimant: Appellant (2)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

SARA LARGE
1016 17TH AVE
COUNCIL BLUFFS, IA 51501

IOWA WORKFORCE DEVELOPMENT
JON NELSON
1000 E. GRAND AVE.
DES MOINES, IA 50309

JONI BENSON, IWD

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the Department. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

July 17, 2013

(Dated and Mailed)

STATEMENT OF THE CASE

Sara Large ("Ms. Large") filed an appeal from a decision issued by Iowa Workforce Development ("IWD") dated June 19, 2013 (reference 01). In this decision, IWD determined that Ms. Large was not eligible to receive unemployment insurance benefits. The decision stated that Ms. Large was discharged from work for excessive unexcused absenteeism and tardiness after being warned. Ms. Large's employer was Iowa Workforce Development.

The case was transmitted from IWD to the Department of Inspections and Appeals on June 27, 2013 to schedule a contested case hearing. A Notice of Telephone Hearing was mailed to all parties on July 5, 2013. On July 15, 2013, a telephone appeal hearing was held before Administrative Law Judge Carol J. Greta. IWD regional manager Paula Fastenau represented

IWD, and presented testimony. Ms. Large appeared personally and presented testimony on her own behalf. IWD submitted 35 pages of documents, which were admitted as evidence in the case.

ISSUE

Whether the claimant was discharged for misconduct and is, therefore, ineligible to receive unemployment insurance benefits.

FINDINGS OF FACT

At the time of her termination, Sara Large was a probationary employee with Iowa Workforce Development, working as a workforce advisor with the Promise Jobs program. She began her employment with IWD on December 7, 2012 and was terminated from that employment on May 22, 2013.

During the 5-1/2 months of her probationary employment with IWD, Ms. Large was absent or tardy as follows:

01/03, ill (called IWD to so advise; had to use partial vacation leave)
01/28, ill (called to so advise)
01/31, ill (called to so advise; had to use partial vacation leave)
03/07, vacation (pre-approved)
03/13, tardy without calling in (arrived at 8:11 a.m., 11 minutes late)
03/14, ill (called to so advise)
03/22, ill (called to do advise)
04/22, ill (called to so advise)
05/03, funeral leave (pre-approved)
05/06, ill (called to so advise)
05/08, child ill, received permission to leave work 1.25 hours early
05/13, ill (called to so advise)
05/14, ill (called to so advise; had to use partial vacation leave)
05/15, left work 30 minute early due to personal emergency (house fire)
05/16, advised supervisor via text message that she would be gone all day to meet with insurance adjuster
05/17, advised supervisor still needed to meet with insurance adjuster

As a result of being tardy on March 13, Ms. Large received a written work directive (warning) from IWD dated March 13, and citing her late arrival earlier that day without notifying her supervisor that she would be late. The letter ended with the following admonition, "It is your responsibility to come to me for clarification if you have any questions about this work directive. At any time you may be given additional written work directives."

The written statement of IWD on the "Fact Finding Worksheet for Misconduct" states as follows:

Final incidents were on 05/15-05/17 on 05/15 she left work early due to a house fire (30 minutes early). On 05/15/13 she indicated she needed to meet with the insurance agent. She said she would be back on 05/17/13. On 05/17/13 she called in and said she was still coordinating with the insurance agent.

In filling out the Worksheet, IWD stated that Ms. Large properly reported the absences. She returned to work the next Monday, May 20, and was terminated on May 22. By decision dated June 19, 2013, IWD informed Ms. Large that she was deemed to have been discharged for

excessive unexcused absenteeism and tardiness after being warned, and was thus ineligible to receive unemployment insurance benefits. Ms. Large filed a timely appeal from that decision.

In support of her appeal, Ms. Large pointed out that, other than her one tardy arrival at work, she gave notice to IWD of her absences and that she had leave to take for all of her absences. Ms. Fastenau agreed that Ms. Large was never in a “leave without pay” situation, although often different combinations of sick leave, vacation, and family sick leave had to be used to cover the times Ms. Large was absent. Other than the one tardy, there is no allegation that Ms. Large failed to inform IWD that she would be absent.

IWD believes that the absences on May 15 – 17 were excessive and unexcused because “unplanned leave really impacts the [Promise Jobs] team and the effectiveness of our team,” and that unplanned absences have a particularly hard impact when the absent employee is probationary because a probationary employee is in training much or all of the time during the probationary period. (Fact Finding Worksheet) Ms. Large had different leave balances to cover her absences, but IWD, according to Ms. Fastenau, was concerned that she was using her leave as fast as she accumulated it. (Fastenau Testimony; Fact Finding Worksheet)

REASONING AND CONCLUSIONS OF LAW

An individual is disqualified from receiving unemployment insurance benefits if she has been discharged for misconduct in connection with employment.¹ The employer has the burden of proving that the claimant is disqualified from receiving benefits because she was discharged for misconduct.²

Misconduct is a deliberate act or omission which constitutes a material breach of the employee’s duties and obligations. It is limited to conduct which demonstrates willful or wanton disregard of an employer’s interest, such as deliberate violation or disregard of standards of behavior that the employer has the right to expect, or recurrent careless or negligence that shows an intentional and substantial disregard of the employer’s interests or the employee’s obligations. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, isolated incidents of ordinary negligence, and good faith errors in judgment are not misconduct.³

The Department’s regulations provide that “excessive unexcused absenteeism” constitutes misconduct, except where an employee is absent because of illness or “other reasonable grounds” and properly reports the absence to the employer.⁴ Habitual absenteeism as a result of “matters of purely personal responsibilities,” such as transportation, can constitute misconduct.⁵ Whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings.⁶ A discharge for misconduct, however, cannot be based on a past act or acts. The misconduct must be a current act.⁷

There is no doubt in this case that Ms. Large had a lengthy history of *excused* absenteeism and one unexcused tardy prior to her final absences on May 15 – 17, 2013. None of the absences are unexcused because Ms. Large was allowed to use sick leave, family sick leave, or vacation

1 Iowa Code § 96.5(2) (2013).

2 Iowa Code § 96.6(2) (2013).

3 871—Iowa Administrative Code (IAC) 24.31(1).

4 871—IAC 24.32(7).

5 *Harlan v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 192, 194 (Iowa 1984).

6 *Higgins v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984).

7 871—IAC 24.32(8).

for her absences. The challenge for IWD is to prove that Ms. Large's final absence, that which triggered her termination, was unexcused and excessive. While past acts can be considered for purposes of determining the magnitude of the current violation, the current act must constitute misconduct in order to disqualify the claimant.⁸

Ms. Large had one written warning from IWD, and that was for her unexcused tardiness of March 13, 2013. She was not tardy after that. This administrative tribunal assumes *arguendo* that Ms. Fastenau had conversations with Ms. Large regarding the importance of faithful attendance at work, especially during her probationary period. But those conversations do not rise to the level of a directive to Ms. Large that she was forbidden to use her leave to tend to the meetings with her insurance agent regarding her house fire.

Our courts have found the existence of excessive unexcused absenteeism where a former employee was late several times without calling to advise her employer that she would be late⁹ and where former employees failed to show up and did not make any attempt to contact their employers.¹⁰ Ms. Large did not fail to contact IWD when she found it necessary to be absent. She was not told by IWD that she could not leave early on May 15 or that she did not have permission to be absent May 16 and 17.

It is understandable that IWD was concerned about Ms. Large's future attendance record, particularly given the nature of her position with IWD. However, lawfully terminating Ms. Large's employment and doing so for misconduct are two different questions. There is insufficient evidence in the record to show that Ms. Large's absences on May 15 – 17 constituted misconduct.

DECISION

Iowa Workforce Development's decision dated June 19, 2013 (reference 01), is REVERSED. IWD failed to prove that Ms. Large's discharge was for misconduct. IWD shall take any action necessary to implement this decision.

cjg

⁸ *Id.*; *Flesher v. Iowa Department of Job Service*, 372 N.W.2d 230, 234 (Iowa 1985).

⁹ *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984).

¹⁰ *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989); *Armel v. Employment Appeal Bd.*, 743 N.W.2d 871 (Iowa App. 2007).