

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

SUZANNE M WENNER
Claimant

APPEAL NO. 18A-UI-08851-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AJS OF DES MOINES INC
Employer

OC: 07/29/18
Claimant: Respondent (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 13, 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 on July 30, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on September 10, 2018. Claimant Suzanne Wenner did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Scott Schwieson represented the employer and presented additional testimony through Joan Hitzel and Tyrel Lickteig. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 13 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of documenting the employer's participation in the fact-finding interview.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant must repay 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: Suzanne Wenner was employed by AJS of Des Moines, Inc, d/b/a Service Master by Rice, as a full-time Area Manager from March 12, 2018 until July 30, 2018, when Scott Schwieson, Regional Director of Operations, and the business owners discharged her for attendance and dishonesty in connection with the final absence. Mr. Schwieson was Ms. Wenner's immediate supervisor.

As the Area Manager assigned to Marshalltown, Ms. Wenner was supposed to be the employer's lead and primary disaster restoration representative for the Marshalltown community. Ms. Wenner's core work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday. Ms. Wenner was a salaried employee. As such, Ms. Wenner was expected to be available for up to 50 hours of work per week. In the event, the employer needed Ms. Wenner to work more than 50 hours per week, the employer would provide additional compensation.

The sole absence and incident that factored in the discharge occurred on July 27, 2018. That absence followed the devastating tornado that hit Marshalltown on July 19, 2018 and a corresponding substantial increase in the demand for the employer's services. At the time of Ms. Wenner's absence, the employer had dozens of employees from other communities assisting with operations in Marshalltown. At 5:58 a.m. on July 27, Ms. Wenner contacted a Project Manager who was not her supervisor to advise that she was ill and would be absent from work. Ms. Wenner was well aware that if she needed to be absent from work, she was required to notify Mr. Schwieson or the business owners of her need to be absent. At 9:06 a.m., Ms. Wenner contacted a project manager in Marion and offered to bring a piece of equipment to Marion. The project manager declined the offer. That afternoon, Ms. Wenner dropped by the Marion Service Master office just to chat with the Marion project manager and made no reference to being ill earlier in the day. As Ms. Wenner made her various contacts with the employer July 27, Mr. Schwieson was alerted to those contacts and the substance of the contacts. It became readily apparent to the employer that Ms. Wenner had been dishonest in asserting a need to be absent due to illness. When Mr. Schwieson met with Ms. Wenner to discuss the matter, Ms. Wenner asserted she had traveled from Marshalltown to Cedar Rapids to go to the doctor, but was unable to substantiate that assertion.

Ms. Wenner established a claim for benefits that Iowa Workforce Development deemed effective July 29, 2018 and received \$3,174.00 in benefits for the six-week period of July 29, 2018 through September 8, 2018. AJS of Des Moines, Inc. is a base period employer for purposes of the claim.

On August 10, 2018, a Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Wenner's separation from the employer. Mr. Schwieson and Joan Hitzel represented the employer at the fact-finding interview.

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).

Ordinarily, 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.

While a disqualifying discharge for attendance usually requires *excessive unexcused* absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See *Sallis v. Employment Appeal Board*, 437 N.W.2d 895 (Iowa 1989). In *Sallis*, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence.

The evidence in the record establishes misconduct in connection with the employment based on Ms. Wenner's July 27, 2018 absence. The weight of the evidence establishes that Ms. Wenner was intentionally dishonest with the employer when she notified the project manager, not her supervisor, that she would be absent due to illness. The weight of the evidence establishes that Ms. Wenner was not in fact ill that day, but simply did not wish to appear for work that day, despite the employer's critical need for her services in the aftermath of the natural disaster in Marshalltown. Ms. Wenner purposely avoided speaking directly with her supervisor or one of the owners. Ms. Wenner was well enough to offer to drive from Marshalltown to Marion just three hours after she told the employer she would not be appearing for her work duties in Marshalltown due to illness. Ms. Wenner was well enough to in fact drive to Cedar Rapids and drop by the employer's Marion office to make small talk. Despite this, Ms. Wenner elected not to appear for work. The absence, in light Ms. Wenner's dishonesty, and her duties demonstrated an intentional and substantial disregard of the employer's interests.

Because the evidence establishes a discharge for misconduct in connection with the employment, Ms. Wenner 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. Wenner must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Wenner received \$3,174.00 in benefits for the six-week period of July 29, 2018 through September 8, 2018, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Wenner received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Wenner is required to repay the overpaid benefits.

The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The August 13, 2018, reference 01, decision is reversed. The claimant was discharged on July 30, 2018 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 ten times her weekly benefit allowance. The claimant must meet all other eligibility requirements. The claimant is \$3,174.00 in benefits for the six-week period of July 29, 2018 through September 8, 2018. The claimant must repay that amount. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs