

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

KENNA M FELIX
Claimant

APPEAL NO. 18A-UI-09841-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEABOARD TRIUMPH FOODS LLC
Employer

OC: 04/15/18
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 20, 2018, reference 04, 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 August 29, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on October 10, 2018. Claimant Kenna Felix participated. Christina Scott represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1, 2 and 3 into evidence. The materials from the September 14, 2018 fact-finding interview were not available to the Appeals Bureau as of the time of the appeal hearing.

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: Kenna Felix was employed by Seaboard Triumph Foods, L.L.C. as a full-time general laborer during two distinct periods of employment. The most recent employment began on July 9, 2018 and ended on August 29, 2018, when Sandra Munoz, Human Resources Clerk, discharged her for attendance. If Ms. Felix needed to be absent from work, the employer's written attendance policy required that she call the automated absence reporting number at least 30 minutes prior to the scheduled start of her shift and leave a message in response to prompts. Ms. Felix was required to state her name, ID number, and the reason for the absence. The absence reporting requirement was set forth in the handbook the employer had Ms. Felix acknowledge on July 11, 2018. Ms. Felix was aware of the absence reporting requirement. Supervisor Juan Popoca

was Ms. Felix's immediate supervisor. Ms. Felix's regular work hours were 5:45 a.m. to 2:15 p.m., Monday through Friday. Ms. Felix was also required to work on Saturday at 5:45 a.m. as needed.

The final absence that triggered the discharge occurred on August 22, 2018. Ms. Felix had left work early on August 21, 2018 with Mr. Popoca's permission after she went to the nurse's office due to issue with a tooth. Ms. Felix needed to have the tooth pulled, but was concerned that her employment would be in jeopardy if she was absent to have the tooth pulled. Ms. Felix specifically raised this concern with Mr. Popoca, who advised Ms. Felix that she would not be discharged in connection with an absence to get her tooth pulled. On August 22, Ms. Felix provided timely and proper notice of her need to be absent to have her tooth pulled. When Ms. Felix returned to work, she provided the employer with a medical excuse that covered the absence. The employer nonetheless discharged her from the employment a week later.

The employer considered earlier absences when making the decision to discharge Ms. Felix from the employment. On July 18, Ms. Felix was absent because the starter went out in her car. Ms. Felix learned about the car problem as she loaded her children, three-year-old and her one-year-old into the vehicle at 4:45 a.m. so that she could take them to the day care provider and get to work by 5:45 a.m. It would usually take Ms. Felix 30 minutes from the time she left home to drop off the children and get to work. When Ms. Felix discovered the car problem, she attempted to reach a coworker for a ride, but her coworkers were enroute to work and did not want to risk being late. Ms. Felix attempted to secure a ride from someone else, but was unable to secure a ride to get her child to the child care provider or get to work that day. Ms. Felix provided timely and appropriate notice to the employer of her need to be absent from work. On August 1, 2, 3 and 6, Ms. Felix was absent due to tonsillitis and properly notified the employer. On Saturday, August 18, 2018, Ms. Felix was absent from work due to a lack of child care and properly notified the employer.

The employer had not issued any reprimands to Ms. Felix during the employment. On July 30, 2018, the employer transitioned to a new attendance policy. In connection with the transition, the employer notified employees, including Ms. Felix, that all employees would be reset to zero attendance points. In other words, in connection with implementing the new attendance system, the employer notified Ms. Felix that her absences prior to July 30, 2018 would not be held against 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 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 establishes a discharge for no disqualifying reason. The final absence that triggered the discharge was due to illness, was properly reported to the employer, and therefore was an excused absence under the applicable law. Accordingly, that absence cannot serve as a basis for a finding of misconduct or disqualification for unemployment insurance benefits. Ms. Felix is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

Because the final absence was an excused absence under the applicable law, the administrative law judge need not consider the earlier absences or whether they were excused under the applicable law. In any event, the evidence would not establish excessive unexcused absences. Each of the prior absences due to illness was properly reported to the employer and was an excused absence under the applicable law. The August 18 absence was unexcused under the applicable law because it concerned a lack of child care, a matter of personal responsibility. The absence on July 18, 2018, was due to transportation, a matter of personal responsibility, but there were extenuating circumstances including the last minute discovery of the starter issue, the need to factor the children in the resolution of that matter, the lack of alternative last-minute transportation to work, and the employer's announcement that absences period to July 30 would not be counted.

DECISION:

The September 20, 2018, reference 04, decision is affirmed. The claimant was discharged on August 29, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs