

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BARBARA A KUNCH
Claimant

APPEAL NO. 12A-UI-06662-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KUM & GO LC
Employer

OC: 04/29/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 24, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 27, 2012. Claimant participated. Roger Thorne represented the employer.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Barbara Kunch was employed by Kum & Go as a part-time sales associate from March 2011 until March 31, 2012, when Roger Thorne, Store Manager, discharged her for attendance. Mr. Thorne was Ms. Kunch's immediate supervisor. On March 31, 2012, Ms. Kunch was scheduled to work from 4:00 p.m. to 11:30 p.m. That morning, Ms. Kunch learned that her usual babysitter was unavailable. Ms. Kunch was unable to find an alternative babysitter. Ms. Kunch contacted coworkers that morning to see whether they could cover all or part of her shift. The overnight sales associate agreed to come in at 9:00 p.m., but could not come in any earlier. Ms. Kunch tried but was unable to find another employee to cover the rest of shift. Ms. Kunch had multiple conversations with Mr. Thorne that morning. Mr. Thorne declined to work the shift and refused to provide Ms. Kunch with the phone number of a coworker, Phillip, so that Ms. Kunch could see whether he could cover the shift. Mr. Thorne told Ms. Kunch multiple times that day that if she could not appear for the shift or find someone to cover it, she would be discharged from the employment. When Ms. Kunch had exhausted all opportunities to find coverage for her shift, Mr. Thorne advised that he had documented her quit from the employment. Ms. Kunch indicated she wished to continue in the employment. After Mr. Thorne communicated to Ms. Kunch that the employment was deemed terminated, he eventually had Phillip cover most of the shift. There were no prior absences for anything other than illness properly reported to the employer. There was no formal attendance policy, but Mr. Thorne expected at least two hours' notice of an employee's need to be absent.

REASONING AND CONCLUSIONS OF LAW:

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.

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 a discharge for attendance based on a single unexcused absence. There was no dishonesty or falsification involved in the absence. The single unexcused absence did not constitute misconduct in connection with the employment. Ms. Kunch was discharged for no disqualifying reason. Accordingly, Ms. Kunch is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Kunch.

DECISION:

The Agency representative's May 24, 2012, reference 01, decision is affirmed. The claimant was discharged 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/pjs