

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BRESHANDA R ARMSTRONG

Claimant

APPEAL NO. 19A-UI-08791-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CCRC OF CEDAR RAPIDS LLC

Employer

OC: 10/13/19

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

BreShanda Armstrong filed a timely appeal from the November 5, 2019, reference 02, 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. Armstrong was discharged on October 2, 2019 for excessive unexcused absences and tardiness after being warned. After due notice was issued, a hearing was held on December 3, 2019. Ms. Armstrong participated. Janice Otting represented the employer. Exhibits 2 through 18 and A were received into evidence.

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: BreShanda Armstrong was employed by CCRC of Cedar Rapids, L.L.C., doing business as Terrace Glen Village, from August 2018 until October 14, 2019, when the employer discharged her for attendance. Ms. Armstrong worked primarily as a full-time certified nursing assistant (CNA). Ms. Armstrong also worked for the employer as a certified medication aide (CMA) and picked up CMA shifts as needed. Ms. Armstrong's usual work hours were 10:00 p.m. to 6:30 a.m.

The employer has a written attendance policy that the employer provided to Ms. Armstrong at the start of her employment. Under the written policy, Ms. Armstrong was required to notify her supervisor "according to ... Department Protocol" at least two hours prior to the scheduled start of her shift if she needed to be absent from work. Under the written policy, Ms. Armstrong was required to notify the employer each date of a multiple-day absence. Under the written policy, Ms. Armstrong was required to notify her supervisor if she needed to leave work before the end of her shift. Under the written policy, a no-call/no-show absence was grounds for discharge from the employment. The employer verbally communicated to Ms. Armstrong an absence reporting policy that differed somewhat from the written policy. The employer communicated to Ms. Armstrong that needed to notify the charge nurse on duty and notify the on-call nurse manager at least two hours prior to the scheduled start of her shift if she needed to be absent or late. The employer also communicated an expectation that Ms. Armstrong attempt to find a

replacement worker if she needed to be absent. If Ms. Armstrong needed to leave work early due to illness, the employer required only that Ms. Armstrong give notice to the charge nurse. The employer reviewed the absence reporting policy during staff meetings and Ms. Armstrong was aware of the policy. In practice, the employer accepted telephone calls and text messaging as acceptable forms of notice.

The final absence that factored in the discharge occurred on October 13, 2019. On that day, Ms. Armstrong was absent in connection with her grandfather's passing. Ms. Armstrong notified a coworker that she would be absent, but did not notify the charge nurse or the on-call nurse manager. Ms. Armstrong had been absent on October 12, 2019 so that she could stay with her grandfather, who was in hospice care, while her father attended to other matters. Ms. Armstrong properly notified the charge nurse and facilitated having another employee cover her shift, but did not notify the on-call nurse manager of the absence. These two absences fell on what were to be Ms. Armstrong's first days back at work following an October 2, 2019 suspension for attendance.

The employer considered many prior absences and late arrivals in making the decision to discharge Ms. Armstrong from the employment. The employer focused primarily on attendance matters that occurred between May 2019 and the discharge date. These included late arrivals for personal reasons on June 16, July 8, July 28, August 9, August 28, September 11, and September 28. In connection with several of these late arrivals, Ms. Armstrong was simply running late. In connection with one or more of the late arrivals, Ms. Armstrong forgot she was scheduled to work and had to be prompted by the employer to report for the shift. On June 28, Ms. Armstrong missed a the first six-hour portion of a split shift due to a lack of child care for her five-year-old. Ms. Armstrong was absent on August 16, 17 and 18, during which time her family had gathered under the belief that Ms. Armstrong's grandfather was about to pass away. On Friday, August 16, 2019, Ms. Armstrong had reported her need to be absent to the executive director in a timely manner. The executive asked whether Ms. Armstrong also needed coverage for the entire weekend. Ms. Armstrong and the executive director ended the discussion with the mutual understanding that Ms. Armstrong would indeed need coverage for the entire weekend. Based on that understanding, Ms. Armstrong did not contact the employer on August 17 and 18 to report her need to be absent on those dates. Upon Ms. Armstrong's return to the employment, the employer requested documentation to support the absence, but Ms. Armstrong did not provide documentation. On September 29, Ms. Armstrong left work early due to illness after giving proper notice to the charge nurse.

The employer's decision to discharge Ms. Armstrong from the employment followed reprimands for attendance. The employer issued a written "verbal" warning on June 16, 2019. On October 2, 2019, the employer issued a written warning in connection with a four-shift suspension.

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 based on excessive unexcused absences. The evidence establishes unexcused absences on June 16, July 8, July 28, August 9, August 28, September 11, and September 28, when Ms. Armstrong was late for personal reasons. In some of these instances, Ms. Armstrong was late for shifts that she had picked up. Once Ms. Armstrong agreed to work a shift, the employer reasonably expected Ms. Armstrong to appear on time to work the shift. The evidence establishes an additional unexcused absence on June 28, when Ms. Armstrong was absent due to a lack of child care, a matter of personal responsibility. The evidence establishes an additional unexcused absence on October 13, 2019, wherein Ms. Armstrong spoke to a coworker, but did not notify either the charge nurse or the on-call nurse of her need to be absent. Though Ms. Armstrong did not notify the on-call nurse on October 12, she did speak with the charge nurse and make appropriate arrangements to cover that shift. Under the particular circumstances, the administrative law judge concludes the October 12 absence cannot be considered unexcused. The evidence similarly indicates that Ms. Armstrong provided reasonable notice to the employer in regard to the August 16-18 absences by speaking with the executive director. The administrative law judge concludes those absences, under the particular circumstances, cannot be deemed unexcused absences. Ms. Armstrong's early departure on September 29 was due to illness, was properly reported to the charge nurse, and was an excused absence under the applicable law. Given the excessive nature of the excused absences referenced above, it is unnecessary for the administrative law judge to consider other absences and whether they were excused or unexcused under the applicable law.

Because the evidence in the record establishes a discharge based on misconduct in connection with the employment, Ms. Armstrong 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. Armstrong must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The November 5, 2019, reference 02, decision is affirmed. The claimant was discharged for misconduct in connection with the employment. The discharge occurred on October 14, 2019, not October 2, 2019. 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 for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn