IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ALEXIS X MONTALVO
Claimant

HILL PHOENIX INC
Employer

APPEAL NO. 17A-UI-05602-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/07/17
Claimant: Appellant (2/R)

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

STATEMENT OF THE CASE:

Alexis Montalvo filed a timely appeal from the May 24, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Montalvo was discharged on May 5, 2017 for excessive unexcused absences. After due notice was issued, a hearing was held on June 14, 2017. Ms. Montalvo participated. Patty Cisler represented the employer.

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: Alexis Montalvo was employed by Hill Phoenix, Inc. as a full-time assembler from February 13, 2017 until May 5, 2017, when Joel Burbank, Human Resources Director, discharged her from the employment for attendance. Ms. Montalvo's work hours at the start of the employment were 6:00 a.m. to 2:30 p.m., Monday through Friday. Toward the end of the employment, the employer amended the end time to 3:30 p.m. The employer also required Ms. Montalvo to appear for overtime hours on Saturday as needed. Ms. Montalvo's immediate supervisor was Kenneth Carlisle, who supervised the sub-refrigeration and sub-assembly departments. During the two and a half month employment, Ms. Montalvo was absent 20 times before the employer decided to end the employment. If Ms. Montalvo needed to be absent or late, the employer's written policy required that Ms. Montalvo telephone the employer's front desk at least 30 minutes prior to the start of her shift and speak with the receptionist or leave a voice mail message. The employer also required that Ms. Montalvo provide a reason for the absence. Ms. Montalvo was familiar with the absence reporting requirement.

Ms. Montalvo last performed work for the employer on May 1, 2017. On that day, Ms. Montalvo left work at 12:52 p.m. to go pick up her young children, her friend, and her friend's young children in Des Moines. Ms. Montalvo's friend had in her care Ms. Montalvo's infant and toddler, as well as the friend's infant and toddler. The friend experienced car problems in Des

Moines. The friend found a restaurant where she could wait with the young children until Ms. Montalvo arrived. Ms. Montalvo spoke with a supervisor prior to departing from the workplace.

On May 2 and 3, 2017, Ms. Montalvo was absent so that she could care for her eight-month old daughter, who was ill. Ms. Montalvo properly reported the absences.

On Thursday, May 4, 2017, Ms. Montalvo was absent from her entire shift due to her own illness. Ms. Montalvo reported the absence at least 30 minutes prior to the shift. In the early afternoon of May 4, Patty Cisler, Human Resources Coordinator attempted to contact Ms. Montalvo at the telephone number the employer had on record for Ms. Montalvo. The employer was not able to reach Ms. Montalvo at that number. Ms. Cisler then sent Ms. Montalvo an email message. Ms. Montalvo received the email message and called Ms. Cisler at about 2:15 p.m. Ms. Montalvo told Ms. Cisler that she had been in the emergency room that week with terrible headaches. Ms. Montalvo asked Ms. Cisler whether she could go on a leave of absence. Ms. Cisler told Mr. Montalvo that because of Ms. Montalvo's previous absences, Ms. Cisler would need to speak with the human resources director to see whether the company could provide Ms. Montalvo with a leave of absence for her illness. Ms. Cisler told Ms. Montalvo that Ms. Cisler would need something from Ms. Montalvo's doctor regarding Ms. Montalvo's purported visit to the emergency room in connection with the purported illness. Ms. Montalvo told Ms. Cisler that she could probably fax Ms. Montalvo something, but that it would be after Ms. Montalvo attended her daughter's preschool graduation that afternoon. The employer did not receive a fax. At 3:30 p.m., Ms. Montalvo attended her daughter's preschool graduation.
On May 5, Ms. Cisler drafted a letter discharging Ms. Montalvo from the employment and mailed the letter to Ms. Montalvo. Ms. Montalvo received the letter on Monday, May 8. In the letter, Ms. Cisler stated that she had attempted to contact Ms. Montalvo on May 5. Ms. Cisler referenced the discussion on May 4. Ms. Cisler told Ms. Montalvo that in light of her prior absences and with nothing from Ms. Montalvo's doctor, there was slim chance of Ms. Montalvo being approved for a leave of absence. Ms. Cisler told Ms. Montalvo that she was not eligible for leave under the Family and Medical Leave Act. Ms. Cisler stated that Ms. Montalvo had been with the employer less than 90 days and already exceeded the number of total hours of absence that would prompt termination of the employment. Ms. Cisler stated that Ms. Montalvo's employment was terminated as of May 5, 2017.

The employer considered several prior absences when making the decision to discharge Ms. Montalvo from the employment. On February 20, Ms. Montalvo had been approved to leave work at 1:30 p.m. for a dental appointment, but clocked out at 1:06 p.m. Ms. Montalvo needed to travel to Ottumwa for a 2:30 p.m. dental appointment. On February 22, Ms. Montalvo left work at 12:30 p.m. with permission to go to another dental appointment. On February 28, Ms. Montalvo left work at 11:30 a.m. for a reason that neither she nor the employer can recall. The employer does not know whether Ms. Montalvo provided the required notice on these days. On March 2 and March 7, Ms. Montalvo reported to work late for reasons that neither she nor the employer can recall. The employer does not know whether Ms. Montalvo provided the required notice on these days. On March 17 and 18, Ms. Montalvo was absent from work so that she could travel to Chicago for a family reunion. Ms. Montalvo decided not to request the time off in advance because she believed the employer would not approve the request. March 18 was a Saturday. The employer had notified Ms. Montalvo at least a week in advance that she would need to work from 6:00 a.m. to 10:00 a.m. that day. On March 21, 22 and 23, Ms. Montalvo was absent due to her daughter having lice. Ms. Montalvo's daughter could not attend preschool or stay at the child care provider while she had lice. Ms. Montalvo properly reported the absences to the employer. On March 24, Mr. Carlisle met with Ms. Montalvo

regarding her several absences from the new employment. Ms. Montalvo acknowledged the seriousness of the situation and vowed that her attendance would not be an issue going forward. On April 18, Ms. Montalvo left work early due to illness and properly reported the absence to a supervisor. On April 19 and 24, Ms. Montalvo was absent due to illness and properly reported the absences. On April 25, Ms. Montalvo left work early due to illness and properly reported the absence to a supervisor. On April 29, Ms. Montalvo was absent from Saturday overtime work for a reason that neither she nor the employer can recall. The employer does not whether Ms. Montalvo properly reported the absence.

Ms. Montalvo established a claim for unemployment insurance benefits that was effective May 7, 2017. Ms. Montalvo's base period for purposes of the claim consists of the four quarters of 2016. Hill Phoenix, Inc. is not a base period employer.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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).

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 employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to prove misconduct in connection with the employment by a preponderance of the evidence. The employer witness lacked personal knowledge of Ms. Montalvo's absences leading up to the discussion on the afternoon of May 4, 2017. The employer elected not to present testimony through the receptionist in charge of receiving absence reporting calls. The employer elected not to present testimony from the supervisor with whom Ms. Montalvo spoke when she needed to leave work early. The employer had the ability to present more direct and satisfactory evidence. The employer provided incomplete testimony and equivocal answers regarding the notice provided by Ms. Montalvo at the time of the absences.

Establishes excessive absences, but does not establish that the final absence that triggered the discharge was an unexcused absence under the applicable law. The weight of the evidence in the record establishes a final absence on May 4, 2017 that was due to illness and that was properly reported to the employer. Accordingly, the absence was an excused absence under the applicable law. Ms. Montalvo's failure to provide a doctor's note to cover the absence did not change the absence from an excused absence under the applicable law to an unexcused

absence. Because the evidence establishes a final absence that was an excused absence under the applicable law, the discharge would not disqualify Ms. Montalvo for unemployment insurance benefits and the administrative law judge need not consider the earlier absences. However, the evidence in the record establishes that the two next most recent absences prior to the discharge, the May 2 and 3, were properly reported to the employer and were due to Ms. Montalvo's need to care for her sick child.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Montalvo was discharged for no disqualifying reason. Accordingly, Ms. Montalvo is eligible for benefits, provided she is otherwise eligible. Because Hills Phoenix, Inc. is not a base period employer, that employer's account is not subject to being charged for benefits paid to Ms. Montalvo in connection with the current claim year that began on May 7, 2017 and that will end on May 5, 2018. However, the employer's account may be charged for benefits paid to Ms. Montalvo if (1) Ms. Montalvo establishes a new claim year on or after May 6, 2018, (2) if Ms. Montalvo is at that point deemed eligible for benefits, and (3) if Hill Phoenix, Inc. is deemed a base period employer for purposes of the claim.

The evidence in the record is sufficient to raise the question of whether Ms. Montalvo has been able to work and available for work within the meaning of the law since she established her claim for benefits. This matter will be remanded to the Benefits Bureau for adjudication of the able and available issues.

DECISION:

The May 24, 2017, reference 01, decision is reversed. The claimant was discharged on May 5, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged as outlined above.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has been able to work and available for work since she established her claim for benefits.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/scn