IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

EMALIE CIPALE
Claimant

THE BREHM ORGANIZATION INC
Employer

APPEAL NO. 13A-UI-10925-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/02/12
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 September 19, 2013, 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. After due notice was issued, a hearing was held on October 17, 2013. Claimant Emalie Cipale did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Amy Brehm represented the employer. Exhibits One, Two and Three 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: The employer operates Java Joe's Coffee House in downtown Des Moines. Emalie Cipale was employed by the Brehm Organization, Inc., as a part-time barista from July 16, 2013 until August 28, 2013, when Amy Brehm, Owner, discharged her for attendance. The single absence that factored in the discharge occurred on August 28, 2013, when Ms. Cipale was absent for personal reasons and failed to notify Ms. Brehm of her need to be absent. Ms. Cipale was scheduled to work from 1:00 p.m. to 6:00 p.m. Ms. Brehm ended up covering the shift. At 8:28 p.m., Ms. Cipale sent a text message to Ms. Brehm. Ms. Cipale wrote: "I'm sorry for just getting to you now. There's been a lot of stuff going on and it all kind of hit me today I just completely broke down. I know it's no reason to not go to work or call you guys." Ms. Cipale indicated that she would report for her shift on August 29, 2013. Ms. Brehm responded by text message. Ms. Brehm told Ms. Cipale that her absence was job abandonment according the employee manual and that Ms. Brehm had to let her go.

If Ms. Cipale needed to be absent from work, Ms. Brehm expected her to telephone the workplace at least two hours prior to the scheduled start of the shift and speak to Ms. Brehm, the manager, or the trainer. Ms. Brehm also expected Ms. Cipale to find her own replacement.

The employer has a written attendance policy set forth in the employee manual that employer provided to Ms. Cipale on July 30, 2013. The policy indicates as follows:

> Failure to show up for a scheduled shift is not excusable and is considered job abandonment. This is grounds for termination. Even if an employee calls to say that he or she will not be able to show up for a shift, if the call is not made ahead of time, he or she will still be held responsible for finding a replacement for that shift. If you are sick, we ask that you find a replacement. Failure to meet these expectations may result in termination.

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.

Because the discharge was based on a single absence, the Sallis analysis applies. Ms. Cipale was an newly hired, part-time hourly employee, a barista. That nature of the work was that Ms. Cipale made coffee drinks and waited on customers, duties that another employee or manager could step into on short notice. Ms. Cipale's absence did leave the employer short staffed and Ms. Brehm ended up working the shift. There is nothing in the record to suggest that Ms. Cipale was dishonest with the employer when she represented that she had been absent that day due to overwhelming personal issues. Ms. Cipale contacted the employer in reference to the absence, but not until after the shift was done. Thus, Ms. Cipale cannot be deemed to have *notified* the employer of the absence. Taking all factors into consideration, the administrative law judge concludes that Ms. Cipale's single absence was insufficient to establish misconduct in connection with the employment that would disqualify her for unemployment insurance benefits.

The evidence does not support the employer's assertion that Ms. Cipale abandoned or quit the employment by means of the single no-call/no-show absence. Iowa Administrative Code section 871 IAC 24.25(4) addressed the number of no-call/no-show absences necessary to create the presumption of a voluntary quit without good cause attributable to the employer and sets that number at three.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Cipale was discharged for no disqualifying reason. Accordingly, Ms. Cipale is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The agency representative's September 19, 2013, reference 04, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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