IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NURIA I MARTINEZ
Claimant

TPI IOWA LLC
Employer

APPEAL NO. 17A-UI-06776-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/11/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Nuria Martinez filed a timely appeal from the June 30, 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. Martinez was discharged on June 6, 2017 for failure to follow instructions in the performance of her job. After due notice was issued, a hearing was held on July 21, 2017. Ms. Martinez participated. Danielle Williams represented the employer. Multiple Spanish-English interpreters from CTS Language Link assisted with the hearing.

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: Nuria Martinez was employed by TPI Iowa, L.L.C.as a full-time production laborer from August 2016 until June 6, 2017, when Human Resources Representatives Scott Gemmel and Reggie McDade discharged her from the employment. Production Supervisor Barb Sinnott was Ms. Martinez's immediate supervisor. Ms. Martinez's work hours were 6:00 a.m. to 2:00 p.m., Monday through Friday. During her shift, Ms. Martinez would receive two 10-minute paid breaks and one 20-minute paid lunch break. Ms. Martinez was required to sign a log book when she left for break and sign a log book when she returned from break.

The final incident that triggered the discharge occurred on June 2, 2017. On that day, Ms. Martinez took a 26-minute break. Ms. Martinez was six minutes late returning from break because she was sick and vomiting in the restroom. Ms. Martinez had correctly documented her departure for the break and correctly documented her late return from the break. When Ms. Martinez returned late from break, she told Ms. Sinnott that she had a fever and was not feeling well. Ms. Sinnott sent Ms. Martinez to the company nurse, but told Ms. Martinez that she would receive a warning for attendance if she left before the end of the shift. Before the scheduled end of Ms. Martinez's shift, Mr. McDade summoned Ms. Martinez to the office and suspended her from the employment. On June 6, 2017, Mr. Gemmel notified Ms. Martinez that

she was discharged from the employment. At that time, Ms. Martinez again explained that she had been late from lunch break on June 2 because she was ill. Mr. Gemmel asserted at that time, that Ms. Martinez had not brought that information forward on June 2.

In making the decision to discharge Ms. Martinez from the employment, the employer considered prior attendance matters and reprimands for attendance. The next most recent incident that factored in the discharge occurred on May 13, 2017, when Ms. Martinez was absent so that she could take her one-year-old son to a medical appointment to address a heart issue. Ms. Martinez had notified Ms. Sinnott three days in advance of her need to be absent for the appointment, but Ms. Sinnott declined to approve the absence. Under the employer's written attendance policy, employees were required to provide 24 hours' notice of a need to be absent. In those instances where such notice is not possible, the employee is required to provide notice prior to the scheduled start of the shift by calling the designated absence reporting line and leaving a voicemail message. On May 13, Ms. Martinez called the absence reporting line prior to her shift and left a message regarding her need to be absent. The employer considered eight instances of tardiness that occurred between January 17, 2017 and May 11, 2017. On October 29, 2016, the employer issued a verbal warning to Ms. Martinez for taken a longer break than authorized. On November 11, 2016, the employer issued a verbal warning to Ms. Martinez for attendance. Also on January 19, 2017, the employer issued a written warning to Ms. Martinez for being late to the start-up meeting.

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). 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 presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish a current act of misconduct. Ms. Martinez testified that she was late returning from lunch on June 2, 2017 because she was sick and vomiting in the restroom. That predicament provided a reasonable basis to be late returning from a very brief lunch break. In addition, the weight of the evidence indicates that Ms. Martinez reported her circumstances to Ms. Sinnott upon her return from break. The employer had the burden of proof, but presented insufficient evidence to rebut Ms. Martinez's testimony. The employer had the ability to present

testimony from Ms. Sinnott, Mr. Gemmel and/or Mr. McDade, but elected not to present such testimony. The employer's sole witness at the appeal hearing was not involved in the final incident and lacked personal knowledge regarding the final incident or prior incidents that factored in the discharge. Prior to the late return from break on June 2, 2017, the next most recent incident that factored in the discharge was the May 13, 2017 absence. The weight of the evidence establishes that that absence was due to Ms. Martinez's infant child's illness and was properly reported to the employer. The employer presented insufficient evidence to establish otherwise. Thus, both the second to last incident that factored in the discharge was an excused absence under the applicable law. Because the evidence fails to establish a current act of misconduct, the discharge does not provide a basis for disqualifying Ms. Martinez for unemployment insurance benefits. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not consider the earlier incidents of tardiness or the much earlier reprimands.

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

DECISION:

The June 30, 2017, reference 01, decision is reversed. 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

jet/rvs