IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

HANNAH M SQUIRE
Claimant

JELD-WEN INC
Employer

APPEAL NO. 19A-UI-00052-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/25/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Jeld-Wen (employer) appealed a representative's December 26, 2018, decision (reference 02) that concluded Hannah Squire (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 17, 2019. The claimant participated personally. The employer participated by Brad Nelson, Manager, and Andrea Robinson, Scheduling Coordinator. Exhibit D-1 was received into evidence. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant worked for the employer as a full-time primary scheduler. The claimant received the employer's handbook. The handbook states that employees who accumulate six attendance points in a rolling twelve-month period will be terminated.

On September 28, 2017, the claimant signed a Step One Warning Notice for performance issues. Also on September 28, 2017, the claimant signed a Step Two Warning Notice for absenteeism. The claimant properly reported her absence due to illness from July 5 to July 11, September 18, and September 22, 2017. The employer assessed her three points for those absences. She was tardy on August 31, 2017, and she left early on September 13, 2017. She was given a total of one point for the two partial absences. Both warning notices stated, "The issuance of a warning may subject the employee to disciplinary action, including dismissal, at the discretion of management." After she signed the warnings, the employer did not give the claimant a copy of either document.

On September 27, 2018, the claimant signed a verbal warning for using the employer's computer for personal use. The verbal warning had the same language about dismissal. The claimant was not given a copy of the warning after she signed it.

On November 2, 2018, the claimant entered a memorandum on the employer's internal task entry screen. She described someone as "not happy". The claimant wrote that the person "yelled and complained about the usual complaints we get (how our business sucks, our customers service sucks, blah blah blah) I apologized and..." The memorandum went on to indicate the actions the claimant took to care for the person.

On November 6, 2018, the claimant's supervisor sent the claimant an e-mail. "Please leave out the unnecessary comments in memos. You can state the customer was frustrated or not happy with our customer service but no need for the statement of usual complaints & blah, blah, blah. This is unprofessional and would not look (sic) for JELD-WEN if it should go to court."

The claimant responded in thirty-two minutes with an e-mail apology. The claimant then went to the supervisor's office and apologized in person. After that, she went to the manager's office and apologized in person. Neither the manager nor the supervisor mentioned terminating her. The matter was not addressed again with the claimant until November 27, 2018.

Between November 6 and 27, 2018, the employer had been working on developing a Performance Improvement Plan for the claimant. As it did so, it looked over her history of warnings and absences. The claimant properly reported her absence due to medical issues from December 26 to December 27, 2017, January 16, and March 19, 2018. She accumulated three additional points for those absences. The employer had a three-point wellness provision and forgave her two points. At the time of termination she had five attendance points.

After reviewing the claimant's history, it decided to terminate the claimant for writing an unprofessional memorandum but did not know what section of the handbook the claimant had violated. The claimant asserted that what she wrote was the truth and she did not use profanity.

The claimant filed for unemployment insurance benefits with an effective date of November 25, 2018. The employer participated personally at the fact finding interview on December 20, 2018, by Brad Nelson.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer was discovered on November 6, 2018. The claimant was not discharged until November 27, 2018. The employer did not provide a reasonable cause for the delay in discharge.

In addition, the employer had not previously warned the claimant about the issue for which the claimant was separated. Without a warning, the employer cannot establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's December 26, 2018, decision (reference 02) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs