IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LATESHA L EDGE
Claimant

MARKETLINK INC
Employer

APPEAL NO. 11A-UI-11725-NT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/03/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Marketlink, Inc. filed a timely appeal from a representative's decision dated August 24, 2011, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was held on September 28, 2011. The claimant participated. The employer participated by Ms. Amy Potratz, human resource manager.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Latesha Edge was employed by Marketlink, Inc. from December 13, 2010, until April 18, 2011, when she was discharged from employment. Ms. Edge held the position of full-time telesales representative and was paid by the hour. Her most recent supervisor was Mr. Bill Leadbetter.

Ms. Edge was discharged when the employer believed that she had failed to report for scheduled work on Saturday, April 16, 2011, and had not provided required notification of her impending absence. The company utilizes a "no-fault" attendance policy. Employees are subject to discharge if they reach a certain number of attendance infraction points within a rolling time frame. Ms. Edge was aware of the policy and had received a final written warning and suspension for attendance on March 1, 2011.

The company uses a rotating scheduling system that requires customer service representatives to work Saturdays on a rotating basis. The scheduling is provided one year in advance to employees. When Ms. Edge noted that she was scheduled to work on Saturday, April 16, 2011, the claimant had gone to her immediate supervisor at the time, Teresa Matthew, and secured permission to be off work on April 16, 2011, provided the claimant made up the absent day the preceding or following weekend. When the claimant was assigned to a new supervisor, she also confirmed with the new supervisor, Mr. Leadbetter, she had made previous plans to be in the Vistula Parade on Saturday, April 16, 2011. The claimant's new supervisor did not disagree with the claimant's plans to substitute the Saturday in question for the preceding or following Saturday.

When Ms. Edge did not report for work on Saturday, April 16, 2011, and did not call in to additionally report her absence that day, the employer considered her failure to be a "no-call, no-show," causing the claimant to exceed the permissible number of attendance infraction points under company policy and resulting in the claimant's termination from employment. Although there was agreement at the termination meeting regarding the claimant's previous request to be off work, the employer stated that the claimant "should have called in that day."

It is the employer's position that statements made to the company's human resource manager by both supervisors conflicted with the claimant's belief that she had been given advance permission to substitute work days.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is not.

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 that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the 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 App. 1992). 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 upon such past acts. The termination from employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct 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 e established. 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 Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

While hearsay is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony. In this matter, the claimant participated personally and provided sworn testimony, testifying with specificity that she had received advance permission from both her previous and her current supervisor to substitute April 16, 2011, for a preceding or following Saturday. The administrative law judge finds the claimant to be a credible witness and finds that her testimony is not inherently improbable.

Based upon the evidence in the record, the administrative law judge concludes that the claimant reasonably believed that she had been given authority to substitute working on April 16, 2011, for the following Saturday and that the claimant did not realize that she would be expected to provide additional notification that day after securing permission from both supervisors.

The question before the administrative law judge is not whether an employer has a right to discharge an employee for the above-stated reasons, but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the decision to terminate Ms. Edge may have been a sound decision from a management viewpoint, the evidence in the record is not sufficient to warrant the denial of unemployment benefits. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated August 24, 2011, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

kjw/kjw