IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRIANNE KEAST
Claimant

MENARD INC
Employer

APPEAL NO: 17A-UI-07815-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/09/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 28, 2017, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 22, 2017. The claimant participated in the hearing. Tyson Thomas, Assistant Department Manager and Aaron Schoening, Assistant Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time general laborer for Menard Inc. from December 22, 2011 to July 13, 2017. She was discharged for a final incident of absenteeism that occurred June 18, 2017.

The claimant worked Sunday, Thursday and Friday from 4:00 p.m. to 12:30 a.m. On January 8, 2017, the claimant called the employer and stated she would be absent because she did not have childcare; on January 15, 16, 18, 22 and 23, 2017, the claimant called the employer and stated she was ill; on February 8, 2017, she called the employer and stated she was ill; on February 13, 2017, she called the employer and stated her child was ill; on April 6 and April 7, 2017, she called the employer and stated she was ill; on May 5, 2017, she called the employer and stated she would be absent due to family issues; on May 28, 2017, she called the employer and stated she was ill; and on June 18, 2017, she called the employer and stated she would be absent due to car problems.

The employer met with the claimant several times to discuss her attendance and worked with her by excusing several of her previous absences so she would not face termination. Employees are also allowed to make up hours. The claimant missed seven Sundays and would have been able to make up those hours during the following week but chose not to do so.

During performance review sessions April 10, 2016, the employer told the claimant she needed to improve her attendance but approved a $.10 raise for her; during the review session October 9, 2016, the employer withheld the claimant's $.10 raise because her attendance had not improved; and on April 2, 2017, even though the claimant had still not improved her attendance the employer allowed her to receive an across the board $.70 per hour raise.

After speaking to the claimant about her attendance numerous times the employer issued the claimant written warnings January 8, 2017, after she called in and said she would be absent because she did not have childcare; May 5, 2017, after she called in and said she would be absent due to family issues; and on June 18, 2017, after she called in and said she would be absent due to car problems. The claimant did not sign the June 18, 2017, warning and neither did her supervisor and the claimant does not recall receiving the warning before her termination July 13, 2017. The claimant knew her attendance was "an issue" but she denies knowing her job was in jeopardy.

The employer terminated the claimant's employment July 13, 2017, for excessive unexcused absenteeism. The claimant's last absence was June 18, 2017.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

While the claimant's attendance was poor, her last absence occurred June 18, 2017 but her employment was not terminated until July 13, 2017. The employer stated the delay was to allow it to "get its records together and verify information." The employer indicated it took a few weeks to do that because of its workload and people being on vacation. The employer actually had the information it needed June 18, 2017, as that was the claimant's last absence. The fact that it took the employer nearly one month to terminate the claimant's employment removes the June 18, 2017, absence from the realm of a current act of misconduct. For that reason, the administrative law judge must conclude the claimant was discharged for no disqualifying reason as the employer let too much time elapse between her last absence and the termination. Therefore, benefits must be allowed.

DECISION:

The July 28, 2017, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/rvs