IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JESSIE L WASHBURN
Claimant

MAID BRIGADE
Employer

APPEAL NO. 13A-UI-09582-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/28/13
Claimant: Respondent (1-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 16, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 24, 2013. At the time of the hearing, claimant Jessie Washburn was not available at the number she had provided for the hearing and did not participate. Debbie Hibler represented the employer and presented additional testimony through Steve Miller. Exhibit One was received into evidence.

At 11:24 a.m. on September 24, 2013, about an hour after the hearing record had closed, Ms. Washburn contacted the Appeals Section. Ms. Washburn told the Appeals Section staff that she had missed the administrative law judge's calls. The administrative law judge returned Ms. Washburn's call at 11:34 a.m. At that time, Ms. Washburn advised that she had missed the calls at the time of the 10:00 a.m. hearing because she had been sleeping. Ms. Washburn further advised that she is pregnant. Ms. Washburn did not provide good cause to reopen the record.

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 is a commercial cleaning enterprise. Jessie Washburn was employed by Maid Brigade as a part-time cleaner from June 25, 2013 until July 15, 2013, when Debbie Hibler, Operations Manager, discharged her for attendance.

The employer's employee handbook contains an attendance policy. The policy required employees to make requests for time off at least two weeks in advance. Otherwise, the policy required that employees notify the office by 6:30 a.m. and to leave a message on the answering machine if no one was available to take the call. Ms. Hibler had told Ms. Washburn that she could also send a text to Ms. Hibler if she encountered any problems with calling the office.

The final absence that triggered the discharge occurred on July 15, 2013. Ms. Washburn was to work 8:00 a.m. to 5:00 p.m. that day. At 6:10 a.m., Ms. Washburn sent a text message to Ms. Hibler to advise that she would be absent because she needed to go to the doctor. Ms. Washburn had not called the office that day. Ms. Hibler communicated with Ms. Washburn multiple times on July 15, 2013. During one of those contacts, Ms. Washburn advised that she would need part of July 16, 2013, so that she could go to the doctor. Ms. Hibler told Ms. Washburn that taking part of the day off would interfere with the employer's work. Ms. Hibler told Ms. Washburn that she would have to take the entire day off. Finally, Ms. Hibler told Ms. Washburn that she was discharged from the employment based on attendance.

The employer considered additional absences in making the decision to discharge Ms. Washburn from the employment. On July 10, Ms. Washburn was sick and vomiting at work, but finished her work day. On July 11, 2013, Ms. Washburn was absent due to the same illness. Ms. Washburn telephoned the office at 6:20 a.m. and left a voice mail message indicating that she was going to go to the doctor. On July 12, Ms. Washburn sent an email indicating that she did not feel well, but would try to make it through her work day. Ms. Washburn arrived for work on time, but later left work early.

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.

The weight of the evidence in the record establishes that Ms. Washburn was dealing with a bonafide illness during the brief employment that interfered with her availability for work. Given the nature of the symptoms, the illness was likely pregnancy related. Despite the written policy that required a call to the office by 6:30 a.m., the evidence indicates that Ms. Hibler had opened the door to Ms. Washburn giving notice by text message if she needed to be absent. Ms. Hibler reasonably relied upon the guidance on July 15, 2013, when she provided timely notice to Ms. Hibler of her need to be absent that day and the next. The next most recent absence was on July 12, 2013, when Ms. Washburn left work early due to illness and properly reported the need to leave to the employer Ms. Washburn was also absent on July 10, 2013 due to illness and properly notified the employer. Each of the absences was an excused absence under the applicable law. None of the absences can be used as a basis for disqualifying Ms. Washburn for unemployment insurance benefits.

While the employer had the discretion to discharge Ms. Washburn from the employment, the administrative law judge concludes that Ms. Washburn was not discharged for misconduct in connection with the employment. Accordingly, Ms. Washburn is eligible for benefits, provided she is otherwise eligible.

The administrative law judge notes that Maid Brigade is not a base period employer for purpose of the claim for benefits that Ms. Washburn established on July 28, 2013. In other words, Maid Brigade is not an employer for whom Ms. Washburn worked during the first four of the last five calendar quarters that predated the quarter in which she filed her claim. What that means for the employer is that the employer is not subject to charge for benefits paid to Ms. Washburn during the current benefit year that started for Ms. Washburn on July 28, 2013 and that will end for her on July 26, 2014. On if Ms. Washburn establishes a claim for benefits on or after July 27, 2014 and only if Maid Brigade is at that time a basis period employer, will Maid Brigade's account be assessed for benefits.

There sufficient evidence in the record to warrant a remand to the Claims Division so that the Division can consider and adjudicate whether Ms. Washburn has met the work ability and work availability requirements since she established her claim for benefits.

DECISION:

The agency representative's August 16, 2013, reference 01, 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, but only as outlined above.

This matter is remanded to the Claims Division for determination of whether the claimant has met the work ability and work availability requirements since she established her claim for benefits.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs