IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

BRITNEY N DOUGLAS
Claimant

VANTEC INC
Employer

APPEAL NO. 18R-UI-11689-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/16/18
Claimant: Respondent (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Administrative Code rule 871-24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 5, 2018, reference 01, decision that held the claimant was eligible for benefits provided she met all other eligibility requirements and the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on August 8, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on December 19, 2018. Claimant Britney Douglas participated. Holly Kapler of Aureon HR represented the employer and presented additional testimony through Joan Kennedy and Jenny Ehlke. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 13 into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Britney Douglas was employed by Vantec, Inc. on a full-time basis from August 2016 until August 8, 2018, when Joan Kennedy, Human Resources Manager, and Jenny Ehlke, Third Shift Supervisor, discharged her for attendance. Ms. Ehlke was Ms. Douglas' supervisor throughout the employment.

The employer has a "no-fault" attendance policy. Under the policy, an employee is subject to discharge from the employment if the employee accrues eight attendance points in a rolling 12-month period. The employer assigns attendance points to most absences, including most absences due to illness and properly reported to the employer. At the start of Ms. Douglas' employment, the employer reviewed the attendance policy with Ms. Douglas and provided Ms. Douglas with an employee handbook that contained the attendance policy. In April 2018,

the employer provided Ms. Douglas with a revised employee handbook that contained a revised attendance policy. Throughout Ms. Douglas' employment, the attendance policy required that she give notice of her need to be absent by calling the workplace at least an hour prior to the scheduled start of her shift. The policy required that Ms. Douglas speak with Ms. Ehlke, if she was available. The policy required that Ms. Douglas leave a voicemail message or speak with another supervisor if Ms. Ehlke was not available. Ms. Doughlas was at all relevant times aware of the absence reporting policy and complied with the policy. Due to the "no-fault" nature of the attendance policy, the employer did not solicit or require Ms. Douglas to provide a reason for her absences. When an absence reason was provided, the employer inconsistently documented the stated reason for the absence.

The final absence that triggered the discharge occurred on August 6, 2018, when Ms. Douglas was absent due to illness and properly reported the absence to the employer. On that day, Ms. Douglas had vomited and was running a fever. Ms. Douglas did not mention the reason for absence when she reported the absence to Ms. Ehlke and Ms. Ehlke did not inquire about the reason for the absence. The absence placed Ms. Douglas at eight attendance points during the applicable rolling 12-month period. On August 7, Ms. Ehlke sent an email message to Ms. Kennedy, Human Resources Manager, indicating that Ms. Douglas was at eight attendance points and that Ms. Ehlke assumed that meant the employment was done. Ms. Kennedy prepared a discharge memo that Ms. Ehlke presented to Ms. Douglas on the morning of August 8.

The employer considered prior absences and reprimands when making the decision to discharge Ms. Douglas from the employment. The next most recent absence occurred on April 25, 2018, when Ms. Douglas forgot that she had volunteered to perform four hours of overtime work before the scheduled start of her shift and appeared for work at the regularly scheduled time. The most recent reprimand was issued to Ms. Douglas on April 27, 2018 and was in response to the April 25 missed overtime work.

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.
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> 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).

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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of*

LeClaire, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence in the record establishes a discharge for no disqualifying reason. The employer presented insufficient evidence to rebut Ms. Douglas' credible testimony that the final absence on August 6, 2018 was due to illness and was properly reported to the employer. Ms. Douglas testified to the specific nature of her illness and time she made her phone call to the employer. On the other hand, Ms. Ehlke had not documented and could not remember the time of the call. In light of the employer's "no-fault" attendance policy, Ms. Ehlke did not ask the reason for Ms. Douglas' absence. The employer presented insufficient evidence to meet its burden of proving the August 6, 2018 absence was an unexcused absence under the applicable law. Because the weight of the evidence establishes that the August 6, 2018 absence was due to illness and was properly reported to the employer, that absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Ms. Douglas for unemployment insurance benefits. The evidence further establishes a pattern of regular work attendance during the preceding three months. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not further consider the earlier absences and reprimands. Ms. Douglas is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The October 5, 2018, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The discharge was not based on a current act of misconduct. The claimant is eligible for benefits, provided she meets all other eligibility requirements. 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