IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

AUSTIN D HARKNESS
Claimant

WELLS ENTERPRISES INC
Employer

APPEAL NO. 18A-UI-05769-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/22/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Austin Harkness filed a timely appeal from the May 18, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Harkness was discharged on April 22, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on June 11, 2018. Mr. Harkness participated. Kellen Anderson of ADP/Equifax represented the employer and presented testimony through Daniel Stockmaster. Exhibits 1 through 5 and 8 were received into evidence.

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: Austin Harkness was employed by Wells Enterprises, Inc. as a full-time ice cream production laborer from 2015 until April 22, 2018, when Jamie Johnson, Human Resources Generalist, and Cody Kirtz, Operations Supervisor, discharged him for attendance. Mr. Kirtz became Mr. Harkness' immediate supervisor in November 2017 and continued to be Mr. Harkness' supervisor until the employment ended. Mr. Harkness' work hours during the final week and a half of the employment were 7:30 p.m. to 6:30 a.m., five or six days per week, with those work days falling between Sunday and Friday. From the beginning of February 2018 until the scheduling change in April 2018, Mr. Harkness' usual start time was 6:50 p.m. and his quit time was 5:30 a.m.

The final absence that triggered the discharge occurred on March 6-8, 2018. On each of those three days, Mr. Harkness was absent due to the flu and properly notified the employer of the need to be absent, per the employer's absence reporting policy, by calling the absence reporting line prior to the scheduled start of his shift. Mr. Harkness sought medical attention on March 6, 2018. On that day, Mr. Harkness provided Mr. Kirtz with a medical excuse on which a doctor indicated Mr. Harkness needed to be absent from work for 72 hours. Mr. Harkness returned to work on March 9, 2018.

On or about March 11, 2018, Mr. Kirtz told Mr. Harkness that Ms. Johnson, the Human Resources Generalist, wanted to reprimand him for attendance because Mr. Harkness had not applied for and been approved for Family and Medical Leave Act (FMLA) leave in connection with the three-day absence. On the day after Mr. Kirtz shared this information, Mr. Harkness contacted his doctor and the doctor completed an FMLA health care provider certification supporting Mr. Harkness' need to be off work for the three days in question. Mr. Harkness promptly provided a copy of the certification to Cigna, the employer's third-party leave administrator. At some point during the first half of April 2018, Mr. Kirtz told Mr. Harkness that the employer had not yet received a decision from Cigna regarding whether Cigna would approve the three-day absence in March as an FMLA covered absence. Mr. Harkness had continued to report for work and perform his regular duties from March 9, 2018 through the shift that ended on April 20, 2018. When Mr. Harkness appeared for work on April 22, 2018, the employer notified him that he was discharged from the employment in light of Cigna's decision to deny FMLA approval for the three-day absence in March. It is unclear why Cigna denied the request for FMLA coverage.

Prior to the March 6-8, 2018 absence, the next most recent absence that factored in the discharge decision occurred on December 27, 2017. On that day, Mr. Harkness was absent due to frigid weather-related car battery issues and properly reported the absence to the employer.

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.
>
> 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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 evidence in the record fails to establish a current act of misconduct in connection with the employment. The final absence on March 6-8, 2018 that triggered the discharge was due to illness and was properly reported to the employer. Because all three days of the absence were excused absences under the applicable law, there were no unexcused absences in 2018. Because the evidence fails to establish a current act, the administrative law judge concludes that Mr. Harkness was discharged for no disqualifying reason. Because the evidence fails to establish a current act, the administrative law judge need not consider the earlier absences.

Mr. Harkness is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The May 18, 2018, reference 01, decision is reversed. The claimant was discharged on April 22, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. 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