IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

STEPHANIE M MANNING
Claimant

LENNOX INDUSTRIES INC
Employer

APPEAL NO. 12A-UI-06879-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/29/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Stephanie Manning filed a timely appeal from the June 1, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 3, 2012. Ms. Manning participated. Bruce Martin, Human Resources Manager, represented the employer. Exhibit A was received into evidence. The administrative law judge took official notice of the documents submitted for and generated in connection with the fact-finding interview.

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: Stephanie Manning was employed by Lennox Industries as a full-time production employee from 2010 until May 1, 2012, when the employer discharged her for attendance. Ms. Manning's usual working hours were 3:30 p.m. to midnight, Monday through Friday.

The final absence that triggered the discharge occurred on April 27, 2012. On that day, Ms. Manning notified her supervisor at 9:45 p.m. of her need to be absent from a shift that started at 3:30 p.m. At about 1:30 p.m., Ms. Manning had taken prescription medication for a migraine headache. Ms. Manning thought she had enough time to resolve her migraine and appear for work on time. The medication made Ms. Manning drowsy and she fell asleep. The medication indicated on the bottle that it could make a person drowsy. Ms. Manning later woke up and realized she had slept through a substantial portion of her shift. Ms. Manning sent a text message to a friend to get the telephone for her new supervisor, Brody Davis, Coach/Supervisor and then telephoned Mr. Davis.

Ms. Manning had notified the employer in July 2011 that she suffered from migraine headaches.

The employer has a written absence notification policy that is part of the collective bargaining agreement that covered Ms. Manning's employment. If Ms. Manning needed to be absent, the

policy required that she contact her supervisor no later than the scheduled start of her shift. Ms. Manning was aware of the policy.

On April 3, 2012, Ms. Manning and the employer had entered into a last-chance agreement. The last-chance agreement indicated that if Ms. Manning accumulated greater than 16 attendance points during the duration of the last-chance agreement, she would face additional discipline. The last-chance agreement also indicated that if Ms. Manning violated any work rule while the last-chance agreement was in place, she would be discharged from the employment. The employer had notified Ms. Manning in March that she was discharged from the employment, but later modified the discharge to a disciplinary suspension in connection with the last-chance agreement. Ms. Manning returned to the employment on or about April 3.

Neither the employer witness nor Ms. Manning can recall the date of her most recent absence prior to the absence on April 27 that triggered the discharge.

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 employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the employment. The employer had the ability to present more direct and satisfactory evidence, which might have included evidence regarding prior absences that factored into the last-chance agreement. The evidence does establish an unexcused absence on April 27, when Ms. Manning failed to notify the employer in a timely manner that she would be late or absent from the employment. The employer has failed to present sufficient evidence to establish any additional unexcused absences. The existence of the last-chance agreement is not sufficient to establish that such agreement was based on absences that were unexcused absences under the applicable. Thus, the evidence establishes a single unexcused absence. That absence, despite the last chance agreement, is insufficient to establish excessive unexcused absences or misconduct in connection with the employment. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Manning was discharged for no disqualifying reason. Accordingly, Ms. Manning is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Manning.

DECISION:

The Agency representative's June 1, 2012, reference 01, decision is reversed. 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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