IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

HEATHER L RENAUD
Claimant

WESLEYLIFE
Employer

APPEAL NO. 14A-UI-09519-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/10/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Heather Renaud filed a timely appeal from the September 3, 2014, reference 01, decision that disqualified her for benefits. After due notice was issued, a hearing was held on October 23, 2014. Ms. Renaud participated. David Williams, of Equifax Workforce Solutions, represented the employer and presented testimony through Tina Inman and Jennifer Flake.

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: Heather Renaud was employed by WesleyLife as a full-time certified nursing assistant from 2011 until August 11, 2014 when the employer discharged her for attendance. Ms. Renaud's work hours through May 7, 2014 were 6:00 a.m. to 2:00 p.m. On May 8, 2014 Ms. Renaud underwent surgery on her ankle for a workplace injury that occurred on February 28, 2014. After the May 8, 2014 surgery, Ms. Renaud continued off work for an extended period. Ms. Renaud was released to return to light-duty, sedentary work effective July 31, 2014. Prior to that date, the employer contacted Ms. Renaud to discuss her return to the employment. Due to confusion about how Ms. Renaud was to get her new work schedule, Ms. Renaud did not return to work on July 31, 2014 and the employer did not count that absence against her. However, when the employer spoke with Ms. Renaud on July 31, the employer clarified that Ms. Renaud was expected to report to the workplace at 8:00 a.m. on August 1 to discuss her new work schedule and light-duty assignment. Ms. Renaud did not appear at 8:00 a.m. on August 1. The employer contacted Ms. Renaud and Ms. Renaud reported to the workplace for a meeting with the employer. The employer clarified at that time that Ms. Renaud's light-duty work hours would be 8:00 a.m. to 4:00 p.m., Monday through Friday. After August 1, 2014 Ms. Renaud was on vacation for several days and was to return to work at 8:00 a.m. on August 11, 2014. On August 11, 2014 Ms. Renaud overslept and reported late for work. Later that day the employer discharged Ms. Renaud from the employment. As of the end of March 2014 Ms. Renaud knew that the employer expected her to provide at least two hours'

notice of any need to be absent from work. On March 4, April 23, May 5 and May 7, 2014 Ms. Renaud was absent due to pain from her workplace injury, but provided the employer with only an hour's notice of her need to be absent. The employer deemed any absence where there was less than the required two-hour notice to be a "no-call/no-show." On May 7, 2014 Ms. Renaud's supervisor issued a written reprimand to her for attendance and warned that it was final warning.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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 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 evidence in the record establishes four unexcused absences during an approximate two-month period leading up to Ms. Renaud's surgery. Until May 7, 2014 Ms. Renaud had had the same 6:00 a.m. start time since the start of her employment. During the time of those absences, Ms. Renaud was dealing with pain issues related to her workplace injury. Ms. Renaud did not plan or adjust her personal schedule so that she could determine whether she was unable to report for work due to pain and provide the employer with appropriate notice of her need to be absent. Ms. Renaud had two additional unexcused absences immediately after being released to return to work after her surgery. On July 1, 2014 the employer clarified that the employer expected Ms. Renaud to appear at 8:00 a.m. the next day. Ms. Renaud then failed to appear at the appointed time and had to be summoned to the workplace. On August 11, Ms. Renaud's first day back from her vacation, Ms. Renaud again failed to appear at the scheduled start time because she had overslept. The final two absences occurred in the context of the warning that had been issued to Ms. Renaud on May 7, 2014. Ms. Renaud's unexcused absences between March 4 and August 11 were excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for misconduct. Accordingly, the claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The Claims Deputy's September 3, 2014, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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