IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MONIQUE D DICKERSON
Claimant

HY-VEE INC
Employer

APPEAL NO. 13A-UI-07761-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/19/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Monique Dickerson filed a timely appeal from the June 25, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was started on August 6, 2013 and concluded on September 10, 2013. Ms. Dickerson participated. Sabrina Bentler represented the employer and presented testimony through Natalie McGee, Jeff Kent and Karla Heffron. Exhibits One through Ten and A through G were received into evidence.

ISSUE:

Whether Ms. Dickerson 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: Monique Dickerson was employed by Hy-Vee as a part-time warehouse order selector from July 2012 until June 5, 2013, when Jeff Kent, Warehouse Facility Manager, and Tina Clark, Warehouse Manager, discharged her for attendance. Ms. Clark was Ms. Dickerson's immediate supervisor. Ms. Dickerson's work hours were 7:00 a.m. to 3:00 p.m.

The employer's written attendance policy required that Ms. Dickerson telephone the workplace no later than one hour before the scheduled start of her shift if she needed to be absent or late. Ms. Dickerson was aware of the policy and had received a copy of the written policy.

The final absence that triggered the discharge occurred on June 1, 2013, when Ms. Dickerson was ten minutes late to work for personal reasons. Ms. Dickerson arrived at the facility late for her shift. When Ms. Dickerson arrived for work, she found her facility access card would not allow her to enter. Ms. Dickerson retrieved a second access card from her car, but it also did not work. Ms. Dickerson then entered the facility through another door and clocked in at that time. Dealing with the access cards and walking to the second entrance took substantially less than ten minutes and was not the reason Ms. Dickerson was 1ten minutes late clocking in for work.

The next most recent absence had been on April 20, 2013. Ms. Dickerson had left work early on April 18, 2013, due to a family emergency. Ms. Dickerson left with a supervisor's approval. The family emergency involved Ms. Dickerson's grandfather being seriously ill. The grandfather was in Arkansas. On April 18, 2013, the employer approved Ms. Dickerson's need for multiple days off in connection with her grandfather's illness. On the morning of April 19, Ms. Dickerson notified a supervisor that she, her mother, and her sister, would be traveling to Arkansas that day to be with the grandfather, who was believed at that time to be on his deathbed. At the time of the contact on April 19, Ms. Dickerson told the supervisor that she would be returning to Iowa late in the evening on April 20. The supervisor approved the absence, but did not document the April 20 absence as a "planned" absence. This led to the employer documenting the April 20 absence as a no-call/no-show. When Ms. Dickerson returned to work following the absence, the employer did not follow up with Ms. Dickerson regarding the absence and did not issue a warning or reprimand to Ms. Dickerson in connection with the absence.

The employer considered additional absences when making the decision to discharge Ms. Dickerson from the employment. On September 22, October 2, 3 and 4, November 2 and 3, 2012 and on February 20, 2013, Ms. Dickerson was absent due to illness and properly notified the employer of her need to be absent. On October 30 and 31 and December 13, 2012, and February 1, March 7 and 19, 2013, Ms. Dickerson was absent so that she could care for her ill five-year-old son. In each instance, Ms. Dickerson properly notified the employer of her need to be absent. On September 14 and 15, 2012, Ms. Dickerson was absent from work in connection with her dog undergoing and recovering from surgery and properly notified the employer of her need to be absent.

The employer has a "no-fault" attendance policy. Under the employer's policy, the employer assigned attendance points to absences depending on whether the absences were "planned" or "unplanned." Under the policy, the employer assigned an attendance point to several of the absences referenced above that were due to personal illness or illness of a child and that were properly reported to the employer. The employer issued multiple warnings or reprimands to Ms. Dickerson for attendance. These included a three-day suspension in December 2012.

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 evidence in the record establishes that the final absence on June 1, 2013 was an unexcused absence under the applicable law. The weight of the evidence does not support Ms. Dickerson's assertion that it took her 10 minutes to gain access to the employer's facility on June 1. The weight of the evidence indicates instead that Ms. Dickerson was already late when she arrived at the employer's facility, took not more than a few minutes to conclude she could not access the facility through the normal means, and then entered through another nearby door near which the time clock was located.

The employer has presented insufficient evidence to establish that the April 20, 2013 absence was an unexcused absence under the applicable law. The employer presented no testimony from the supervisor with whom Ms. Dickerson spoke on the morning of April 19, 2013. Given the driving distance between Iowa and Arkansas, a reasonable person would not expect Ms. Dickerson to travel the distance to Arkansas on April 19 and then return to Iowa on April 20 in time to work her 7:00 a.m. to 3:00 p.m. shift. The weight of the evidence indicates that the April 20 absence was approved by the supervisor. This explains why the employer did not follow up with Ms. Dickerson immediately following the absence to warn or discipline her in connection with the absence.

As for the remaining absences, the evidence establishes that all but the two dog-related absence in September were due to Ms. Dickerson's illness or her young son's illness and were properly reported to the employer. Accordingly, all of the absences due to illness were excused absences under the applicable law and cannot be used as a basis for denying unemployment insurance benefits. The two dog-related absences in September 2012 were unexcused absences under the applicable law. For both of those absences, Ms. Dickerson could have made other arrangements for the care and supervision of her dog, but elected not to.

So we are left with three unexcused absences. The final unexcused absence was an incident of tardiness. The earlier two unexcused absences occurred eight months prior to the final unexcused absence. The administrative law judge concludes that Ms. Dickerson's unexcused absences were not excessive and did not constitute misconduct in connection with the employment. While it was within the employer's discretion to end the employment, the discharge did not disqualify Ms. Dickerson for unemployment insurance benefits. Ms. Dickerson is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The agency representative's June 25, 2013, 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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