IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DEDE J DOSSOU Claimant	**APPEAL NO. 17A-UI-06779-JTT**
	ADMINISTRATIVE LAW JUDGE DECISION
MASTERBRAND CABINETS INC Employer	
	OC: 06/04/17 **Claimant: Appellant (2R)**

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

STATEMENT OF THE CASE:

Dede Dossou filed a timely appeal from the June 27, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Dossou was discharged on May 23,2017 for violation of a known company rule. After due notice was issued, a hearing was held on August 17, 2017. Ms. Dossou participated and presented additional testimony through Koffi Dossou. Stephanie Mosely represented the employer. French-English interpreter Roland Hyppollite of CTS Language Link assisted with the hearing. Exhibit A was received into evidence.

This hearing was initial set for July 21, 2017, but had to be moved from that date because Ms. Dossou was in hospitalized at the time. The hearing was reset for August 4, 2017, but had to be reset again because Ms. Dossou was significantly ill and on pain medication at the time of the hearing.

ISSUE:

Whether Ms. Dossou separated from the employment for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dede Dossou is a French-speaking immigrant from Togo. Ms. Dossou arrived in the United States in February 2016. Ms. Dossou did not study English prior to coming to the United States and is still in the process of learning to speak and read English. Ms. Dossou's husband, Koffi Dossou, is fluent in English.

Ms. Dossou began her employment with Masterbrand Cabinets in November 2016. Ms. Dossou was assigned to the overnight shift. At the start of the employment, the employer assigned Ms. Dossou to work from 8:00 p.m. to 4:00 a.m. Shortly thereafter, the employer began to regularly require overtime work. Ms. Dossou could be scheduled to start as early as 4:30 p.m. and work as last as 8:30 a.m. and regularly worked well in excess of eight hours per shift. Ms. Dossou's work week began on Sunday evening and ended on Friday morning.

Ms. Dossou last performed work for the employer in a shift that ended at 5:15 a.m. on the morning of May 22, 2017. Ms. Dossou was next scheduled to report to work at 6:00 p.m. on May 22. On that day, Ms. Dossou's husband took Ms. Dossou to a medical clinic, where Ms. Dossou was diagnosed with a collapsed lung. Ms. Dossou was transported by ambulance from the medical clinic to an emergency room. Ms. Dossou was admitted to the hospital in a seriously ill condition and remained in the hospital until she was discharged from the hospital on Sunday, May 27, 2017. In the meantime, the employer deemed Ms. Dossou a no-call/no-show for her shifts on May 22 and 23, 2017. If Ms. Dossou needed to be absent from work, the employer's policy required that she call the designated absence reporting number at least 30 minutes prior to the start of her shift. Ms. Dossou was aware of the policy, but was physically incapacitated on May 22 and 23 and, therefore, incapable of providing the required notice. Mr. Dossou did not contact the employer because he was preoccupied with Ms. Dossou's serious illness. On May 24, 2017, the employer mailed notice to Ms. Dossou's address of record by certified mail terminating the employment based on the two no-call/no-show absences. The employer's written attendance policy deems two no-call/no-show absences to constitute abandonment of the employment. Ms. Dossou's husband signed for the certified mail on May 27, 2017. At that time, Mr. Dossou elected not to bring the letter to Ms. Dossou's attention in light of her continuing significant illness. After Ms. Dossou was discharged from the hospital, she decided that she could not return to the employment. Soon thereafter Ms. Dossou was readmitted to the hospital.

Prior to the absences on May 22 and 23, 2017, Ms. Dossou had most recently been absent on May 15 and 16. On May 15, Ms. Dossou left work early due to illness and properly notified her supervisor prior to departing. On May 16, Ms. Dossou was absent due to illness and properly notified the employer. The next most recent absence was on May 11, 2017, when Ms. Dossou was 12 minutes late for personal reasons.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

Iowa Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Ms. Dossou did not voluntarily quit the employment. Rather, the employer ended the employment on May 24, 2017 after erroneously concluding, pursuant to the employer's policy, that Ms. Dossou had abandoned the employment. The employer's no-call/no-show and job abandonment policy does not comport with the Iowa Administrative Code rule that requires three consecutive no-call/no-show absences before the employee will be presumed to have abandoned the employment. Ms. Dossou was discharged from the employment on May 24, 2017. The discharge was based on attendance. Ms. Dossou's decision at some later point not to return to the employment was of no weight because the separation had already occurred on May 24, 2017. The weight of the evidence indicates that Ms. Dossou and Mr. Dossou misstated the hospital admission date at May 26 in the appeal letter.

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:
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> 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 a discharge 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 a discharge triggered by absences on May 22 and 23, 2017. Both absences were due to serious illness requiring hospitalization. The claimant was physically incapable of providing notice to the employer on her need to be absent on either day. Each absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Ms. Dossou for unemployment insurance benefits. Because the final absences were unexcused absences under the applicable law, the evidence fails to establish a current act of misconduct.

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

The evidence in the record and the multiple illness-related delays in the appeal hearing call into question whether Ms. Dossou has been able to work and available for work since she established her claim for benefits. For that reason, this matter will be remanded to the Benefits Bureau for adjudication of that set of issues. The Benefits Bureau's review of the matter should

include review of medical documentation indicating whether Ms. Dossou has been released to return to work following her hospitalizations.

DECISION:

The June 27, 2017, reference 01, decision is reversed. The claimant was discharged on May 24, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has been able to work and available for work since she established her claim for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs