IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LINDA M MERKES
Claimant

EXIDE TECHNOLOGIES
Employer

APPEAL NO. 17A-UI-00277-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/11/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Linda Merkes filed a timely appeal from the December 29, 2016, 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. Merkes was discharged on December 12, 2016 for excessive unexcused absences. After due notice was issued, a hearing was held on January 31, 2017. Ms. Merkes participated. Fred Gilbert represented the employer. Exhibits 1 through 5, Seven and A through E 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: Linda Merkes was employed by Exide Technologies on a full-time basis from 2010 until December 12, 2016, when Fred Gilbert, Human Resources Manager, discharged her from the employment for attendance. From August 2014, Ms. Merkes was a respirator cleaner. From August 2014, Ms. Merkes' work hours were 9:00 p.m. to 5:00 a.m. Ms. Merkes' work week began on Sunday evening and ended on Friday morning.

The employer has a written attendance policy set forth in the employee handbook that Ms. Merkes received at the beginning of her employment. Pursuant to the written attendance policy, Ms. Merkes was required to telephone the designated absence reporting line and leave a message at least 30 minutes prior to the scheduled start of her shift. In the message, Ms. Merkes was required to provide her name, her shift, her supervisor's name, and a brief reason for the absence. If Ms. Merkes provided the employer with a doctor's note that took her off work for multiple days, she was not required to call in each day of the absence. Likewise, if Ms. Merkes was on an approved leave of absence, she did not have to call in each day of the absence. In all other circumstances, Ms. Merkes had to call in each day she was absent.

The employer uses a third-party leave and disability benefits administrator, Unum. To apply for a leave of absence, Ms. Merkes was required to telephone Unum or access Unum's website. Ms. Merkes was required to comply with Unum's request for supporting documentation by supplying such documentation to Unum.

Ms. Merkes last performed work for the employer on the morning of November 28, 2016, when she completed the shift that had started on November 27. On Friday, November 25, Ms. Merkes had suffered a non-work related injury to her left knee when her grandson jumped on her knee and hyper-extended the knee. Ms. Merkes had previously undergone knee replacement on that same knee. On November 28, Ms. Merkes went to Regional Family Health to have knee evaluated by a Physician Assistant (PA). The PA provided Ms. Merkes with a medical excuse document that took Ms. Merkes off work through December 4, 2016. The document indicated that Ms. Merkes was released to return to work on the evening of December 5, 2016 "unless notified otherwise." The PA told Ms. Merkes to rest her leg and to use her cane.

When Ms. Merkes got home from the medical appointment on November 28, she called Unum to apply for leave under the Family and Medical Leave Act (FMLA). Ms. Merkes provided appropriate information regarding her need to be absent during the period of November 28 through December 4. The Unum representative asked Ms. Merkes when her next medical appointment was. Ms. Merkes advised the Unum representative that her next medical appointment would be on December 5, 2016. The Unum representative told Ms. Merkes to call Unum after the appointment to provide an update regarding her medical condition. On November 28, Ms. Merkes took the written medical excuse to the workplace and handed it to Mr. Gilbert. Ms. Merkes was then absent from her shifts on November 28, 29 and 30 and December 1 and 4, 2016. Ms. Merkes did not call in for those shifts because she had provided the employer with the medical excuse and was not required to call in.

Ms. Merkes did not return to work on December 5, 2016. On that day, Ms. Merkes had her follow up appointment with the physician assistant and the PA provided her with a written medical excuse that took her off work through December 11. The medical excuse released Ms. Merkes to return to work on December 12 "unless notified otherwise." Ms. Merkes contacted Unum after the appointment to provide the update Unum had requested. Ms. Merkes had received written notice from Unum that she was *eligible* for FMLA leave as of the November 28. The notice from Unum went on to state that Ms. Merkes' eligibility "will be reevaluated as of the first approvable absence." The notice went on to state that if Ms. Merkes' disability claim was approved, her FMLA claim would also be approved. The notice stated further that if Ms. Merkes did not receive or did not want disability benefits, she was still entitled to FMLA leave and a certification from her health care provider may be required. Though Ms. Merkes believes she took a copy of the December 5 medical excuse to the workplace, the weight of the evidence indicates she did not. Ms. Merkes did not call in absences for the period of December 5-8 because she believed she was on an approved FMLA leave of absence and, therefore, believed she was not required to call in the absences.

On Friday, December 9, Mr. Gilbert called Ms. Merkes to ask why she had not returned to work and had not been calling in her absences. At that time, Ms. Merkes told Mr. Gilbert she had not been calling in because she had a letter from Unum that said she was approved for FMLA. Ms. Merkes told Mr. Gilbert that she had contacted Unum on December 5, after her medical appointment, and had been approved by Unum for both FMLA and short-term disability benefits. Mr. Gilbert told Ms. Merkes that he did not have anything from Unum that approved FMLA. Ms. Merkes and Mr. Gilbert agreed that Ms. Merkes would drop the letter off between 4:30 and 5:00 p.m. that day. Mr. Gilbert ended up leaving earlier than expected that day and, therefore,

was not available to speak with Ms. Merkes when she went to the workplace. Ms. Merkes provided the first page of the Unum letter to Julie Hume in the human resources office.

After the contact on December 9, Ms. Merkes and the employer next had contact on Monday December 12, 2016. Ms. Merkes' usual work hours would have included a shift on the evening of Sunday, December 11, 2016. Ms. Merkes did not report for work that evening and did not call in an absence for that evening. Ms. Merkes continued under the belief that she did not need to report the absence because Unum had approved FMLA leave.

On December 12, 2016, Ms. Merkes returned to Regional Family Heath for a follow-up evaluation of her knee. At that time, the evaluating doctor released her to return to work without restrictions. After the appointment, Ms. Merkes took the medical release to the workplace and met with Mr. Gilbert. Ms. Merkes' supervisor, Julie Christianson, also participated in the meeting. During the meeting, Mr. Gilbert told Ms. Merkes that she had "pointed out" pursuant to the employer's attendance policy by being a no-call/no-show for multiple shifts Ms. Merkes reiterated that had not called in to report those absences because she believed she was on a Unum approved FMLA leave. Mr. Gilbert discharged Ms. Merkes from the employment at that time.

On December 16, 2016, Unum mailed a letter to Ms. Merkes that indicated Ms. Merkes was approved for short-term disability benefits for the period of November 28 through December 11, 2016.

On December 19, 2016, Unum mailed a letter to Ms. Merkes that indicated Ms. Merkes was approved for FMLA leave for the period of November 28 through December 11, 2016.

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.
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> 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 weight of the evidence fails to establish any unexcused absences during the period beginning November 28, 2016, and therefore fails to establish misconduct in connection with the employment. The weight of the evidence in the record establishes that Ms. Merkes reasonably

concluded, based on information she had received from Unum and based on the employer's attendance policy, that she was not required to report the absences that triggered the employer's decision to discharge her from the employment. The initial Unum correspondence that Ms. Merkes relied upon was at best confusing. A reasonable person could well take from the correspondence that FMLA had been approved. The correspondence that Unum sent to Ms. Merkes on December 16 and 19 supports the conclusion that Ms. Merkes had a reasonable belief that she did not need to call in the absences that triggered the discharge. Employer's sometimes invite this sort of confusion when they elect to utilize third-party leave administrators. The evidence fails to establish any substantial, willful or wanton disregard of the employer's interests. The weight of the evidence establishes instead an employee acting in good faith to maintain the employment relationship while dealing with a significant health issue.

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

DECISION:

The December 29, 2016, reference 01, decision is reversed. The claimant was discharged on December 12, 2016 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

jet/rvs