IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TAMARA TOLEFREE
Claimant

HY-VEE INC
Employer

APPEAL NO. 15A-UI-04529-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/19/14
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 9, 2015, reference 02, decision that that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on May 21, 2015. Claimant Tamara Tolefree participated. Susan Bentler of Corporate Cost Control represented the employer and presented testimony through Wes Brommel and Jason Crocker. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant in connection with the claimant in connection with the current claim year. Exhibits One, Two, Four through Seven, Nine and Twelve were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tamara Tolefree was employed by Hy-Vee as a full-time assistant manager from January 17, 2015 until March 30, 2015, when Jason Crocker, Store Director, discharged her for attendance. If Ms. Tolefree needed to be absent from the employment, the employer's written policy required that she notify her supervisor at least an hour prior to the scheduled start of her shift. The policy was provided to Ms. Tolefree at the start of her employment and she was aware of the policy. As an assistant manager, Ms. Tolefree was responsible for assisting with enforcement of the policy.

The final absence that triggered the discharge occurred on March 10, 2015, when Ms. Tolefree was absent from her 8:00 a.m. to 4:00 p.m. shift. Ms. Tolefree was absent because she had been in a two-car collision while enroute to work that morning. Ms. Tolefree had been a

passenger in a vehicle operated by an acquaintance when the vehicle was rear-ended by another car. Ms. Tolefree bumped her knee and thereby reinjured a prior knee injury. Ms. Tolefree's acquaintance had been more seriously injured than Ms. Tolefree. Neither motorist had auto insurance. For that reason, the motorists agreed not to summon law enforcement to document the accident. Ms. Tolefree used someone's cell phone to summon a friend to take her and the driver to Broadlawns Medical Center. In the heat of the moment, Ms. Tolefree did not think to use that same phone to notify Hy-Vee that she would be absent or late. Ms. Tolefree was evaluated at Broadlawns and was then sent home. Ms. Tolefree did not think to contact the employer while she was waiting to be seen at Broadlawns. At about 12:30 p.m. a friend of Ms. Tolefree contacted Hy-Vee, spoke to a manager, and indicated he was calling on behalf of Ms. Tolefree to report that she had been in a car accident.

At 2:45 p.m. on March 10, Ms. Tolefree contacted Hy-Vee and spoke to Wes Brommel, Human Resources Manager. Ms. Tolefree said she was calling to confirm that her friend had contacted the employer on her behalf. Ms. Tolefree said she would not be in for her shift because she had been in a car accident and that she was pretty sore. Ms. Tolefree said the driver of the vehicle in which she was riding was in critical condition. Mr. Brommel told Ms. Tolefree that he would need documentation concerning the accident because in light of her late notice to the employer that she would be absent from her shift. Mr. Brommel told Ms. Tolefree to keep in touch.

Later in the day on March 10, Ms. Tolefree returned to Broadlawns because her knee had worsened. While at Broadlawns, Ms. Tolefree obtained a medical excuse that indicated she had been seen on that day and was released to return to work on March 12, 2015.

Ms. Tolefree was scheduled to work 3:00 p.m. to 11:00 p.m. on March 11, 2015, but properly reported to the employer that morning that she would need to be absent. The manager that Ms. Tolefree spoke to reiterated that she would need to provide documentation concerning the car accident before she would be allowed to return to work. Ms. Tolefree advised that she would have a friend drop off documentation later in the day. No one dropped off documentation later that day.

Ms. Tolefree was next scheduled to work 3:00 p.m. to 11:00 p.m. on March 15. Ms. Tolefree contacted the store that morning to confirm her work hours for that day. The manager reminded Ms. Tolefree that she would need to provide documentation concerning the accident before she would be allowed to return to work. Ms. Tolefree said it would be very hard for her to do that as the passenger in one of the vehicles and that the police had not been called to investigate. Ms. Tolefree told the manager that she had medical documentation. The manager told Ms. Tolefree that the documentation would be insufficient and that the employer required documentation of the car accident. The manager told Ms. Tolefree that in the absence of documentation of the accident, the employer would deem her to have passed the number of allowable attendance occurrences.

Ms. Tolefree was on the schedule to work on March 18 and 19, but had not been made aware that she was scheduled to work those days.

On March 20, Ms. Tolefree went to the store to deliver her medical release from the March 10 trip to Broadlawns. The note was from the evening to trip to Broadlawns. While Ms. Tolefree was at Hy-Vee, Mr. Brommel asked her whether the vehicle she was in had remained drivable or had been totaled. Ms. Tolefree said she did not know because she had not spoken to the driver since the accident. Mr. Brommel suggested that if the vehicle had been towed Ms. Tolefree could provide proof of that to the employer.

On March 23, Ms. Tolefree spoke to Mr. Brommel and said she would provide a tow receipt by the end of the day. Ms. Tolefree did not provide the documentation that day or the next. The auto shop that had towed the vehicle was a small operation and Ms. Tolefree had been having difficulty locating the tow operator.

On March 28, Ms. Tolefree delivered a tow receipt to Hy-Vee. The employer questioned the validity of the tow receipt because someone appeared to have written directly on the form, but the form was the yellow copy of a three-part carbon copy packet. Mr. Brommel told Ms. Tolefree that Store Director Jason Crocker would review the tow receipt and make a decision about her employment.

The employer subsequently notified Ms. Tolefree that she needed to appear for a meeting on March 30. At that meeting, Mr. Crocker told Ms. Tolefree that he needed an explanation of what had happened on March 10 because he was questioning why Ms. Tolefree had not contacted the employer earlier on March 10. When Mr. Crocker proceeding to question Ms. Tolefree about the particulars of the accident, Ms. Tolefree said she had never been subjected to such questioning in prior employments and that she did not have to explain herself. Mr. Crocker told Ms. Tolefree that she did have explain herself. Mr. Crocker told Ms. Tolefree that the documentation she had provided was insufficient and that she was discharged from the employment. At that point, Ms. Tolefree got up and exited and the meeting. Mr. Crocker asked for her store keys. Ms. Tolefree indicated that she would provide them, but never did.

In making the decision to discharge Ms. Tolefree from the employment, the employer considered prior absences. The next most recent absence had occurred on March 7, when Ms. Tolefree was late due to transportation issues. Ms. Tolefree had also been late for personal reasons on February 3, February 5 and March 5. The employer had issued a written reprimand to Ms. Tolefree on March 7.

The claimant has not received any unemployment insurance benefits in connection with the claim year that started for her on October 19, 2014.

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.

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 question the administrative law judge must decide is whether Ms. Tolefree was discharged for reason that disqualifies her for benefits, a determination that is distinct from the employer's decision to end the employment. Though the employer assigned to Ms. Tolefree the burden of proving that she had good cause for failing to notify the employer earlier in the day on March 10 regarding her need to be absent that day, the administrative law judge must be careful not to shift to the claimant a burden of proof that the law assigns to the employer in this matter. The weight of the evidence indicates that Ms. Tolefree was indeed involved in a car accident on the morning of March 10. That conclusion is supported by several pieces of evidence including the friend's telephone call on March 10, Ms. Tolefree's telephone call on March 10, the doctor's note dated March 10 and the tow receipt for the totaled vehicle dated March 10. While one can take issue with Ms. Tolefree's decision to go along with the drivers' agreement not to involve law enforcement, Ms. Tolefree's poor judgment in that regard does not establish that no accident occurred. Ms. Tolefree could not have complied with the employer's requirement that she contact the employer at least an hour prior to the shift because the accident did not occur at least an hour prior to the shift. Ms. Tolefree testified that contacting Hy-Vee regarding her need to be absent was not part of her thought process at the time of the accident. A reasonable person would find such temporary lapse understandable in light of more immediate concerns regarding personal injury suffered by Ms. Tolefree and the driver of the vehicle in which she was riding. However, given Ms. Tolefree's testimony that she had been on her way to work at the time of the accident, given the warning she had just received from the employer three days earlier, and given the evidence indicating that she had access to a phone a number of times prior to 2:45 p.m., the weight of the evidence indicates that Ms. Tolefree unreasonably delayed providing personal notice to the employer of her need to be absent. Ms. Tolefree had been released from her first visit to Broadlawns by the time her friend contacted the employer at 12:30 p.m. The weight of the evidence indicated that Ms. Tolefree could have taken reasonable steps at that point, if not earlier, to contact the employer personally, but elected not to do that. Given that Ms. Tolefree could have, and should have, contacted the employer earlier than she did, the administrative law judge concludes that the March 10 absence must be deemed an unexcused absence. The March 10 absence followed four additional unexcused absences in February and March. Ms. Tolefree's unexcused absences were excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Tolefree was discharged for misconduct. Accordingly, Ms. Tolefree 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.

Because there has been no payment of benefits, there is not overpayment to address.

DECISION:

The April 9, 2015, reference 02, decision is reversed. The claimant was discharged for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been 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.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/css