IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JESSICA L WOOD
Claimant

THE UNIVERSITY OF IOWA
Employer

APPEAL NO. 06A-UI-09248-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/06/06 R: 03
Claimant: Appellant (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Jessica Wood filed a timely appeal from the September 14, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 2, 2006. Ms. Wood participated. Human Resources Specialist David Burgeon represented the employer and presented additional testimony through Facilities Services Coordinator Bill Ciha. Employer's Exhibits One through Five were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jessica Wood was employed by the University of Iowa as a full-time custodian from October 18, 2004 until August 3, 2006, when Facilities Services Coordinator Bill Ciha discharged her for attendance. Ms. Wood worked at the University of Iowa Hospitals and Clinics (UIHC) throughout the employment. On March 6, Ms. Wood transferred to the area supervised by Mr. Ciha. Ms. Wood's regular hours of employment were 5:00 p.m. to 1:30 a.m., Monday through Friday.

The University has a written attendance policy that is set for in an employee handbook. Under the policy, an employee is required to notify the employer prior to the scheduled start of a shift if she needs to be absent. This campus-wide policy is reviewed with employees at the time of hire and reviewed during any attendance disciplinary measures. The policy was reviewed with Ms. Wood on November 29, 2005 in connection with a reprimand for attendance.

Early in July, Ms. Wood was absent for several days due to mental illness. Ms. Wood had been diagnosed with depression and anxiety and had been prescribed psychotropic medications. On July 12, at the end of the period of absence, Ms. Wood contacted the UIHC Human Resources department to request that her absence be treated as a leave of absence under the Family and

Medical Leave Act (FMLA). The employer provided Ms. Wood with an application for FMLA. Ms. Wood had her doctor complete medical certification information and returned the application to the employer.

Mr. Ciha was on vacation beginning July 17 and returned to work on July 31. While Mr. Ciha was away, five "group leaders" were assigned responsibility for receiving calls from employees who needed to be absent. Ms. Wood did not speak with any of the group leaders with regard to her absences that occurred while Mr. Ciha was on vacation. Mr. Ciha had previously designated his telephone number as the number employees were to call to report absences. If Mr. Ciha was not available to take the call, there was a telephone voice messaging system on which employees could leave messages. The telephone voice messaging system records the date and time of messages. When Mr. Ciha returned from his vacation, he learned that Ms. Wood had been absent since she left her shift early on July 20. Mr. Ciha reviewed the messages Ms. Wood had left on the voice messaging system. None of the messages included a telephone number at which Ms. Wood might be reached.

On July 20, Ms. Wood left work early because her psychotropic medication was making her feel ill. Before Ms. Wood left work, she left a voice mail message for Mr. Ciha. Ms. Wood indicated the shat was leaving work early due to illness, but planned to be back at work on Friday, July 21. Ms. Wood asserts that she called and left a message for Mr. Ciha on July 21, but no such message appeared on Mr. Ciha's voice mail when he returned from vacation. On Monday, July 24, Ms. Wood notified the employer at 5:14 p.m. that she would be absent from her 5:00 p.m. shift due to illness. Ms. Wood indicated that she might extend the absence to three days, beginning with Friday, July 21, so that she could ask to have the absences treated as FMLA leave. On July 25, Ms. Wood was absent without notifying the employer. Ms. Wood asserts that she contacted the employer on that day and left a message, but no such message appeared on Mr. Ciha's voice mail when he returned from vacation. On July 26, Ms. Wood left a voice mail message for Mr. Ciha at 5:25 p.m. Ms. Wood indicated that she was still on leave and would remain on leave until further notice. Ms. Wood was absent without notifying the employer on Thursday, July 27, Friday, July 28, Monday, July 31, and Tuesday, August 1. On August 2, Ms. Wood notified the employer at 6:29 p.m. that she would be returning to the employment on August 3. However, Mr. Ciha had already sent Ms. Wood a letter discharging her from the employment.

Ms. Wood acknowledges that she failed to properly notify the employer on some, but not all, of the dates she was absent. Ms. Wood acknowledges that on those occasions where she failed to timely notify the employer, it was because she did not have ready access to a telephone, did not have reliable transportation, had just moved to a new neighborhood, and/or did not know anyone in the new neighborhood well enough to borrow a telephone. If the employer needed to contact Ms. Wood during her absence, Ms. Wood expected the employer to telephone her father and leave a message. Ms. Wood expected her father would then drive to her residence to relay the message. Ms. Wood had previously provided the employer with a contact number that was subsequently disconnected. Ms. Wood was aware of the appropriate absence notification. On November 29, 2005, Ms. Wood had received a three-day disciplinary suspension for failing to properly notify the employer regarding the need to be absent from work. The notification requirement was reviewed with Ms. Wood at that time.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Wood was discharged for misconduct in connection with the employment. It does.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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). In the present case, Ms. Wood's absences did not come to the attention of Mr. Ciha until July 31.

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). Ms. Wood indicated she had phone records of the telephone calls she made to the employer. However, Ms. Wood did not make those records available for the hearing.

In order for Ms. Wood's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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).

The evidence in the record establishes that the final absence that prompted the discharge occurred on August 2. On that day, Ms. Wood may have been absent due to illness, but she failed to properly notify the employer of the absence. This final unexcused absence followed several days of "no-call, no-show" absences and absences without proper notification. All of these absences, except the absence on July 20 were unexcused under the applicable law. The evidence indicates that Ms. Wood was well aware of the proper notification procedure and the requirement that she notify the employer each day she was absence. Ms. Wood's unexcused absences were excessive.

Ms. Wood provided internally contradictory testimony and testimony inconsistent with the weight of the evidence. The administrative law judge finds not credible Ms. Wood's assertions that she contacted the employer at times not documented by the employer's voice mail system.

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

DECISION:

The Agency representative's September 14, 2006, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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