IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

FREWEYNI ABRAHA
Claimant

SWIFT PORK COMPANY
Employer

APPEAL NO. 17R-UI-09701-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/04/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The matter was before the administrative law judge for hearing based on the Employment Appeal Board remand in Hearing Number 17B-UI-06430. Claimant Freweyni Abraha filed a timely appeal from the June 22, 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. Abraha was discharged on May 15, 2017 for excessive unexcused absences. After due notice was issued, a hearing was held on October 9, 2017. Ms. Abraha participated. Rogelio Bahena represented the employer. Tigrinya-English interpreter Daniel Gheresus assisted with the hearing.

ISSUE:

Whether Ms. Abraha 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: Freweyni Abraha was employed by Swift Pork Company, a/k/a JBS, as a full-time pork production worker from 2014 until May 17, 2017, when Rogelio Bahena, Human Resources Supervisor, discharged her for attendance. The workplace was in Ottumwa and Ms. Abraha resided in Ottumwa. Ms. Abraha's scheduled work hours were 5:30 a.m. to 2:00 p.m., Monday through Saturday. Ms. Abraha was required to stay until the day's production was done, which might mean staying until 3:00 p.m. If Ms. Abraha needed to be absent from work, the employer's attendance policy required that she give notice to the employer by calling the designated absence reporting line at least 30 minutes prior to the scheduled start of her shift and follow the automated prompts to provide her identity and the reason for the absence. The employer reviewed the policy with Ms. Abraha at the start of her employment. Ms. Abraha was aware of the absence reporting policy. The number for the absence reporting line was on the back side of Ms. Abraha's employee ID. Ms. Abraha speaks Tigrinya and does not speak English. Ms. Abraha required the assistance of a bilingual or English speaking friend to leave the required absence reporting information on the designated absence reporting line. Until March 2017, Ms. Abraha relied upon a particular friend to assist her in reporting absences. The friend

then moved and was no longer available to assist Ms. Abraha. Under the employer's attendance policy, Ms. Abraha was subject to discharge if she accumulated 10 attendance points. The employer assigned two attendance points for absences without notice to the employer.

The final absence that triggered the discharge occurred on May 15, 2017, when Ms. Abraha was absent for personal reasons and failed to notify the employer of her need to be absent. Ms. Abraha returned to work on May 16, 2017 and was discharged the next day.

In making the decision to discharge Ms. Abraha from the employment, Mr. Bahena considered absences dating back to November 23, 2016. On that date Ms. Abraha was absent so that she could take her ill child to a medical appointment in Iowa City. Ms. Abraha provided proper notice to the employer, but erroneously indicated that the absence was FMLA-related.

Ms. Abraha was absent on February 13, 14 and 15, 2017 due to the need to care for her sick child. Ms. Abraha did not notify the employer of her need to be absent on February 13, 2017. Ms. Abraha properly notified the employer on February 14 and 15 of her need to be absent those days. When Ms. Abraha returned to work, she provided the employer with a medical note supporting her need to be absent all three days.

On April 15, 2017, Ms. Abraha was absent due to illness and properly notified the employer.

On May 9 and 10, 2017, Ms. Abraha was absent from work and did not notify the employer. Ms. Abraha's absence for each day was based on a disagreement with her husband and her husband's refusal to transport her to and from the workplace. Ms. Abraha returned to work on May 11. The final no-call/no-show absence followed on May 15, 2017.

REASONING AND CONCLUSIONS OF LAW:

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:
>
> 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 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 in the record establishes a discharge based on excessive unexcused absences. The weight of the evidence in the record establishes that Ms. Abraha

was absent without notice to the employer on February 13, May 9, May 10 and May 15, 2017. Ms. Abraha was aware of the absence reporting requirement. Despite the language barrier issue, Ms. Abraha demonstrated during the employment the ability to obtain assistance when necessary so that she could properly report her absences to the employer. The three no-call/ no-show absences in May 2017 were sufficient to establish excessive unexcused absences and misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Abraha was discharged for misconduct. Accordingly, Ms. Abraha is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Abraha must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The June 22, 2017, reference 01, decision is affirmed. The claimant was discharged on May 17, 2017 for excessive unexcused absences. 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 amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs