IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ELIZABETH A SAUVE
Claimant

NURSEFINDERS OF DES MOINES
Employer

APPEAL NO. 08R-UI-00690-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/19/07 R: 02
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The matter was before the administrative law judge based on an Employment Appeal Board remand. Nursefinders of Des Moines filed a timely appeal from the September 27, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 19, 2008. Claimant Elizabeth Sauve participated. Carrie Morehouse, Branch Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Six 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: Elizabeth Sauve was employed by Nursefinders of Des Moines as a part-time Certified Nursing Assistant (C.N.A.) from November 16, 2005 until August 20, 2007, when Melinda McCarty, Mason City Staffing Manager, discharged her. The employer is a staffing agency. Ms. Sauve was scheduled to work at 10:00 p.m. on August 20. At 12:52 p.m., Ms. Sauve contacted Ms. McCarty to report that she would be absent due to illness. The employer's policy required that Ms. Sauve contact the employer as soon as possible and at least two hours prior to the scheduled start of the shift. Ms. McCarty suggested that Ms. Sauve lay down and wait to see whether she felt better later in the day. Ms. Sauve indicated that she was sick and that it would not be a good idea for her to work. Ms. Sauve was pregnant and was experiencing illness related to the pregnancy. The employer's written policy requires a doctor's excuse for every absence due to illness. Ms. Sauve had an upcoming appointment, but told Ms. McCarty that she would not be going to the doctor that day and would not be providing a doctor's excuse. Ms. McCarty told Ms. Sauve that there was no one else to cover Ms. Sauve's assigned shift. Ms. McCarty had done no investigation to see whether there was in fact someone else who could cover the shift. Ms. McCarty told Ms. Sauve that if she cancelled the shift, she would no longer have a job. Ms. Sauve said she would not be appearing for the shift and Ms. McCarty

told Ms. Sauve she was discharged from the employment. After Ms. McCarty discharged Ms. Sauve, Ms. Sauve indicated that the timing of the discharge was fortuitous because her mother was coming to visit the next week. Ms. Sauve had previously been scheduled to work several shifts during the next week.

Ms. Sauve's next most recent absence has occurred on April 29, 2007. On that day, Ms. Sauve attended a funeral and, afterwards, did not believe she was able to work. However, Ms. Sauve provided the employer with late notice of her need to be absent. Ms. Sauve drove to the assignment, arrived late, and left when the employer provided a replacement.

The employer's staffing procedure allowed Ms. Sauve, or any other employee, to decline offered assignments. The employer's written prohibited excessive "cancellations" or absences once the employee had accepted a particular assignment. Prior to August 20, Ms. Sauve has most recently "cancelled" an assignment on March 12, 2007, because her child was ill. Ms. Sauve properly reported the absence. Ms. Sauve's child had been to the emergency room that day. In connection with the separation, the employer recorded cancellations for August 21, 22, 24, 28, 29, 30, and 31. However, each of these days fell after the date of discharge.

Ms. McCarty involuntarily separated from her employment with Nursefinders at the end of 2007 and did not testify at the appeal hearing.

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.

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.

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).

The administrative law judge concludes that the employer's requirement that an employee obtain a doctor's note for each and every absence due to illness was unreasonable. The evidence indicates that the final absence that prompted the discharge was an absence due to illness, was appropriately reported to the employer, and was an excused absence under the applicable law. Because the final absence that prompted the discharge was an excused absence under the applicable law, the evidence fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). Because the evidence fails to establish a "current act," the discharge would not disqualify Ms. Sauve for unemployment insurance benefits. See 871 IAC 24.32(8). Because the final absence was an excused absence under the applicable law, the administrative law judge need not consider the prior absences and whether they were excused. Nonetheless, the evidence indicates that the next most recent absence was on April 29, 2007. Accordingly, even if the evidence had established a final unexcused absence, the evidence would not have established excessive unexcused absences that would disqualify Ms. Sauve for benefits. The greater weight of the evidence indicates that Ms. Sauve's comments about the August 21-31 shifts occurred after Ms. McCarty discharged her. Accordingly, anything

pertaining to those shifts is irrelevant with regard to the determination of whether Ms. Sauve was discharged for misconduct.

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

DECISION:

The Agency representative's September 27, 2007, reference 01, decision is affirmed. The claimant was discharged 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

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