IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

ARIEL M ODEEN
Claimant

GRANNEMANS INVESTMENTS INC
Employer

APPEAL NO: 18A-UI-08856-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/29/18
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 14, 2018, reference 01, decision 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 the Benefits Bureau deputy's conclusion that the claimant was discharged on July 30, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on September 10, 2018. Claimant Ariel Odeen did not register a telephone number for the hearing and did not participate in the hearing. Marty Smith represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

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: Ariel Odeen was employed by Grannemans Investments, Inc., d/b/a Subway, as a part-time Sandwich Artist from May 28, 2018 until June 30, 2018, when the employer discharged her for attendance. Ms. Odeen worked at the Subway restaurant in Washington, Iowa. Brittany Reed, Store Manager, was Ms. Odeen's immediate supervisor. Ms. Reed reports to Marty Smith, Director of Operations. The employer's verbal absence reporting policy required that employees give notice of absences 24 hours prior to the scheduled start of the shift. The employer's verbal policy also required that employees find a replacement employee to work the shift. The employer's verbal absence policy required that employees present a doctor's note releasing them to return to work following an absence due to illness. It is unclear how much of

this verbal absence reporting policy was actually communicated to Ms. Odeen. The employer has posted in the workplace an Iowa Department of Inspections and Appeals flier regarding communicable illness. The flier states an employee must notify the person in charge of the establishment if the employee has been exposed to, or the employee or a member of the employee's household has been diagnosed with norovirus, E. Coli, Salmonella, Shigella or hepatitis A. The employer interprets the flier as requiring a medical release in each instance an employee is absent due to any illness. Mr. Smith speculates that Ms. Odeen's absences were not due to illness, but were instead "a tantrum" in response to the employer's decision discharge Ms. Odeen's friend and coworker.

The final absence that triggered the discharge occurred on July 29, 2018, when Ms. Odeen was absent due to illness and notified Ms. Reed prior to the scheduled start of her shift. The employer considered earlier absences and associated reprimands when making the decision to discharge Ms. Odeen from the employment. On July 16, 2018, Ms. Odeen was absent without notifying the employer. On July 17, 2018, Ms. Reed issued a written reprimand to Ms. Odeen in which she stated, "We must know if your [sic] coming in for your shift." Ms. Reed did not include any more information regarding absence reporting requirements. On July 23, 2018, Ms. Odeen was absent due to illness and notified Ms. Reed prior to the scheduled start of her shift. On July 24, 2018, Ms. Reed issued a written reprimand to Ms. Odeen. Ms. Reed wrote, "Could not find anyone to cover you." Ms. Reed made no reference in the reprimand to requirements that Ms. Odeen report the absence 24 hours in advance, that she find her own replacement, or that she provide a medical excuse upon return to work following an absence due to illness. Ms. Reed issued a third reprimand to Ms. Odeen in connection with an absence due to illness on July 25, 2018. Curiously, the reprimand is dated July *24*, 2018. Again, Ms. Reed made no reference in the reprimand to requirements that Ms. Odeen report the absence 24 hours in advance, that she find her own replacement, or that she provide a medical excuse upon return to work following an absence due to illness.

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).

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 employer presented insufficient evidence to provide misconduct in connection with the employment by a preponderance of the evidence. The employer presented insufficient evidence to prove that absences Ms. Odeen reported as due to illness were not in fact due to

illness. The employer's sole witness, Mr. Smith, did not have any direct contact or discussion with Ms. Odeen in connection with any of the absences or reprimands. The employer elected not to present testimony from Ms. Reed, the person who was in immediate contact with Ms. Odeen regarding the absences and reprimands. The employer presented insufficient evidence to prove that employer communicated to Ms. Odeen a requirement of a 24-hour advance notice of absences, a requirement that Ms. Odeen find her own replacement, or a requirement that Ms. Odeen provide a medical release upon return from an absence due to illness. A 24-hour notice requirement for all absences is inherently unreasonable. A requirement that an employee absent to illness find his or her own replacement is often unreasonable. *Gaborit*, above, makes clear that requiring a medical note cannot change what would otherwise be an excused absence under the applicable law into an unexcused absence. The weight of the evidence in the record establishes that Ms. Odeen was absent due to illness and with appropriate notice to the employer on July 23, 25 and 29, 2018. Accordingly, each of these absences was an excused absence under the applicable law and cannot serve as a basis for a finding of misconduct or a disqualification for unemployment insurance benefits. Because the final absence was an excused absence under the applicable law, the administrative law judge need not further consider the July 16 no-call, no-show absence.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Odeen was discharged on July 30, 2018 for no disqualifying reason. Accordingly, Ms. Odeen is eligible for benefits, provided she is otherwise eligible. As stated at the appeal hearing, his employer is not a base period employer for purposes of the claim year that began for Ms. Odeen on July 29, 2018 and therefore will not be charged for benefits in connection with the current claim year. However, the employer's account may be charged for benefits paid to Ms. Odeen in connection with a future claim year, provided Ms. Odeen is at that time deemed eligible for benefits and the employer is at that time deemed a base period employer.

DECISION:

The August 14, 2018, reference 01, decision is affirmed. The claimant was discharged on July 30, 2018 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