IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NANCY M BUJANOWSKI
Claimant

AGRI-INDUSTRIAL PLASTICS CO
Employer

APPEAL NO. 13A-UI-07796-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/02/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Nancy Bujanowski filed a timely appeal from the June 26, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 11, 2013. Ms. Bujanowski participated. Brett Ferrel represented the employer. Exhibits A and B were received into evidence.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nancy Bujanowski was employed by Agri-Industrial Plastics as a full-time machine operator from February 18, 2013 until June 5, 2013, when Brett Ferrel, Human Resources Manager, discharged her for attendance. Ms. Bujanowski's usual work hours were 4:00 p.m. to midnight shift, Monday through Friday. Ms. Bujanowski's supervisor was Jared Hook. If Ms. Bujanowski needed to be absent from work, the employer's policy required that she telephone Mr. Hook at least 30 minutes before the scheduled start of her shift. The policy was contained in the employee handbook, which the employer had provided to Ms. Bujanowski. Ms. Bujanowski last performed work for the employer on April 25, 2013.

On April 26, 2013, Ms. Bujanowski broke her foot as she was getting off an exam room table when she jumped off an exam table in her doctor's office. Ms. Bujanowski contacted the workplace and left a voicemail message for Mr. Hook. Ms. Bujanowski explained that she had broken her foot and that her doctor had said she would need to take it day-by-day, week-by-week to see when she would be able to return to work. Ms. Bujanowski left her phone number and invited Mr. Hook to call her if he had any questions. Ms. Bujanowski was on crutches and in an orthopedic walking boot. Her doctor had told her to stay off her foot. The employer did not make contact with Ms. Bujanowski. Ms. Bujanowski did not make further direct contact with the employer until June 3, 2013.

On May 7, 2013, the employer received a doctor's note that took Ms. Bujanowski off work through May 21, 2013. On May 21, 2013, the employer received a doctor's note that took Ms. Bujanowski off work through Monday, May 27, 2013. The note indicated that Ms. Bujanowski could return to work on May 28, 2013. Ms. Bujanowski did not return to work on May 28, 2013 or notify the employer of her need to be off work that day.

On Wednesday, May 29, 2013, the employer received a doctor's note that said Ms. Bujanowski could return to work on June 3, 2013. Ms. Bujanowski did not return to work on June 3 or 4. Ms. Bujanowski did not contact the employer on June 3 or June 4 to indicate a continued need to be absent. Ms. Bujanowski waited until June 4 to contact her doctor about continued foot pain and her belief that she could not return to work on June 3 or 4. The employer did not receive a doctor's note to cover the absences on June 3 and 4.

On June 5, 2013, Ms. Bujanowski telephoned Brett Ferrel, Human Resources Manager. Ms. Bujanowski's father, who also worked for the employer, had told Ms. Bujanowski that the employer had ended the employment based on Ms. Bujanowski's failure to appear for work or contact the employer. When Ms. Bujanowski contacted Mr. Ferrel on June 5, Mr. Ferrel told Ms. Bujanowski that the employment was ended due to her no-call/no-show absences on June 3 and June 4. Ms. Bujanowski asserted that her doctor had faxed notes to the employer. The employer had not received any such notes. Ms. Bujanowski's doctor had indeed released her to return to work on June 5, 2013.

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 evidence in the record establishes no-call/no-show absences on May 28, June 3 and June 4, 2013. Each of the absences was an unexcused absence under the applicable law. The evidence indicates that Ms. Bujanowski had little invested in the employment and was unreasonably casual with regard to staying in touch with the employer during her extended absence. Ms. Bujanowski largely delegated her obligation to maintain contact with the employer to her doctor. It was not the doctor's obligation to keep the employer informed of Ms. Bujanowski's continued need to be absent. The employer discharged Ms. Bujanowski from the employment after the two final consecutive no-call/no-show absences. The weight of the evidence fails to support Ms. Bujanowski's assertion that she left messages for Mr. Hook on June 3 or June 4. There is no reason to believe Ms. Bujanowski would make such contact on those days after being out of direct contact with the employer since April 26, 2013. Ms. Bujanowski's unexcused absences were excessive and constituted misconduct in connection with the employment. Ms. Bujanowski 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.

DECISION:

The agency representative's June 26, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. 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 will not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs