IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

MARIE DUCLOS
Claimant

GYPSUM CREEK HEALTHCARE INC
Employer

APPEAL NO. 19A-UI-04946-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/19/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Marie Duclos filed a timely appeal from the June 12, 2019, reference 01, decision that held she was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that the claimant was discharged on May 21, 2019 for leaving work without the employer's permission. After due notice was issued, a hearing began on July 15, 2019 and concluded on July 19, 2019. Ms. Duclos participated. Debra Koenig represented the employer. Exhibits 1 through 7 were received 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: Gypsum Creek Healthcare, Inc. operates Fort Dodge Health and Rehab, a long-term care facility in Fort Dodge, where Marie Duclos was briefly employed as an occupational therapist. Ms. Duclos began the employment on March 26, 2019, as a part-time, on-call employee. In mid-April 2019, Ms. Duclos became a full-time employee. Ms. Duclos was allowed flexibility in scheduling her day-shift hours consistent with residents' evaluation and therapy needs. Brandon Reyes, Therapy Program Manager, was Ms. Duclos immediate supervisor. Ms. Duclos and Mr. Reyes developed a strained relationship during the brief employment. This was attributable in part to Ms. Duclos' limited interpersonal communication skills. The strained relationship was also due in part to Mr. Reyes' expectation that Ms. Duclos be willing to work as hard as he did and be available at all hours, including times when Ms. Duclos was off-duty, though Mr. Reyes' jealously guarded his own free time.

The employer discharged Ms. Duclos from the employment on May 21, 2019, ostensibly for attendance. At the start of the employment, the employer had Ms. Duclos sign to acknowledge the employer's online employee handbook and had Ms. Duclos sign a separate hardcopy attendance policy. Both policies included a requirement that an employee who needed to be absent must notify the supervisor at least two hours prior to the start of the shift. The employer accepted text messages as a proper form of notice.

Ms. Duclos last performed work for the employer on May 21, 2019. On that day, Ms. Duclos arrived at work to find that Mr. Reyes had only scheduled her to meet with two residents. On the previously day, Ms. Duclos had complained that Mr. Reyes had scheduled her to see too many residents. In light of that discussion, Mr. Reyes had scheduled Ms. Duclos to see fewer residents on May 21, 2019. Ms. Duclos was under the erroneous belief that she was only paid for the time she spent in the presence of residents and that she was not paid for her other time at the facility. Ms. Duclos was an hourly employee and was paid $36.00 per hour for all of the time she spent on the clock at the employer's facility. On May 21, Ms. Duclos was upset because she thought she would only be paid for a couple hours of work that day. Ms. Duclos did not know that the employer also expected her to complete evaluations for two new residents that day.

By 10:00 a.m., Ms. Duclos had concluded her time with the two residents, but had not yet completed her treatment notes for those residents. Under the employer's documentation protocol, Ms. Duclos had until midnight that evening to complete the treatment notes. In her upset state of mind, Ms. Duclos went to speak with Jessica Hudson, Business Office Manager, regarding her belief that Mr. Reyes was ill treating her by scheduling her to see so few patients that day. Ms. Hudson encouraged Ms. Duclos to speak with Mr. Reyes about her concerns. Ms. Duclos asserted that Mr. Reyes was harassing her for having been absent due to illness. Though Mr. Reyes was at the facility, Ms. Duclos elected not to speak with Mr. Reyes. Before Ms. Duclos left Ms. Hudson's office, she asked how long a notice she needed to give if she was going to quit. Ms. Duclos did not indicate that she was in fact quitting. Ms. Duclos told Ms. Hudson that she needed time "to discharge" and was "heading out." Ms. Duclos then left the workplace for an extended period. When Ms. Duclos left, the employer was uncertain whether she would be returning.

Ms. Duclos returned at 1:45 p.m. At that time, Debra Koenig, Administrator, and Candace Hardin, Therapy Resource, met with Ms. Duclos and discharged her from the employment. The employer notified Ms. Duclos that she was being discharged for attendance. The employer also stated that Ms. Duclos was not a good fit for the employment.

The employer considered earlier absences when making the decision to discharge Ms. Duclos from the employment. The employer asserts there are eight absences in total, but only has information regarding the final absence on May 21, the absences on April 22, 23, and 26, and a purported absence on April 25, 2019. On April 22, 2019, Ms. Duclos was absent due to illness and notified Mr. Reyes by text message. Neither party is able to say with certainty when the notice was sent. Later that day, Ms. Duclos notified Mr. Reyes she would also be absent on April 23 due to illness. Ms. Duclos provided a medical excuse upon her return to work on April 24. The medical excuse covered both absence dates. Ms. Duclos was in fact at work on April 25, 2019, worked a 10-hour shift, and went to the emergency room after that shift ended. The medical provider took Ms. Duclos off work until an April 27, 2019 return to work date. Ms. Duclos sent a text message to Mr. Reyes regarding her need to be absent. Neither party is able to say with certainty what time the text message was sent. Ms. Duclos provided the medical excuse to the employer upon her return to work.

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.
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> 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 ordinarily establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule

871-24.32(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 Iowa Administrative Code rule 871-24.32(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 evidence in the record establishes a discharge for no disqualifying reason. The evidence establishes an unexcused absence on May 21, 2019. On that day, Ms. Duclos left work for three or more hours without a reasonable basis for doing so and without permission from the employer. The weight of the evidence establishes that Ms. Duclos did give notice that she was "heading out" "to discharge." Ms. Duclos left without completing her treatment notes for the residents she had seen that day and without checking to see whether there was other work for her to perform that day. The employer reasonably worried whether Ms. Duclos would be returning.

The weight of the evidence fails to establish any additional absences that would be unexcused absences under the applicable law. There is insufficient evidence to establish an April 25, 2019 absence. The Absences on April 22, 23 and 26 were due to illness. The evidence establishes that Ms. Duclos properly notified the employer on the afternoon of April 22 that she would be absent on April 23 due to illness. The employer presented insufficient evidence to establish that the absences on April 22 and April 26 were improperly reported.

Accordingly, the evidence establishes only a single absence that would be an unexcused absence under the applicable law. While a disqualifying discharge for attendance usually requires *excessive* unexcused absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. *See Sallis v. Employment Appeal Board*, 437 N.W.2d 895 (Iowa 1989). In *Sallis*, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence. In this instance, Ms. Duclos provided notice and there was no dishonesty. The nature of Ms. Duclos' work was an aggravating factor in the context of the absence, but not sufficiently aggravating to make this one unexcused absence rise to the level of misconduct in connection with the employment that would disqualify Ms. Duclos for unemployment insurance benefits.

Because the administrative law judge concludes Ms. Duclos was discharged for no disqualifying reason, she is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The June 12, 2019, reference 01, decision is reversed. The claimant was discharged on May 21, 2019 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