IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AVA J COOVER
Claimant

JELD-WEN INC
Employer

APPEAL NO. 09A-UI-00998-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/21/08 R: 02
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 January 13, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing commenced on February 9, 2009. The claimant participated on February 9. Susan Chmelovsky of Talx UC eXpress represented the employer. No evidence was presented on February 9. After the opening statement, the claimant indicated she had not received Employer's Exhibit Eight. The claimant and the employer agreed to reschedule the hearing to February 13, 2009 at 1:00 p.m. so that the Appeals Section could mail the claimant the one-page exhibit she lacked. The Appeals Section mailed Exhibit Eight to the claimant on February 9, 2009. Formal written notice of the hearing was mailed to the parties on Tuesday, February 10, 2009. The claimant lives in Des Moines. The exhibit and the new hearing notice were mailed from Des Moines.

On February 13 at 1:00 p.m., the claimant was not available at the number she provided for the hearing. The claimant had not requested that the February 13 proceedings be rescheduled. The administrative law judge made two attempts to reach the claimant for the hearing and left two voicemail messages. Ms. Chmelovsky represented the employer and presented testimony through Brent Mintle, Midwest Branch Manager, and Jason Conn, Coordinating General Manager. Exhibits One through Nine were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ava Coover was employed by Jeld-Wen as a full-time customer care representative form May 14, 2007 until December 17, 2008, when Brent Mintle, Midwest Branch Manager, suspended her pending a review of her attendance history and a decision about her continued employment. On December 22, 2008, Mr. Mintle and Jason Conn, Coordinating General Manager, met with Ms. Coover and discharged her from the employment for attendance. Mr. Mintle was Ms. Coover's immediate supervisor.

The employer has a written attendance policy. The policy was revised on February 1, 2008. On May 19, 2008, Ms. Coover signed acknowledgment of the amended policy, and her acknowledgement of receipt of the amended policy. Under the policy, "occurrence points" are assigned to each absence and number of points assigned depends on the nature of the absence. Occurrence points are assigned to absences that are due to illness properly reported as well as to almost all other absences. An employee who accrues nine occurrence points during the calendar year is subject to discharge from the employment. Included in the attendance policy is an absence notification policy, which states as follows:

> You must personally speak with your manager, or another supervisor, as soon as possible prior to missing any time. Leaving a live or voicemail message with office staff is not acceptable and will be considered unexcused. If you are unable to contact your manager or another supervisor directly, please leave a voice message and continue calling until you do.

The final absence that prompted the discharge occurred on December 11, 2008, when Ms. Coover left work early without contacting Mr. Mintle. Though Mr. Mintle was working at another branch office at the time, Mr. Mintle was available by phone, by instant message, and by e-mail. Ms. Coover made no attempt to properly notify the employer of her need to be absent.

In making the decision to discharge Ms. Coover from the employer, the employer considered attendance matters going back to April 18, 2008. On April 18, 2008, Ms. Coover was tardy because she overslept. On April 28, Ms. Coover left work early because her child had been hurt at school. Ms. Coover spoke directly with Mr. Mintle about her need to leave before she departed and Mr. Mintle approved the early departure. On May 6, 2008, Ms. Coover was absent for part of the day so that she could take her child to a dental appointment. Prior to the absence, Ms. Coover spoke with Mr. Mintle about her need to be absent for the dental appointment and Mr. Mintle approved the absence. On May 20, Ms. Coover was absent for part of the day so that she could take her child to a medical appointment. Prior to the absence, Ms. Coover spoke with Mr. Mintle about her need to be absent and Mr. Mintle approved the absence. On June 2, Ms. Coover notified Mr. Mintle that she needed to leave earlier for personal reasons. On June 20, Ms. Coover notified Mr. Mintle prior to the start of her shift that she needed to be absent for personal reasons. On July 11, Ms. Coover was tardy to work for personal reasons. On July 22, Ms. Coover was absent for part of the day so that she could go to a medical appointment. Ms. Coover provided proper notice of the need to be absent. On July 25, Ms. Coover left work early for personal reasons and properly notified the employer prior to departing. On August 7 and 8, Ms. Coover left work early so that she could spend time with her father, who was visiting from out of state. On September 29, and again on November 17, Ms. Coover was absent due to illness and properly notified the employer. On December 10, Ms. Coover was late to work due to a weather related school delay. Mr. Mintle had previously notified Ms. Coover that this late arrival would be deemed excused.

Except for the weather-related absence on December 10, in each instance that Mr. Mintle approved an absence, it was with the understanding that Ms. Coover would still be assigned appropriate "occurrence points."

On November 18, after Ms. Coover's absence due to illness properly reported on November 17, Mr. Mintle met with Ms. Coover. Ms. Coover had accrued nine attendance points during the calendar year. In lieu of discharging Ms. Coover from the employment, Mr. Mintle suspended her for one day.

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).

Because Ms. Coover did not appear and present evidence, the evidence in the record is limited to the testimony and exhibits submitted by the employer. The weight of the evidence in the record establishes that the final absence on December 11, 2008, was an unexcused absence. The evidence indicates that Mr. Mintle was aware of December 11 that Ms. Coover had just left work early without providing proper notice. Mr. Mintle waited for Ms. Coover to mention the early departure. When she did not, Mr. Mintle moved forward with addressing the matter with Ms. Coover on December 17.

The weight of the evidence indicates additional unexcused absences on April 18, June 2, June 20, July 25, August 7, August 8. These absences were all for matters of personal responsibility, not for illness properly reported.

The weight of the evidence indicates excused absences on April 28, May 6, May 20, July 22, September 29, November 17, and December 10. All but one of these absences was for illness of Ms. Coover or her child, or for medical/dental appointments, with the absences properly reported to the employer. The December 10 absence was due to the weather and was approved by the employer. Each of these absences is an excused absence under the applicable law, regardless of the "occurrence points" assigned by the employer's attendance policy.

The weight of the evidence indicates that prior to the final unexcused absence on December 11, 2008, one has to go four months back, to August 8, to find another absence deemed unexcused under the applicable law. Based on these circumstances, the administrative law judge concludes that Ms. Coover's unexcused absences were not excessive and, therefore, did not constitute misconduct in connection with the employment that would disqualify Ms. Coover for unemployment insurance benefits. Ms. Coover is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Coover.

DECISION:

The Agency representative's January 13, 2009, 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

jet/pjs