IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHIRA K ELLINGSON
Claimant

WEST LIBERTY FOODS LLC
Employer

APPEAL NO. 17A-UI-09930-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/03/17
Claimant: Respondent (1)

Iowa Code section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 20, 2017, 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 claims deputy's conclusion that the claimant was discharged on August 18, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on October 13, 2017. Claimant Shira Ellingson did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Monica Dyar represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials. The fact-finding materials had been mailed to both parties on October 3, 2017.

ISSUE:

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: Shira Ellingson was employed by West Liberty Foods, L.L.C., as a full-time molder from November 2016 until August 18, 2017, when Monica Dyar, Human Resources Supervisor, and Jean Spiesz, Human Resources Manager, discharged her for attendance. Ms. Ellingson's shift hours were 6:55 a.m. to 3:30 p.m. Production Supervisor Lora Conchas was Ms. Ellingson's immediate supervisor. The employer had a written attendance policy that is set forth in the employee handbook that the employer provided to Ms. Ellingson at the start of her employment. If Ms. Ellingson needed to be absent from a shift or later than two hours for a shift, the employer's absence reporting policy required that Ms. Ellingson call the designated absence reporting number no later than two hours *after* the scheduled start of her shift. Under the written attendance policy, the employer assigned various attendance occurrence points to Ms. Ellingson depending on the nature of the absence. An employee who accrued eight

attendance points during a rolling 12-month period was subject to being discharged from the employment. Ms. Ellingson could, within limit, utilize a paid time off benefit to reduce the number of occurrence points assessed to her in connection with her absences.

The final absence that triggered the discharge occurred on August 12, 2017. On that day, Ms. Ellingson reported for work one hour and three minutes late. Ms. Ellingson was late that day for personal reasons.

The employer considered prior absences dating back to December 29, 2016, when making the decision to discharge Ms. Ellingson from the employment. On December 29, 2016, Ms. Ellingson was absent due to illness and properly reported the absence to the employer. On January 15, 2017, Ms. Ellingson was absent from her shift with proper notice due to winter weather conditions. Ms. Ellingson resided about 30 miles from the workplace. If Ms. Ellingson had appeared *late* for work due to a weather event, the employer would have waived the occurrence point. On January 23, 2017, Ms. Ellingson was absent due to illness and properly reported the absence to the employer. On January 27, Ms. Ellingson left work early after properly notifying her supervisor. The employer witness does not know what information Ms. Ellingson shared with her supervisor or whether the absences was due to illness versus some other matter. On February 6, 2017, Ms. Ellingson clocked in two minutes late for personal reasons. On February 13, 14 and 15, 2017, Ms. Ellingson was absent due to the need to care for her sick child. Ms. Ellingson properly notified the employer each day of the absence. Ms. Ellingson provided the employer with a medical excuse that covered the first two days of the absence. On February 27, Ms. Ellingson left work early for a medical appointment after providing proper notice to the supervisor. On July 24, 2017, Ms. Ellingson left work early after properly notifying her supervisor. The employer witness does not know what information Ms. Ellingson shared with her supervisor or whether the absences was due to illness versus some other matter.

The employer issued attendance-based written warnings to Ms. Ellingson prior to discharging her from the employment. On February 22, 2017, the employer issued a warning indicating that Ms. Ellingson had accrued six attendance points. On March 10, 2017, the employer issued a written warning indicating that Ms. Ellingson had accrued seven occurrence points. On August 18, 2017, the employer issued a written warning to Ms. Ellingson in connection with discharging her from the employment. The written warning indicated that Ms. Ellingson had accrued eight attendance occurrence points.

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). 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). 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 based on accrued attendance occurrence point, but not absence based on excessive unexcused absences. The evidence in the record establishes a final, unexcused absence on August 12, 2017, when Ms. Ellingson was late due to personal reasons. Ms. Ellingson's prior absences included both absences that were excused absences under the applicable law and absences that were unexcused under the applicable law. The December 29, 2016, absence was due to illness, and properly reported, and, therefore was an excused absence under the applicable law. The weight of the evidence indicates that the January 15, 2017 absence was an excused absence under the applicable law. The absence was due to inclement weather, a matter beyond Ms. Ellingson's control, and was properly reported to the employer. Given the time of year, the distance to be traveled, and the nature of Iowa winter weather events, the administrative law judge concludes that Ms. Ellingson's decision not to make the journey to work that day was reasonable. Ms. Ellingson's absence on January 23, 2017, was due to illness, was properly reported to the employer and, therefore, was an excused absence under the applicable law. The employer presented insufficient evidence to establish an unexcused absence in connection with the January 27 and July 24, 2017 early departures. The evidence indicates that Ms. Ellingson left early both days after speaking with her supervisor. The employer did not know the content of Ms. Ellingson's discussion with the supervisor. The employer had the ability to present testimony from the supervisor, but did not present such testimony. The employer did not know whether those two absences were due to illness versus something else. The weight of the evidence establishes an incident of unexcused tardiness on February 6, 2017, when Ms. Ellingson clocked in two minutes late for personal reasons. Ms. Ellingson's absences on February 13, 14 and 15, 2017 were each due to the need to care for a sick child, were each properly reported to the employer and, therefore, were each excused absences under the applicable law. Ms. Ellingson's early departure on February 27, 2017, was based on a medical appointment, was properly reported to the supervisor and, therefore was an excused absence under the applicable law. In summary, the evidence establishes an incident of unexcused tardiness on February 6, 2017 and August 12, 2017, but no other absences that were unexcused absences within the meaning of the law.

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

DECISION:

The September 20, 2017, reference 01, decision is affirmed. The claimant was discharged on August 18, 2017 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/scn