IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHAUNA A GRAENSER
Claimant

ADVANCE SERVICES INC
Employer

APPEAL NO. 17A-UI-02353-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/12/17
Claimant: Respondent (5)

Iowa Code Section 96.5(2)(a) - Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 28, 2017, reference 01, decision that allowed benefits to the claimant and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant separated from the employer on February 2, 2017 for good cause attributable to the employer. After due notice was issued, a hearing was held on March 27, 2017. Claimant Shauna Graenser participated. Melissa Lewien represented the employer and presented additional testimony through Chelsea Nebel. Department Exhibits D-1, D-2, and D-4 through D-7 were received into evidence. The administrative law judge took official notice of the agency's administrative record of unemployment insurance benefits paid to the claimant.

ISSUES:

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

Whether the separation was from "temporary employment" within the meaning of Iowa Code Section 96.5(1)(j).

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: Advance Services, Inc. (ASI) contracts with ball bearing manufacturer AKS to provide workers at AKS. The arrangement allows AKS to outsource to ASI the responsibility for payroll processing and disciplinary action, along with liability for unemployment insurance benefits and worker's compensation benefits. In April 2015, Shauna Graenser commenced her full-time employment with Advance Services, Inc. (ASI). ASI assigned Ms. Graenser to a long-term, full-time quality assurance and inspection position at AKS. The assignment lasted 21 months. The assignment was at-will, but not temporary employment. Ms. Graenser's assignment at AKS was not based any need on the part of AKS to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and was not for special assignments and projects. The AKS plant is in Clarinda. AKS is ASI's only client in the Clarinda area.

Ms. Graenser lives in Clarinda. Ms. Graenser's supervisor at AKS was Dana Livengood. Ms. Graenser's work hours at AKS were 6:30 a.m. to 3:00 p.m., Monday through Friday. Ms. Graenser was also required to appear for mandatory overtime work on alternating Saturdays. From the start of the employment until November 2016, Ms. Graenser's contact at ASI was James Shore.

At the beginning of the employment, ASI had Ms. Graenser sign a job assignment sheet and a second document that contained the ASI end-of-assignment notification requirement that obligated Ms. Graenser to contact ASI within three working days of the completion of the assignment to request an additional assignment or be deemed to have voluntarily quit and risk eligibility for unemployment insurance benefits. However, ASI did not provide Ms. Graenser with a copy of either document.

Ms. Graenser continued to work full-time at AKS until February 2, 2017, when AKS notified ASI by email that it was ending the assignment for attendance. At the start of the employment, ASI provided Ms. Graenser with a written policy statement that directed her to notify both her supervisor at AKS and ASI if she needed to be absent. That initial policy statement did not specify a time by which Ms. Graenser was expected to contact AKS and ASI. After Ms. Graenser began working at AKS, Mr. Livengood notified her that under AKS policy she was required to give notice of her absences at least two hours prior to the scheduled start of her shift. Ms. Graenser continued to provide notice of her absences to AKS and also to ASI until May 4, 2016, when Mr. Shore told her that she no longer needed to give notice to ASI so long as she had provided notice to her supervisor at AKS. At that point, Ms. Graenser ceased providing notice to ASI.

On February 2, ASI staff attempted unsuccessfully to contact Ms. Graenser by telephone to let her know her work at AKS was done. Ms. Graenser appeared for work at AKS the next day and was then notified by her immediate supervisor, Dana Livengood, that *ASI* had ended her assignment. Mr. Livengood told Ms. Graenser that she should contact ASI. Mr. Livengood then escorted Ms. Graenser from the AKS workplace.

Immediately after Ms. Graenser was escorted from AKS, she reported to the ASI office and spoke with Human Resources Coordinator Chelsea Nebel. At ASI, Ms. Graenser asked Ms. Nebel for a copy of her attendance record, including overtime hours she had worked, extra hours she worked to make up missed time, and her absences and tardiness. Ms. Nebel told Ms. Graenser that she would need to obtain that record from AKS. Ms. Graenser assumed that meant Ms. Nebel would mail the information to her. Ms. Nebel assumed Ms. Graenser would check back in for the record.

While Ms. Graenser was speaking with Ms. Nebel on February 3, she asked about the possibility of returning to AKS. Ms. Nebel told Ms. Graenser that she would not be able to return to AKS because the assignment had been terminated for attendance. Ms. Graenser asked if that meant she could not have any more work through ASI. Ms. Nebel told Ms. Graenser that ASI would contact her if an assignment became available. Ms. Graenser documented her discussion with Ms. Nebel. The next contact between the parties occurred two weeks later when Ms. Graenser left a message inquiring about the attendance record she had requested. ASI did not respond to Ms. Graenser's message.

Immediately after Ms. Graenser left the ASI office on February 3, 2017, Ms. Nebel contacted AKS by email to request a copy of Ms. Graenser's attendance record. AKS responded with a summary email that included reference to late arrivals on February 24, June 24, July 1, August 23, September 16, October 3, 13 and 27, November 2, 7 and 30, and December 2,

2016, along with a final late arrival on February 2, 2017. ASI had previous notice of the absences through November 2, 2016 and had issued a written reprimand to Ms. Nebel in connection with those absences. At the time AKS ended the assignment, ASI was not aware of the absences that occurred after November 2, 2016. ASI does not have any more information concerning the late arrivals other than the cursory information provided by AKS in the email on February 3, 2017 and an earlier similar email. Ms. Graenser recalls being late on November 2, 2016, when her vehicle slid off the road due to icy road conditions. Ms. Graenser was on her way to work at the time of the incident and notified Mr. Livengood that she would be late. Ms. Graenser recalls being late on November 30 and December 2, 2016, but does not recall why she was late. Ms. Graenser recalls that some of her late arrivals were attributable to a babysitter not showing up and that others were attributable to her need to arrange care for her sick child.

The February 3, 2017, email from AKS to ASI also referenced absences other than tardiness. That material identifies February 1, 2017 and the final such absence. On that day, Ms. Graenser had left work early due to illness and had properly notified Mr. Livengood of her need to leave early. Ms. Graenser had also been absent due to illness on October 18 and December 6, 2016 and on January 31, 2017 and had provided proper notice to AKS of her need to be absent those days. On May 4 and 18, 2016, Ms. Graenser had missed of portion of her work day due to a need to seek dental care and had properly notified Mr. Livengood at AKS. Ms. Graenser had also notified Mr. Shore at ASI of her need to be gone for part of May 4 and it was during that contact that Mr. Shore told her she no longer needed to notify ASI of her absences. Ms. Graenser was subsequently absent for a portion of July 13 and all of July 14, 2016 in connection with her need to seek dental attention and properly notified Mr. Livengood at AKS. On May 4, May 18, and July 13, Ms. Thomas had reported for work early to make up, in advance, the time she would miss from her regular shift on those days. The February 3, 2017 AKS email included absences on April 30, May 1, 5 and 6, 2015. These were associated with Ms. Graenser's mother's final days and her mother's passing. Earlier in the employment, AKS and/or ASI had notified Ms. Graenser that those absences would not be counted against her.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first address Ms. Graenser's discharge from the long-term assignment at AKS.

Iowa Code § 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.

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 a discharge 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.

That weight of the evidence fails to establish that Ms. Graenser was discharged from the long-term work assignment for a reason that would disqualify her for unemployment insurance benefits. ASI conceded during the appeal hearing that it lacked information concerning Ms. Graenser's attendance issues beyond the November 2016 written reprimand, the AKS email that preceded that reprimand, and the February 3 AKS email that ASI received immediately after the assignment ended. The employer has presented sufficient evidence to establish absences, including tardiness, but the employer had not presented sufficient evidence to establish *unexcused absences*. The administrative law judge would be unable to find any of the absences or late arrivals to be unexcused absences without inappropriately shifting the burden of proof to the claimant. The claimant testified that her late arrivals were attributable either to basic childcare issues or to the need to arrange care for a sick child. The former would be unexcused absences under the applicable law, the latter would be excused absences under the applicable law. The employer has the burden of proving that specific late arrivals on specific dates were for reasons that would make the absences unexcused absences under the applicable law. The employer has not met that burden. The final non-tardiness related absence occurred on February 1, 2017, when Ms. Graenser was absent due to illness and properly reported the absence to AKS as instructed by Mr. Livengood and Mr. Shore. Accordingly, the absence was an excused absence under the applicable law, as were the similar absences due to illness or need to seek dental care that preceded it.

The administrative law judge will now turn to Ms. Graenser's separation from ASI.

Iowa Code § 96.5-(1)-j provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:
>
> j. (1) The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.
>
> (2) To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.

> (3) For the purposes of this paragraph:
>
> (a) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their workforce during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.
>
> (b) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

Iowa Admin. Code r. 871-24.26(19) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

The evidence in the record indicates that the contract labor Ms. Graenser performed for AKS as an employee of ASI was not *temporary* employment under Iowa Code Section 96.5(1)(j). The assignment lasted approximately 21 months. The assignment was not based on a need on the part of AKS to *supplement* their work force *during absences, seasonal workloads, temporary skill or labor market shortages*, and was not for *special assignments and projects*. Rather, the employment indistinguishable from regular, at-will employment, with the exception that the work was performed at AKS for employer ASI. Nothing about the arrangement made it *temporary* employment or made Ms. Graenser a *temporary employee* within the meaning of the statute. For these reasons, the statute simply does not apply. Because the statute does not apply, Ms. Graenser's obligation to ASI ended when she was discharged from the AKS assignment.

Even if the employment had indeed been temporary employment within the meaning of the temporary employment statute, that statute would still not apply because the employer failed to comply with a fundamental requirement set forth in the statute. The weight of the evidence establishes that the ASI did not provide Ms. Graenser with a copy of the end-of-assignment notification policy that ASI had her sign. Ms. Graenser was the only witness who testified from personal knowledge on that subject. The employer presented insufficient evidence to rebut Ms. Graenser's candid, reliability testimony that she was not provided with a copy of the policy statement. Again, because the statute does not apply, Ms. Graenser's obligation to ASI ended when she was discharged from the AKS assignment.

Finally, even if the temporary employment statute had applied to Ms. Graenser's employment, and even if the evidence had indicated that the employer had provided her with a copy of the

end-of-assignment policy, the weight of the evidence establishes that Ms. Graenser did in fact request additional work on February 3, 2017, the same day she was notified the assignment ended. The employer had no additional work to offer her at that time.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Graenser's February 3, 2017 separation from ASI was a discharge for no disqualifying reason and was for good cause attributable to ASI. Ms. Graenser is eligible for benefits provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 28, 2017, reference 01, decision is modified as follows. The claimant's February 3, 2017 separation from was a discharge for no disqualifying reason and was for good cause attributable to the employer. The claimant is eligible for benefits provided she is otherwise eligible. The employer's account may be charged for benefits.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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