IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROSALINA R VICENTE
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 14A-UI-04391-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/06/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Rosalina Vicente filed a timely appeal from the April 24, 2014, reference 01, decision that disqualified her for unemployment insurance benefits. After due notice was issued, a hearing was held on June 4, 2014. Ms. Vicente participated. Ann Dee Long represented the employer. Exhibits One, Two and A were received into evidence. Pohnpei-English Interpreter Angieleen Olpet assisted with the hearing.

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: Rosalina Vicente was employed by Tyson Fresh Meats, Inc., from 2011 until April 7, 2014, when the employer discharged her for attendance. If Ms. Vicente needed to be absent from work, the employer's policy required that she call the designated phone number at least 30 minutes prior to the scheduled start of her shift. Ms. Vicente was aware of the policy. Under the employer's attendance policy, Ms. Vicente could ask to use accrued vacation time to cover the absence upon her return to work after the absence and, if she did that, the absence would not be counted against her under the employer's attendance point rubric.

The final absence that triggered the discharge occurred on March 28, 2014, on that day, Ms. Vicente was absent because she needed to move. Ms. Vicente made the required contact with the employer in a timely manner on March 28. Ms. Vicente returned to work on March 31, 2014. Upon returning to work, Ms. Vicente made multiple attempts to speak to her supervisor to request the use of vacation time to cover her absence. In connection with those multiple attempts, the supervisor told Ms. Vicente that he was busy with other matters. Thus, Ms. Vicente did not get the opportunity to request use of vacation before the employer reviewed the absence and treated it as an unexcused absence. Ms. Vicente continued to work until April 4, 2014, when the employer suspended her, after the employer reviewed her attendance

points. The employer had Ms. Vicente return on April 7 and at that time discharged Ms. Vicente from the employment.

The employer considered prior absences dating back to May 2013 when the employer made its decision to discharge Ms. Vicente from the employment. Prior to the absence on March 28, 2014, the next most recent absence that factored in discharge occurred on February 28, 2014. On that day, Ms. Vicente became sick while she was at work. Ms. Vicente's supervisor directed her to go speak with the company nurse. The company nurse directed Ms. Vicente to leave the workplace. Ms. Vicente provided her supervisor with the documentation from the nurse and the supervisor approved her early departure from work. On May 21 and June 10, 2013, Ms. Vicente was absent due to illness and properly reported the absences to the employer. On August 26, 2013, Ms. Vicente was absent due to her five-year-old daughter's illness and properly reported the absence to the employer. On January 15, 16, 17 and 18, 2014, Ms. Vicente was absent due to illness and properly reported the absence to the employer.

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.

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 weight of the evidence in the record establishes a single unexcused absence on March 28, 2014. The uncontroverted evidence concerning that absence was that the absence was due to Ms. Vicente's need to move. Such matters are matters of personal responsibility. All of the other absences that factored in the discharge were absences due to illness and were properly reported to the employer. Accordingly, all but one of the absences that the employer considered in making its decision to end employment was an excused absence under the applicable law and cannot be considered against Ms. Vicente when determining her eligibility for unemployment insurance benefits.

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

DECISION:

The claims deputy's April 24, 2014, reference 01, decision is reversed. 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

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