IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AMY J LIPPE
Claimant

CALERIS INC
Employer

APPEAL NO. 11A-UI-12822-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/28/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Amy Lippe filed a timely appeal from the September 20, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 31, 2011. Ms. Lippe participated. Stacie Springer, vice president, represented the employer and presented additional testimony through Angie Nickel, Manager. Exhibits 1 through 16 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: Amy Lippe was employed by Caleris, Inc., as a full-time call center technical support representative from June 15, 2010 until August 31, 2011, when Angie Nickel, call center manager, discharged her for attendance. Ms. Lippe's immediate supervisor was Supervisor Erica Gethrow.

The final absence that prompted the discharge was occurred on August 30, 2011, when Ms. Lippe was absent due to transportation issues. Ms. Lippe lived in Altoona, but worked in Newton. Ms. Lippe had taken her car to a friend so the friend could repair part of the suspension, but the friend had not yet completed the repair. Ms. Lippe has also been absent from work on August 29 due to the same lack of transportation.

The employer's written attendance policy required that Ms. Lippe call in before the scheduled start of her shift and speak directly with her supervisor, or with another supervisor if her supervisor was not available. The employer did not allow voice mail messages in lieu of direct contact with the supervisor during the week when a supervisor was available. Ms. Lippe was aware of the policy.

In making the decision to discharge Ms. Lippe from the employment, the employer considered attendance matters dating back to the start of Ms. Lippe's employment. There had been

attendance issues throughout much of the employment. On June 16, 2010, the first day of the employment, Ms. Lippe was late because she had overslept. On June 25 and September 28 and 29, Ms. Lippe left a voice mail message for her supervisor prior to the shift indicating that she was not feeling well and would not be in. On September 30, Ms. Lippe called in prior to the start of her shift and spoke to a supervisor regarding her need to be absent due to illness. On October 2 and 3, Ms. Lippe was absent due to a lack of transportation. On October 5, Ms. Lippe left a voice mail message for her supervisor at about 5:00 a.m. that she would be absent due to a migraine headache. Ms. Lippe ended up citing migraines as a reason for multiple absences, but never provided a medical documentation to support her assertion that she suffered from migraine headaches. On November 4, Ms. Lippe called in sick at 9:50 a.m. because she could not turn her head and needed chiropractic adjustment. Neither the employer nor Ms. Lippe recalls what time she was scheduled to work that day.

Ms. Lippe's attendance matters continued into the new year. On January 17, Ms. Lippe left a voice mail message for her supervisor immediately before the scheduled start of her shift indicating that she would be absent due to the weather. No travel advisory had been issued by the Iowa Department of Transportation. Ms. Lippe owned a fairly recent model of vehicle, a 2006 Chevrolet Malibu. Ms. Lippe later worked an extra day to "make up" the absence. On February 1, Ms. Lippe again left a message for the supervisor prior to the shift indicating that she would be absent due to weather. Again, no travel advisory had been issued. On March 4, Ms. Lippe called and spoke to the supervisor prior to the scheduled start of her shift to indicate that she would be absent due to a migraine. At 11:25 p.m. on March 4, Ms. Lippe left a message for the supervisor indicating that she would be absent on March 5 because she was still dealing with a migraine. On the evening of Saturday, March 5, Ms. Lippe left a message indicating that she needed to travel to Wisconsin in connection with a family emergency. Ms. Lippe indicated that she would be gone from work on March 6 and 7. The family emergency concerned Ms. Lippe's step-father being hospitalized in Wisconsin for a heart ailment. Ms. Lippe did not provide any care to her step-father and her presence was not needed otherwise to address his medical needs. On March 9, Ms. Lippe left a message for her supervisor prior to the shift indicating that she was still in Wisconsin due to weather and that she would be out on March 10 and 11. On March 11, Ms. Lippe sent an e-mail message to her supervisor saying she did not know when she could return to the employment and that she might have to quit the employment. At the scheduled start of her shift on March 14, Ms. Lippe left a voice mail message for her supervisor requesting a return call. Ms. Lippe called later in the day and left another message indicating that she would call with an update.

On March 15, Ms. Lippe called and resigned from the employment. Then on March 21, Ms. Lippe called and asked the employer to take her back. The employer treated the absence as an unexcused absence, allowed Ms. Lippe to return to the employment, issued a reprimand for attendance and told Ms. Lippe she could not miss any work for 90 days. On May 5, Ms. Lippe was late getting to work because she had overslept. On August 23, Ms. Lippe was 10 minutes late returning from lunch because she had taken her car to a repair shop during her lunch break. On August 24 and 25, Ms. Lippe left a message for her supervisor prior to the scheduled start of her shift indicating that she would be absent due to a stomach illness.

The employer issued seven reprimands to Ms. Lippe during the course of the employment.

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.
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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.

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 that Ms. Lippe had a casual approach about appearing for work. The weight of the evidence in the record establishes unexcused absences on June 16 and 25, September 28 and 29, October 2, 3, and 5, January 17, February 1, March 5, 6, 7, 9, 10 and 11, May 5, and August 23, 24, 25, 29, 30. Some of these were due to illness, but were improperly reported. Some of these were due to transportation matters, a matter of personal responsibility. Some of these were due to Ms. Lippe's decision to travel to Wisconsin to spend time with her family—where her assistance was not needed—instead of going work. The continued unexcused absences continued despite several written reprimands for attendance. Ms. Lippe's unexcused absences were excessive and constituted misconduct in connection with the employment. Ms. Lippe is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Lippe.

DECISION:

The Agency representative's September 20, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw