IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

CYNTHIA K VANRIPER
Claimant

TYSON PET PRODUCTS INC
Employer

APPEAL NO. 18A-UI-10708-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/07/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Cynthia Vanriper filed a timely appeal from the October 24, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Vanriper was discharged for excessive unexcused absences. After due notice was issued, a hearing was held on November 13, 2018. Ms. Vanriper participated. Dakota Cunninghan represented the employer. Exhibits 1 through 19 were received into evidence.

ISSUE:

Whether Ms. Vanriper 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: Cynthia Vanriper was employed by Tyson Pet Products, Inc. as a full-time production laborer from 2015 until October 1, 2018, when the employer discharged her for attendance. Ms. Vanriper lived across the street from the workplace. Ms. Vanriper's regular work hours were 3:30 p.m. to midnight, Monday through Friday. Ms. Vanriper was also required to work weekend hours as needed. Production Supervisor Sandy Brustkern was Ms. Vanriper's immediate supervisor. The employer has a written attendance policy under which the employer assigns attendance points to absences based on the nature of the absence and whether the employee appropriately notified the employer of the absence. Under the attendance policy, Ms. Vanriper would be subject to discharge from the employment if she incurred 14 attendance points in a rolling 12-month period. If Ms. Vanriper needed to be absent from work, the employer's attendance policy required that Ms. Vanriper call a designated absence reporting number at least 30 minutes prior to the scheduled start of her shift and leave a message in response to the automated prompts. The absence reporting system would solicit Ms. Vanriper's personnel ID number. The absence reporting system would prompt Ms. Vanriper to indicate whether she would be less than two hours late, more than two hours late, or entirely absent from the shift. The absence reporting system would prompt Ms. Vanriper to indicate whether her absence was based on illness,

transportation, or personal business. Ms. Vanriper was at all relevant times aware of the attendance policy, including the absence reporting policy.

The absences that triggered the employer's decision to discharge Ms. Vanriper from the employment occurred during the period of September 21-28, 2018. The absences during that period followed a medical leave of absence that started on July 25, 2018. The leave of absence was based on issues Ms. Vanriper was having with her knee. On August 14, 2018, Ms. Vanriper underwent surgery on her knee. Ms. Vanriper's doctor released Ms. Vanriper to return to work without restrictions effective Tuesday, September 18, 2018. Ms. Vanriper returned to work on September 18, 2018, though she continued to experience knee pain and believed her knee had not healed right. Ms. Vanriper completed her shifts on September 18, 19 and 20, 2018. On September 21, Ms. Vanriper made a timely report of her need to be absent from her shift due to knee pain, but selected "personal business" as the basis for the absence. Ms. Vanriper reported the absence as based on personal business, because she believed her knee pain did not constitute an illness. Ms. Vanriper made similar timely reports in connection with additional absences on September 22, 24, 25, 26, 27, 28 and 29, 2018. On Friday, September 14, Ms. Vanriper telephoned her doctor to request additional pain medication. Ms. Vanriper enlisted a friend or family member to pick up her new pain medication. Under the employer's attendance point system, the September 29 absence put Ms. Vanriper at 14 attendance points and subjected her to discharge from the employment. When Ms. Vanriper reported for work on October 1, 2018, Brook Salgar, Human Resources Manager, met with Ms. Vanriper and discharged her from the employment. Ms. Salgar asked whether Ms. Vanriper had a doctor's note to support the absences, but Ms. Vanriper had not obtained or brought a doctor's note.

In making the decision to discharge Ms. Vanriper for attendance, the employer considered absences dating from October 25, 2017. On that day, Ms. Vanriper properly reported her need to be absent for personal business. The employer did not document the specific basis for the absence and Ms. Vanriper cannot recall the specific basis for the absence. On January 4, 2018, Ms. Vanriper left work early due to illness and with the approval of a supervisor. On January 5, March 15, March 16, March 23, and May 14, 2018, Ms. Vanriper was absent due to illness and properly notified the employer. The employer had Ms. Vanriper sign Attendance Notification Reports in connection with her absences to keep her apprised of her attendance point accrual.

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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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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.

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 discharge for no disqualifying reason. Each of the absences during the final absence period of September 21-29, 2018 was due to illness and/or injury and was reported to the employer in a timely manner via the proper means. Accordingly, each of those absences was an excused absence under the applicable law, regardless of whether Ms. Vanriper produced a medical note to cover the absences. The next most recent absence that factored in the discharge occurred in May 2018. Though the decision to discharge Ms. Vanriper from the at-will employment was within the employer's discretion, the discharge was not based on misconduct in connection with the employment and, therefore, does not disqualify Ms. Vanriper for unemployment insurance benefits. Ms. Vanriper is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The October 24, 2018, reference 01, decision is reversed. The claimant was discharged on October 1, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs