IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

LUCY DUNCAN
Claimant

VON MAUR INC
Employer

APPEAL NO. 19A-UI-03402-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/31/19
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Lucy Duncan (claimant) appealed a representative's April 17, 2019, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Von Maur (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for May 14, 2019. The claimant participated personally. The employer did not provide a telephone number where it could be reached and therefore, did not participate in the hearing.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on November 13, 2018 as a part-time wrapper. On January 7, 2019, her job changed to part-time sales associate. She signed for receipt of the employer's handbook at her orientation on or about November 13, 2018. The handbook contained an attendance policy that stated an employee could be terminated after seven incidents of tardiness.

During the week of March 4, 2019, the employer met with the claimant to review her performance. The employer told the claimant she had five incidents of tardiness. The employer told the claimant she could be terminated for further incidents. The employer did not give the claimant a copy of the review or a list of the dates of tardiness. The claimant did not realize the list included times the claimant was a minute or two late clocking in after her lunch break. Sometimes there were other employees at the time clock that delayed the claimant's ability to clock in.

The claimant thought she had a three minute window on either side of her start time to clock in to work. She had arrived at work fifteen minutes early for her shift and waited in the break room only to discover her shift had started at the time she arrived. After the review, the claimant was careful to arrive at work on time.

The claimant had been diagnosed by her physician with manic depression. On or about March 15, 2019, the claimant was unable to appear for work on time due to her condition. She reported this to the employer and appeared for work ten minutes late. On March 22, 2019, the employer terminated the claimant for excessive absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer did not participate in the hearing and, therefore, provided no evidence of job-related misconduct. The last incident of absence the claimant knew about, was a properly reported illness which occurred on or about March 15, 2019. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's April 17, 2019, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs