IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GLORY L CRAIG-POTHOVEN
Claimant

FISHER INVESTMENTS LTD
Employer

APPEAL NO. 14A-UI-00926-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/29/13
Claimant: Respondent (1-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 16, 2014, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged. After due notice was issued, a hearing was held on February 17, 2014. Claimant Glory Craig-Pothoven participated. Janet Leuze represented the employer. Exhibit One was 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: The employer operates a Subway restaurant in Oskaloosa. Glory Craig-Pothoven was employed by Fisher Investments, Ltd., d/b/a as Subway, as a part-time sandwich artist from 2011 until December 22, 2013, when Janet Leuze, Store Manager, discharged her for attendance. Ms. Leuze was Ms. Craig-Pothoven's immediate supervisor.

If Ms. Craig Pothoven needed to be gone from work, the employer expected her to notify the employer at least four hours prior to the scheduled start of her shift. Ms. Craig-Pothoven was aware of this requirement. However, no one would be at the restaurant to take her call before 6:00 a.m.

Ms. Craig-Pothoven reports that during the period of the employment she was suffering from a bowel disorder. The employer believed that to be the case. Ms. Craig-Pothoven's bowel disorder could come on suddenly and, at times, prevented her from being able to provide the employer with four-hour's notice of absences.

On Sunday, December 22, 2013, Ms. Craig-Pothoven was on the schedule to work a 9:00 a.m. to 3:00 p.m. shift,. At 8:45 a.m., Ms. Craig-Pothoven telephoned the workplace and notified Ms. Leuze that she was going to be late to work. Ms. Craig-Pothoven had just discovered that

her car was snowed in and that she needed to dig it out. When Ms. Craig-Pothoven telephoned the workplace, Ms. Leuze told Ms. Craig-Pothoven that she was discharged for attendance.

Ms. Craig-Pothoven had been absent due to illness on December 7, 2013. Ms. Craig-Pothoven was scheduled to work 10:30 a.m. to 5:00 p.m. Ms. Craig-Pothoven notified Ms. Leuze at 10:00 a.m. that she would be absent from her shift.

Ms. Leuze considered additional prior absences when she made the decision to end Ms. Craig-Pothoven's employment. On September 21, 2013, Ms. Leuze issued a written warning to Ms. Craig-Pothoven for failing to provide the required four-hour notice in connection with four absences. On October 21, 2013, Ms. Craig-Pothoven notified Ms. Leuze at shortly after 6:00 a.m. that she would be absent from her 10:30 a.m. to 5:30 p.m. shift due to illness. On October 24, 2013, Ms. Craig-Pothoven notified Ms. Leuze between 8:30 and 9:00 am. that she would be absent from her 11:30 a.m. to 5:00 p.m. shift due to illness. On October 27, 2013, Ms. Craig-Pothoven notified a coworker between 8:00 a.m. and 9:00 a.m. that she would be absent from 10:30 a.m. to 4:00 p.m. shift. On October 30, 2013, Ms. Craig-Pothoven notified Ms. Leuze between 8:00 a.m. and 9:00 a.m. that she would be absent from her 11:30 a.m. to 5:00 p.m. shift due to illness. On November 1, Ms. Craig-Pothoven notified the employer after 8:00 a.m. that she would be absent from her 10:30 a.m. to 5:00 p.m. shift due to illness. On the morning of November 4, 2013, Ms. Craig-Pothoven notified a coworker that she would be absent from her 9:00 a.m. to 3:00 p.m. shift. Ms. Craig-Pothoven notified the coworker prior to the scheduled start of the shift. On November 9, 2013, Ms. Craig-Pothoven notified the employer after 8:00 a.m. that she would be absent from her 11:30 a.m. to 5:00 p.m. shift. On November 20, 2013 Ms. Craig-Pothoven left her 10:30 a.m. to 5:00 p.m. shift shortly after noon due to illness. Before she left, Ms. Craig-Pothoven spoke with Ms. Leuze and Ms. Leuze approved the early departure. On November 24, 2013, Ms. Craig-Pothoven left her 9:00 a.m. to 3:00 p.m. shift around 10:30 a.m. due to illness. Before she left, Ms. Craig-Pothoven spoke to Sherri Bierbaur, who was running the shift.

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.
>
> 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 the final absence was due to inclement weather, something that was beyond Ms. Craig-Pothoven's control. Ms. Craig-Pothoven did not know, prior to 8:45 a.m., and notified the employer as soon as she learned of the situation. Under the

circumstances, the absence would be an excused absence under the applicable law. While the employer asserts that the decision to discharge Ms. Craig-Pothoven had been made on December 21, 2013, the weight of the evidence indicates the proposed late arrival on December 22, 2013 as the triggering absence. The employer had taken no steps to notify Ms. Craig-Pothoven that she was discharged prior to Ms. Craig-Pothoven's call on December 22. Because the final absence that triggered the discharge was an excused absence under the applicable law, the evidence fails to establish a current act of misconduct upon which a disqualification for benefits must be based. Even if the administrative law judge had concluded, as the employer asserted, that the final absence that triggered the discharge was the next most recent absence on December 7, 2013, that absence would not constitute a current act as of December 22, 2013. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not consider the earlier absences and whether they were excused or unexcused absences under the applicable law.

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

In light of the evidence concerning Ms. Craig-Pothoven's health condition that caused her to repeatedly miss work, and in light of the fact that no medical documentation was provided as evidence at the hearing, this matter will be remanded to the Benefits Bureau for determination of whether Ms. Craig-Pothoven has been able to work and available for work within the meaning of the law since she established her claim for benefits.

DECISION:

The Claim's Deputy's January 16, 2014, reference 01, decision is affirmed. 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.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has been able to work and available for work within the meaning of the law since she established her claim for benefits. That determination should include consideration of appropriate medical documentation.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs