IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TINA D SLAUGHTER
Claimant

BRITE BEGINNINGS INC
Employer

APPEAL NO. 14A-UI-03381-JT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/09/13
Claimant: Appellant (2-R)

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

STATEMENT OF THE CASE:

Tina Slaughter filed a timely appeal from the March 20, 2014, reference 03, decision that disqualified her for benefits. After due notice was issued, an in-person hearing was held on April 23, 2014. Mrs. Slaughter participated personally and was represented by attorney Connie Diekema. Ms. Diekema presented testimony through the claimant and Dustin Slaughter. Attorney Ann Kendell represented the employer and presented testimony through Mary Beth Corrigan and Renae Morales. Exhibits One through Eight and A through J were received into evidence.

ISSUE:

Whether Mrs. Slaughter separated from the employment for a reason that disqualifies her for benefits or that relieves the employer of liability for benefits. The administrative law judge concludes that Mrs. Slaughter was discharged for no disqualifying reason, is eligible for benefits provided she meets all other eligibility requirements, and that the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brite Beginnings, Inc., owns and operates the Generation Next licensed preschool and child development center located in Urbandale. The employer is required to maintain state-mandated teacher-child ratios. Tina Slaughter was employed by Brite Beginnings as a full-time Child Development Specialist at the Urbandale facility. The employment began in October 2013 and ended on March 4, 2014, when the employer discharged Mrs. Slaughter from the employment for attendance. Mrs. Slaughter's regular work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. Mrs. Slaughter's immediate supervisor was Renae Morales, Director of Operations and Programming at the Urbandale center. Mrs. Slaughter's regular duties involved caring for young children.

If Mrs. Slaughter needed to be absent from work, the employer's written policy required that Mrs. Slaughter telephone the workplace at least an hour prior to the scheduled start of her shift. The employer had this requirement so that it could maintain appropriate staffing ratios. If

Mrs. Slaughter called before the center opened, the written policy required that she leave a voice mail message and then call back during center hours and speak with a member of management. Mrs. Slaughter had received a copy of the written policy at that start of her employment. Ms. Morales accepted a text message as initial notice of the need to be absent, but expected the text message to be sent at least an hour prior to the scheduled start of the shift and expected a follow-up phone call. Mrs. Slaughter was aware of this requirement.

During the period of the employment, Mrs. Slaughter began to suffer from a medical condition that was initially diagnosed as syncope, fainting episodes that her doctor believed might be caused by a drop in blood pressure. The episodes might last a short while or for a prolonged period. During the episodes, Mrs. Slaughter would suffer impaired consciousness or loss of consciousness. Mrs. Slaughter was dependent on those around her to tell her, after the episode had passed, what had occurred during the episode. While Mrs. Slaughter's doctor initially diagnosed these episodes as syncope, as of March 3, 2014, Mrs. Slaughter's doctor began to suspect that Mrs. Slaughter instead had a sleep disorder akin to narcolepsy and recommended that she undergo a sleep study.

In February 2014, the employer's human resources representative approved Mrs. Slaughter for intermittent FMLA leave based on the syncope diagnosis. The employer approved Mrs. Slaughter for the FMLA leave even though Mrs. Slaughter had not worked for the employer long enough for the employee to qualify for FMLA under the applicable law. At the time the employer approved the FMLA leave, the employer notified Mrs. Slaughter that she still needed to comply with the employer's absence notification policy in connection with her absences. The employer deemed Mrs. Slaughter's absences through February 28, 2014 to be properly reported and excused absences under the employer's attendance policy.

The employer's decision to end the employment was based exclusively on Mrs. Slaughter's absences on March 3 and 4, 2014. On March 3, Mrs. Slaughter husband attempted to wake Mrs. Slaughter at about 5:30 a.m. so that the couple could get ready for work. Both were due at work by 7:00 a.m. Mrs. Slaughter was not feeling well when she awoke, but nonetheless attempted to get ready for work. Mrs. Slaughter's doctor had restricted her from driving and Mrs. Slaughter was dependent on her husband to transport her to and from work. As Mrs. Slaughter attempted to get ready for work, she repeatedly lost consciousness. Each time Mrs. Slaughter regained consciousness she asked her husband what had happened and he explained that she had just had one of her episodes. As Mrs. Slaughter continued to try to get ready for work, she continued to lose consciousness.

At 7:00 a.m., Mrs. Slaughter sent a text message to Ms. Morales. The text message indicated as follows: "We r trying to get dr to c wat is going on dizzy lost feeling in arm and have been passing out since last night. Gunna try to come in later hopefully after we see wat dr says." Mrs. Slaughter had not previously given notice to the employer of her need to be absent on March 3. Neither Mrs. Slaughter nor her husband had thought to notify the employer earlier that morning of the possibility that Mrs. Slaughter might be absent from the employment. Mrs. Slaughter had not been sufficiently coherent to give earlier notice. Mr. Slaughter had been preoccupied with caring for Mrs. Slaughter and for the couple's infant child. It was Mr. Slaughter who took steps to contact the doctor's office to secure an appointment for Mrs. Slaughter. Mrs. Slaughter suffered loss of consciousness at the doctor's office that morning. It was the doctor's observation of that episode that prompted the doctor to suspect that Ms. Slaughter was suffering from a sleep disorder, rather than syncope.

Following the medical appointment, Mrs. Slaughter sent a brief text message to Ms. Morales: "He says rest today." Mrs. Slaughter did not telephone the workplace to speak with

Ms. Morales. The doctor had in fact provided Mrs. Slaughter with a note indicating that she needed to be off work for two to three weeks for further testing. Mrs. Slaughter had nonetheless held out hope that she would feel well enough the next day to report work and did not mention the doctor's note when she sent her text message to Ms. Morales after the medical appointment. Mr. Slaughter had taken the couple's child to his mother's house before taking Mrs. Slaughter home. Mr. Slaughter's mother usually cared for the child while Mr. and Mrs. Slaughter were at work.

On March 4, Mrs. Slaughter's husband again attempted to wake Mrs. Slaughter so that the couple could begin their morning routine of getting ready for work and dropping off the baby. Mrs. Slaughter again attempted to get ready for work and again suffered repeated loss of consciousness. Mr. Slaughter dropped the baby off at the grandmother's and then drove Mrs. Slaughter to her workplace. Mrs. Slaughter continued to suffer loss of consciousness. Mr. Slaughter arrived at Mrs. Slaughter's workplace at about 7:05 a.m. and attempted to help Mrs. Slaughter from the car so that she could report for work. Mrs. Slaughter continued to suffer loss of consciousness. After trying for 10 to 15 minutes to get Mrs. Slaughter out of the car, Mr. Slaughter entered Mrs. Slaughter's workplace and briefly explained the situation to Ms. Morales. Mr. Slaughter then left to secure another medical appointment. After the medical appointment, Mrs. Slaughter sent a text message to Ms. Morales at 10:17 a.m. The message indicated as follows: "Now they think I may have a sleep disorder and We r waiting for insurance so we can do some more tests. Dusty took me to a different dr for a second opinion. Dr said as long as I'm not having these episodes I can work but if I am I can't." Mrs. Slaughter did not telephone Ms. Morales.

Ms. Morales had been in contact with Mary Beth Corrigan, Regional Director, as the events of March 3 and 4 unfolded. In connection with Mrs. Slaughter's absence on March 3, Ms. Morales had prepared a written reprimand that she intended to present to Ms. Morales. The employer deemed that single absence sufficient to end the employment, but had decided not to go forward with ending the employment on March 3. After Mrs. Slaughter's text message on March 4, Ms. Corrigan and Ms. Morales decided to end the employment. Ms. Corrigan notified Mrs. Slaughter by telephone on March 4 that the employer deemed her to have abandoned the employment. Mrs. Slaughter had given no prior indication that she intended to sever 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.
>
> 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 employer reasonably expected employees to provide appropriate notice of absences so that the employer could maintain staffing ratios. Mrs. Slaughter had been provided with appropriate instructions regarding how to appropriately notify the employer of her need to be absent. The weight of the evidence indicates that Mrs. Slaughter lacked the capacity to give timely notice of her absences on March 3 and March 4. The evidence indicates that Mrs. Slaughter did have the capacity at some point on both days to give untimely notice to the employer through a phone call. Though Mrs. Slaughter indicates she does not recall sending one or more of the text messages, her ability to send the text messages strongly suggests equal ability to make a phone call to the employer with the same phone. The weight of the evidence indicates that Mrs. Slaughter failed to take reasonable steps to communicate with the employer regarding her absences and in that regard, each absence was unexcused under the applicable law. However, the evidence also indicates mitigating circumstances in connection with both absences. Under the particular facts in evidence, the administrative law judge concludes that these two absences were not sufficient to establish excessive unexcused absences.

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

DECISION:

The Agency representative's March 20, 2014, reference 03, 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 for benefits.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has been able to work and available for work since she established her claim for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs