IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHANNA M HALL
Claimant

HCM INC
Employer

APPEAL NO. 13A-UI-00768-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/09/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 14, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 20, 2013. Claimant Shanna Hall participated. Dan Hansen represented the employer and presented additional testimony through Bob Riggins. Exhibits One and Two 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: Shanna Hall was employed by HCM Inc. as a full-time cook/dietary aide from November 2011 and last performed work for the employer on November 29, 2012. Ms. Hall's work hours were 6:00 a.m. to 2:30 p.m. During the last weeks of the employment, Ms. Hall's immediate supervisor was Bob Riggins, Dietary Supervisor.

On November 29, 2012, Ms. Hall appeared for work at 6:35 a.m., but left at 7:01 a.m. due to illness. When Mr. Riggins arrived for work that morning, Ms. Hall told Mr. Riggins that she was not feeling well. Mr. Riggins told Ms. Hall that she had to work when she was not feeling well and that that was part of having a job. When Ms. Hall became upset and continued to press her case, Mr. Riggins told her to go because he was tired of listening to her complain. On the evening of November 29, Ms. Hall contacted a coworker to get Mr. Riggin's telephone number so that she could notify him of her need to be absent the next day due to illness. The coworker told Ms. Hall that Mr. Riggins had already secured her to cover Ms. Hall's November 30 shift. After Ms. Hall spoke to the coworker to obtain Mr. Riggins' cell phone number, she attempted to reach Mr. Riggins at that number. Mr. Riggins did not answer and there was no option to leave a message. Ms. Hall did not contact the workplace regarding her need to be absent from the November 30 shift.

The employer's written attendance policy required that Ms. Hall notify Mr. Riggins at least two hours prior to the scheduled start of her shift if she needed to be absent. The policy also indicated that an employee would be considered to have "self terminated" if the employee was absent without notifying the employer. Ms. Hall was aware of the attendance policy.

Ms. Hall was next scheduled to work on December 1. Ms. Hall did not notify the employer prior to that shift of her continued need to be absent. A friend had taken Ms. Hall to the Emergency Room that morning and Ms. Hall had been admitted to the hospital for respiratory issues that developed into pneumonia. Midway through the morning of December 1, Ms. Hall contacted Mr. Riggins. Ms. Hall told Mr. Riggins that she had a doctor's note that took her off work for a week. Mr. Riggins told Ms. Hall to get better and that he would speak to her when she came back to work. Mr. Riggins did not say anything to Ms. Hall to indicate that she would need to continue to call in every day she was absent. Ms. Hall was discharged from the hospital on the afternoon of December 2.

Ms. Hall was scheduled to work on December 2, 3 and 4, but did not make further contact with Mr. Riggins after December 1 regarding her need to be absent those days.

Ms. Hall next spoke to Mr. Riggins on or about December 7. Mr. Riggins directed Ms. Hall to bring in her doctor's note. Mr. Hall notified Ms. Riggins that she was being demoted to part-time status and that another employee had been assigned Ms. Hall's full-time hours. Mr. Riggins told Ms. Hall that the employer was going to consider whether to allow Ms. Hall to continue in the employment. Mr. Riggins subsequently notified Ms. Hall that the employer considered her to have voluntarily quit the employment.

The employer paid Ms. Hall sick leave and vacation pay to compensate her for the days she was absent through December 4.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

When an employee is absent for three days without notifying the employer in violation of the employer's policy, the employee is presumed to have voluntarily quit without good cause attributable to the employer. See Iowa Admin. Code rule 871 – 24.25(4).

For the reasons set forth below, the administrative law judge concludes that Ms. Hall was discharged from the employment and did not voluntarily quit.

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 Ms. Hall was late getting to work on November 29 due to illness and did not notify the employer she would be late. The employer's work rules required that Ms. Hall notify Mr. Riggins directly of her need to be absent. Mr. Riggins was a new supervisor and Ms. Hall lacked a telephone number for Mr. Riggins until the evening of November 29, 2012. Given the lack of a means to give the required notice to Mr. Riggins prior to the November 29 shift, the administrative law judge concludes that the late arrival on November 29 would not be an unexcused absence under the applicable law. The weight of the evidence indicates that Ms. Hall left work early on November 29 due to bonafide illness and with the begrudging permission of Mr. Riggins. The early departure on November 29 was an excused absence under the applicable law. The evidence indicates that Ms. Hall was absent from work on November 30 and failed to provide timely notice to Mr. Riggins. Ms. Hall had the ability to provide such notice after receiving Mr. Riggins' number from a coworker. Ms. Hall made no attempt to reach Mr. Riggins after the single attempt on the evening of November 29. Ms. Hall's absence on November 30 was an unexcused absence under the applicable law. Ms. Hall failed to give the required prior notice of her need to be absent on December 1. However, the evidence also indicates that Ms. Hall was sufficiently ill that she needed to be transported to the Emergency Room. The weight of the evidence indicates good cause for not contacting the employer prior to the start of the shift on December 1. In addition, Ms. Hall was in touch with the employer later that morning to explain her circumstances. The weight of the evidence indicates that the absence on December 1 cannot be deemed an unexcused absence under the applicable law.

Ms. Hall was then absent for shifts on December 2, 3 and 4. Prior to those absences, Ms. Hall spoke directly with Mr. Riggins on December 1. During that conversation, Ms. Hall told Mr. Riggins of her trip to the Emergency Room and that she possessed a doctor's note that would take her off work for week from December 1. The weight of the evidence indicates that Ms. Hall reasonably concluded from Mr. Riggins comments during that conversation that she had approval from the employer to be off for that week. Thus, the absences on December 2, 3 and 4 would be excused absences under the applicable law.

The evidence establishes only one absence, the absence on November 30, that was an unexcused absence under the applicable law. That absence did not involve any dishonesty or other aggravating factors and would not be sufficient to establish misconduct in connection with the employment. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

At no time did Ms. Hall indicate through words or deeds an intention to sever the employment relationship. Ms. Hall's absences due to illness, as outlined and analyzed above, were insufficient to indicate such intent to voluntarily sever the employment relationship. Rather, the employer discharged Ms. Hall for attendance.

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

DECISION:

The Agency representative's January 14, 2013, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs