IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BARGINEAR, CHRISTOPHER, C
Claimant

FOCUS SERVICES LLC
Employer

APPEAL NO. 11A-UI-09944-JT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/26/11
Claimant: Appellant (5)

Section 96.5(2)(a) - The discharge for Misconduct
Section 96.4(3) - Able & Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 22, 2011, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was held on October 27, 2011. Claimant participated. Kelly Lechnir, staffing coordinator, represented the employer. The administrative law judge took official notice of the documents submitted for and that were generated in connection with the fact-finding interview. Exhibits 2, 9 through 12, and A through F were received into evidence.

ISSUES:

Whether the claimant separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

Whether the claimant has been able to work and available for work during the period when his claim for benefits was active.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Christopher Barginear worked for the employer during two separate and distinct brief periods. The most recent period of employment began on March 21, 2011. Mr. Barginear most recently performed work for the employer on May 30, 2011 and completed his entire shift on that day. Mr. Barginear worked as a full-time telephone customer service representative. Mr. Barginear's immediate supervisor was Michael Pressley, coach/team lead. Stephanie Reding was the site supervisor.

Thirty minutes before work on May 31, 2011, Mr. Barginear was injured in a slip and fall accident outside of work. Mr. Barginear suffered injury to his lower back and to his right knee. Mr. Barginear was transported by ambulance to a hospital, where he was diagnosed with a lumbar strain and knee strain. Mr. Barginear was discharged from the hospital the same day with instructions to seek follow-up treatment. The employer's absence reporting policy required that Mr. Barginear notify his immediate supervisor or the site supervisor at least two hours prior

to the scheduled start of the shift if he needed to be absent. The employer also accepted as proper notice a doctor's note submitted prior to the shift to be missed. It was not possible for the claimant to give two hours' notice on May 31, but Mr. Barginear did provide the employer with timely notice on May 31 that he was injured and unable to come to work. Mr. Barginear provided the employer with a doctor's note from the hospital emergency room that indicated he was seen on May 31, 2011 and was released to return to work on June 6, 2011.

After his initial evaluation and treatment at the hospital, Mr. Barginear followed up with a chiropractor, who diagnosed him with lumbar, hip and right knee sprain. Mr. Barginear provided the employer with a doctor's note, dated June 6, that excused him from work through June 8, 2011, with a June 9, 2011 return to work date. Mr. Barginear provided the employer with a doctor's note, dated June 8, 2011, that released him from work through June 12, 2011, with a June 13, 2011 return to work date. Mr. Barginear provided the employer with a doctor's note, dated June 13, 2011, that released him from work through June 17, 2011, but omitted a return to work date. Mr. Barginear provided the employer with a doctor's note, dated June 17, 2011, that excused him from work for the period of through June 24, 2011, but omitted a return to work date. Mr. Barginear did not have a doctor's note that excused him from work beyond June 24 until he obtained a note, dated July 1, 2011, that released him from work from June 1, 2011 through July 8, 2011, with a return to work date of July 11, 2011. In the meantime, Ms. Barginear was absent from scheduled shifts on June 26, 27 and 28 without notifying the employer. Mr. Barginear had the same work schedule from week to week and knew that he was expected to appear for these regularly scheduled shifts unless he followed the call-in procedure or provided a doctor's note prior to the shift he expected to miss. On July 29, 2011, Ms. Reding documented a separation from the employment, which she initially documented as a discharge, but later changed to a voluntary quit. Mr. Barginear subsequently contacted the employer and learned that the employer deemed the employment terminated.

Mr. Barginear established a claim for benefits that was effective June 26, 2011. This would be the Sunday of the week in which Mr. Barginear applied for benefits. Mr. Barginear was under the care of a chiropractor at the time for lumbar, hip, and knee sprain. Mr. Barginear has provided a doctor's note, dated July 1, 2011, that released to return to work effective July 11, 2011. Mr. Barginear discontinued his claim for benefits after the benefit week that ended August 27, 2011.

REASONING AND CONCLUSIONS OF LAW:

The employer did not present testimony from anyone with first-hand, personal knowledge of the events that factored into the separation. The weight of the evidence in the record establishes that Mr. Barginear was discharged effective June 29, 2011 for being absent without properly notifying the employer for shifts on June 26, 27, and 28.

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.
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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.

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.

There is insufficient evidence in the record to establish unexcused absences prior to the three absences that occurred on June 26, 27, and 28. The weight of the evidence does indicate that Mr. Barginear was absent without notifying the employer on June 26, 27 and 28. Mr. Barginear had an obligation to maintain appropriate contact with the employer while he was off work due to a non-work related injury. The weight of the evidence indicates that Mr. Barginear failed to maintain that appropriate contact beyond June 24—the last date covered by a doctor's note prior to Mr. Barginear obtaining the next doctors note on July 1. While there is insufficient evidence to establish a voluntary quit, there is sufficient evidence in the record to establish misconduct in connection with the employment based on three consecutive no-call, no-show absences. These unexcused absences were excessive. Mr. Barginear was discharged for misconduct. Mr. Barginear is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Barginear.

Iowa Code section 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> (1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
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> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.22(2) provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> (2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Mr. Barginear established a claim for benefits that was effective June 26, 2011. This would be the Sunday of the week in which Mr. Barginear applied for benefits. Mr. Barginear was under the care of a chiropractor at the time for lumbar, hip, and knee sprain. Mr. Barginear has provided a doctor's note, dated July 1, 2011, that released to return to work effective July 11, 2011. Mr. Barginear discontinued his claim for benefits after the benefit week that ended August 27, 2011. The weight of the evidence indicates that the claimant was not able and available for work during the two-week period that ended July 9, 2011. The weight of the evidence indicates that the claimant was able and available for work during the seven week period of July 10, 2011 through August 27, 2011, at which time he discontinued his claim for benefits.

DECISION:

The Agency representative's July 22, 2011, reference 01, decision is modified as follows. The claimant was discharged for misconduct effective June 29, 2011. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged. Claimant was not able and available for work during the two-week period of June 26, 2011 through July 9, 2011. The claimant was able and available for work during the benefit week that ended July 16, 2011 through the benefit week that ended August 27, 2011, at which time the claimant discontinued his claim for benefits.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/kjw