IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ALICIA R CAIRNS
Claimant

ACCESSIBLE MEDICAL STAFFING
Employer

APPEAL NO. 17A-UI-04041-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/26/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Alicia Cairns filed a timely appeal from the April 10, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Cairns had been discharged on March 17, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on May 5, 2017. Ms. Cairns did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Mindy Butler represented the employer and presented additional testimony through Rosemonde "Tootie" Vitritto. Exhibits 1 through 13 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: Accessible Medical Staffing provides temporary staff to health care facilities. Alicia Cairns was employed by Accessible Medical Staffing as a Certified Nursing Assistant (CNA) from February 22, 2017 and last performed work for the employer on March 17, 2017. The employer declined to provide Ms. Cairns with additional work after March 17, 2017 unless Ms. Cairns produced a medical excuse to support her need to leave work early on March 17.

On March 17, Ms. Cairns began a 12-hour shift at Valley View Village at 7:00 a.m. At 11:00 a.m., Ms. Cairns properly notified Rosemonde "Tootie" Vitritto, Staffing Coordinator, of her need to leave work to care for her sick child. Ms. Vitritto was Ms. Cairns primary contact at Accessible Medical Staffing and her de facto supervisor. Ms. Cairns was still at Valley View Village when she called Ms. Vitritto about her need to leave. Ms. Cairns notified Ms. Cairns that she had checked her cell phone on break and had a call from her child care provider indicating that she needed to come collect her sick child. The employer was aware that Ms. Cairns had four minor children. The employer had told Ms. Cairns at the start of the employment that personal emergency calls for Ms. Cairns during work hours should be directed to the employer

and that the employer would then contact Ms. Cairns. The employer had also told Ms. Cairns at the start of the employment that a medical excuse would be required in connection with an absence due to illness. When Ms. Cairns notified the employer on March 17 of her need to leave work to care for her child, she told Ms. Vitritto that she would come to the workplace to pick up her paycheck and then would be taking her child to the doctor. When Ms. Vitritto asked whether someone else could take the child to the doctor, Ms. Cairns told Ms. Vitritto that was not possible. Ms. Vitritto asked Ms. Cairns whether she would be able to return for the remainder of her shift and Ms. Cairns advised she would not be able to return that day. Ms. Cairns promised to provide a doctor's note to cover the absence, but did not provide a doctor's note to demonstrate that she had taken her child to the doctor on March 17.

At the time Ms. Cairns left work early on March 17, she was on the schedule to work on March 21, 23 and 24. The employer did not allow Ms. Cairns to work those shifts and did not schedule additional shifts because Ms. Cairns did not produce a doctor's note specific to March 17. Ms. Cairns provided the employer with a medical excuse from her child's medical appointment on March 22, 2017. That note referenced the same child having "had vomiting" the previous Friday, which would have been March 17. The employer deemed that note unacceptable as it related to the early departure on March 17. On March 27, Ms. Cairns contacted Ms. Vitritto and asked whether she was being fired. Ms. Vitritto told Ms. Cairns that due to three absences in a month and due to the failure to produce a doctor's note for March 17, the employer was terminating the employment.

Prior to March 17 early departure, Ms. Cairns had been absent from two shifts and late for two shifts. On February 28, 2017, Ms. Cairns was absent due to her child's illness. Ms. Cairns notified the employer at 5:36 a.m. that she would be absent for a 7:00 a.m. shift. Ms. Cairns notified the employer that she had just awakened to take her children to daycare and had discovered that her youngest child was vomiting. The employer requires two hours' notice of a day-shift absence. The employer had reviewed the absence reporting policy with Ms. Cairns at the start of the employment. On March 1, Ms. Cairns was late because she overslept. On March 8, Ms. Cairns reported late for her 7:00 a.m. shift after reporting at 5:32 a.m. that she thought she had conjunctivitis, pink eye. On March 13, 2017, Ms. Cairns was absent due to purported weather-related road conditions. Ms. Cairns notified the employer at 5:29 a.m. that she would be absent from a 7:00 a.m. shift. Ms. Cairns declined the employer's offer to come collect her for work.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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).

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 weight of the evidence in the record fails to establish an unexcused final absence on March 17, 2017. The weight of the evidence in the record establishes that Ms. Cairns left work early that day due to the need to care for a sick minor child. Ms. Cairns properly notified the employer of her need to leave work early to care for the child. The fact that the care provider contacted Ms. Cairns on her cell phone, rather than through the employer, does not make the absence unexcused under the applicable law. Under the Iowa Court of Appeals ruling in *Gaborit*, Ms. Cairns' failure to present a doctor's note specific to the March 17 absence did not make that absence unexcused under the applicable law. Because the final absence that triggered the discharge was an excused absence under the applicable law, the discharge cannot be deemed for a current act of misconduct and cannot serve as a basis for disqualifying Ms. Cairns for unemployment insurance benefits. Because the final absence was an excused absence under the applicable law, the administrative law judge need not further consider the earlier absences that factored in the discharge decision.

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

DECISION:

The April 10, 2017, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The effective date of the separation was March 17, 2017. 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/scn