IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KIMBERLEY A PEARSON
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WAUKON IA 52172-2038

REGIS CORP
C/O EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 06A-UI-05176-JTT
OC: 05/08/06 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Regis Corporation filed a timely appeal from the May 8, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 31, 2006. Claimant Kimberley Pearson participated. Lucie Reed of Employers Unity/TALX UC eXpress represented the employer and presented testimony through Area Supervisor Paulette Davidson. Exhibits One through Six were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kimberley Pearson was employed by Regis as a full-time hair stylist from June 21, 2004 until April 13, 2006, when Manager Kris Schnor discharged her for attendance.

The final absence that prompted the discharge occurred on April 13, 2006, when Ms. Pearson notified the employer that she needed to be absent for personal reasons. Ms. Pearson was scheduled to work 1:00-9:00 p.m. At 9:15 a.m., Ms. Pearson notified Ms. Schnor that she needed to be absent. Ms. Pearson was upset about a breakup with her boyfriend and other matters and believed she was too upset to work. Ms. Pearson and Ms. Schnor were and are friends. Ms. Schnor told Ms. Pearson that her absence would likely lead to her being discharged from the employment. Sometime between 3:00 p.m. and 4:00 p.m., Ms. Schnor contacted Ms. Pearson to inquire whether she would be coming to work. Ms. Pearson indicated she would not be coming to work. Prior to Ms. Pearson's scheduled shift on April 14, Ms. Pearson contacted Ms. Schnor to inquire whether she still had a job. Ms. Schnor told Ms. Pearson that Ms. Schnor had been instructed by her supervisor to discharge Ms. Pearson. Ms. Schnor told Ms. Pearson that the decision to discharge Ms. Pearson was based in part on two prior warnings for attendance and the fact that Ms. Schnor had alerted Ms. Pearson that her absence on April 13, 2006 would likely lead to her discharge.

On April 6, Ms. Schnor had issued a written reprimand to Ms. Pearson for being tardy on Sunday, April 6, 2006. Ms. Schnor had been tardy because she had forgotten to set her clock one hour forward for daylight savings time, which had started that day. On August 19, 2005, Ms. Schnor had issued a verbal warning to Ms. Pearson for tardiness. Ms. Schnor's record of the written warning does not indicate that date(s) of tardiness that prompted the warning.

Ms. Schnor had issued other warnings to Ms. Pearson for matters other than attendance. On August 10, 2005, Ms. Schnor issued a warning to Ms. Pearson for using her cell phone at work. On November 26, 2005, Ms. Schnor issued a warning to Ms. Pearson for "creating a major scene not only in front of a client but in front of staff also" and for "refusing a service."

REASONING AND CONCLUSIONS OF LAW:

The first question for the administrative law judge is whether the evidence in the record establishes a quit or a discharge.

A discharge is a termination of employment initiated by the employer fro such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. See 871 IAC 24.1(113). A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces. See 871 IAC 24.1(113). 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.

The greater weight of the evidence in the record establishes that Ms. Pearson did not quit, but was discharged. 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). The administrative law judge notes that the employer was on notice at the time of the fact-finding interview that Ms. Pearson asserted she had been discharged by Ms. Schnor. Despite being on notice that Ms. Pearson would make such an argument, the employer failed to present testimony at the hearing from Ms. Schnor.

The next question is whether the evidence in the record establishes that Ms. Pearson was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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 Ms. Pearson's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her 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).

The evidence in the record establishes that Ms. Pearson's absence on April 13, 2006, was for personal reasons other than illness and, therefore, unexcused under the applicable law. The evidence indicates that Ms. Pearson had previously been tardy when she had failed to adjust her clock for daylight savings time. The employer presented testimony regarding a warning issued in August 2005 for tardiness, but failed to provide meaningful evidence to corroborate regarding any specific incidents of tardiness that prompted that warning. The evidence in the record does not demonstrate excessive unexcused absences.

The administrative law judge again notes the employer's failure to present direct and satisfactory evidence through testimony from Ms. Schnor.

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

DECISION:

The Agency representative's decision dated May 8, 2006, reference 01, 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.

jt/pjs