**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**KARI A GREEN**
Claimant

**THOMAS L CARDELLA & ASSOCIATES INC**
Employer

**APPEAL NO. 13A-UI-11699-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 09/15/13**
**Claimant: Appellant (2R)**

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

**STATEMENT OF THE CASE:**

Kari Green filed a timely appeal from the October 9, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 12, 2013. Ms. Green participated. Barbara Toney of Equifax Workforce Solutions represented the employer and presented testimony through Corey Samuels. Exhibits One, Two and Three were received into evidence.

One day after the hearing record closed, the claimant submitted a proposed exhibit, which proposed exhibit was not received into the 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: Kari Green was employed by Thomas L. Cardella & Associates, Inc., as a full-time telemarketer from November 2012 until September 19 2013, when the employer discharged her for attendance. When Ms. Green appeared for work that day, Miranda Smith, Administrative Assistant, and Supervisor Chris Huong summoned Ms. Green to a meeting and told her she was discharged for attendance.

In early June 2013, Ms. Green was diagnosed with pulmonary embolism. Ms. Green was under the care of a physician from that point on and was treated with blood thinners. Ms. Green's symptoms caused her to feel pain in her lungs and chest and sometimes prevented her from being able to work. In response to Ms. Green's illness, Ms. Green transitioned from full-time to part-time work status. In September 2013, Ms. Green was absent from work due to illness on September 12, 14, 17 and 18. On each day, Ms. Green properly reported her absences to the employer by telephoning the workplace at least an hour before her shift and speaking to Ms. Smith or, on Saturdays, the person filling in for Ms. Smith. Once Ms. Green went to part-time status, she no longer worked on Mondays. However, the employer erroneously

documented absences on Monday, September 9 and Monday, September 16. Ms. Green was also absent due to illness and properly reported the absences to the employer on July 10, 13, and 31, and August 8 and 20, 2013. Ms. Green was absent for the first half of her shift on August 17, 2013. The absence was due to illness and Ms. Green properly reported the absence to the employer that morning.

Ms. Green had provided the employer with medical documentation to support some, but not all, of her absences due to illness. The employer provided Ms. Green with Family and Medical Leave Act application materials even though Ms. Green had not worked for the employer long enough to qualify for an FMLA leave. Ms. Green discovered that she did not qualify and, therefore, did not complete an application for FMLA leave.

At the time of discharge, the employer presented Ms. Green with a termination form that listed, in small print, all of the absences that the employer had taken into consideration in ending her employment. Ms. Green signed the document without reading it and did not note that September 9 and 16, Mondays, had been included.

**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 has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish any unexcused absences. The employer presented no testimony from persons with personal knowledge of the absences that factored in the discharge. The employer had the ability to present testimony from persons with personal knowledge, but elected not to present such evidence. The employer's witness initially provided erroneous testimony regarding several purported no-call/no-show absences. The weight of the evidence indicates that the employer's witness also provided erroneous information regarding the claimant's work hours. The weight of the evidence indicates that Ms. Green was diagnosed with a serious illness at the beginning of June 2013. The illness was serious enough to cause her to move from full-time to part-time employment. Ms. Green's absences were due to illness and were properly reported to the employer. The employer, pursuant to its written policy, elected to use such absences as a basis for ending the employment. The employer's expectation that Ms. Green provide a doctor's excuse for medical absences does not change the fact that the absences were due to illness and excused absences under the applicable law. The employer's expectation that

Ms. Green complete an FMLA application when both parties knew she was not eligible for FMLA leave was unreasonable.

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

**DECISION:**

The agency representative's October 9, 2013, reference 01, 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.

This matter is remanded to the Claims Division for investigation into and adjudication of whether the claimant has been able to work and available for work since she filed her claim for benefits.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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