IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAVID W HARRINGTON
Claimant

MASTERBRAND CABINETS INC
Employer

APPEAL NO. 15A-UI-07899-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/28/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

David Harrington filed a timely appeal from the July 2, 2015, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that the claimant had been discharged for excessive unexcused absences. After due notice was issued, a hearing was held on July 31, 2015. Mr. Harrington participated. Jodi Schaefer represented the employer. Exhibits A, B and C 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: David Harrington was employed by Masterbrand Cabinets, Inc., from 2006 until June 15, 2015, when Jodi Schaefer, Human Resources Generalist, discharged him from the employment. During the last two years of the employment, Mr. Harrington was a full-time process tech/machine operator. Mr. Harrington's work hours were 5:00 a.m. to 1:30 p.m., Monday through Friday. Mr. Harrington's supervisor was Dan Seeks.

The employer had a written attendance policy that obligated Mr. Harrington to call a designated attendance line at least 30 minutes prior to the start of his shift if he needed to be absent or late. The policy required that Mr. Harrington leave a message identifying himself, his supervisor and the reason for the absence. Mr. Harrington's supervisor would then listen to the message and document the absence. Mr. Harrington was familiar with the policy and the absence reporting protocol. The employer also had a written policy that subjected employees to discharge from the employment if they received three reprimands within a 12-month period.

The final absence that triggered the discharge occurred on June 11, 2015, when Mr. Harrington was late because he had overslept. Mr. Harrington left a message for the employer at 5:27 a.m. and clocked in at 5:58 a.m. It usually took Mr. Harrington 15 minutes to commute from his home in Waterloo to the workplace in Waterloo. Mr. Harrington would usually awake at 4:25 or

4:30 a.m., which would leave him about 15-20 minutes to get ready for work. Mr. Harrington continued to report for work after the late arrival on June 11, 2015. After Mr. Harrington completed his shift on June 15, 2015, Mr. Schaefer called him and discharged him from the employment.

The next most recent absence that factored in the discharge occurred on May 7, 2015, when Mr. Harrington was absent due to illness, but did not notify the employer until 5:20 a.m. Mr. Harrington indicates that he called late because he had been throwing up and because the employer required employees to personally notify the employer of absences. Mr. Harrington's mother was present and awake that morning. Mr. Harrington ended up being absent due to illness the next day and provided the employer with a doctor's note to cover both dates.

The employer considered earlier absences when making the decision to discharge Mr. Harrington from the employment. Prior to the absence on May 7, 2015, the next most recent absence that factored in the discharge occurred on June 27, 2014, when Mr. Harrington was 45 minutes late for personal reasons. Mr. Harrington had been absent due to illness on June 19, 2014, but did not notify the employer of the absence until 5:32 a.m. Mr. Harrington ended up being absent due to illness the next day and provided the employer with a doctor's note to cover both dates. Mr. Harrington had also been absent due to illness on June 3, 2014, but did not notify the employer of the absence until 5:07 a.m. Mr. Harrington ended up being absent due to illness the next day. Mr. Harrington has also been absent on May 7, 2014 due to back issues, but did not notify the employer of the absence until 6:17 a.m.

On June 19, 2014, the employer issued a written warning to Mr. Harrington based on the absences on May 7 through June 19, 2014. On May 7, 2015, the employer issued another written warning to Mr. Harrington.

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.
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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.

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 evidence in the record establishes that the final absence on June 11, 2015 was an unexcused absence. That incident of tardiness occurred because Mr. Harrington had overslept.

The evidence in the record also establishes an unexcused absence on May 7, 2015. Mr. Harrington was absent that day due to illness, but did not notify the employer until 20 minutes after the scheduled start of the shift. The weight of the evidence indicates that Mr. Harrington could have notified the employer in timely manner of his need to be absent. Before the May 7, 2015 absence, once has to go back almost 11 months to get to the next most recent unexcused absence and reprimand. Given the extended period between the earlier unexcused absences and the final two that factored in the discharge, the administrative law judge concludes that the evidence fails to establish *excessive* unexcused absences.

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

DECISION:

The July 2, 2015, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he 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

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