IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANGELA K PIRCK
Claimant

APAC CUSTOMER SERVICES OF IOWA LLC
Employer

APPEAL NO: 06A-UI-08840-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/23/06 R: 04
Claimant: Respondent (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

APAC Customer Services of Iowa filed a timely appeal from the August 16, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 27, 2006. Claimant Angela Pirck participated. Benefits Administrator Turkessa Hill represented the employer and presented additional testimony through Operations Manager Paul Flemr. The administrative law judge took official notice of Agency records regarding benefits disbursed to the claimant. Claimant's Exhibit A was received into the record.

ISSUE:

Whether the claimant voluntary quit the employment without good cause attributable to the employer by being absent three days without notifying the employer in violation of the employer's written policy.

Whether the claimant was discharged for misconduct based on excessive unexcused absences.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Angela Pirck was employed by APAC Customer Services of Iowa until July 21, 2006, when Operations Manager Paul Flemr terminated her employment. Mr. Flemr made the decision to discharge Ms. Pirck and based the decision on information he received from other APAC staff that Ms. Pirck had been absent three days without notifying the employer. Mr. Flemr did not know the specific days that Ms. Pirck was absent and was not able to testify to specific absences at the hearing. At the time of the separation and at the hearing, Mr. Flemr characterized the separation as a voluntary quit based on a violation of the employer's policy that it would deem three days' absence without notifying the employer a voluntary quit. Mr. Flemr did not personally track Ms. Pirck's attendance. This responsibility was left to Ms. Pirck's immediate supervisor, or Team Lead, or that person's substitute for the day. No Team Leads testified at the hearing. If there were "no-call, no-show" absences, these were not in fact the final absences that prompted Mr. Flemr to discharge Ms. Pirck, but instead occurred earlier, during the week of July 10-14.

The employer's Benefits Administrator testified at the hearing, but based her testimony regarding specific absences on documentation prepared by the Team Leads. Multiple Team Leads were charged with documenting Ms. Pirck's absences. It is unclear whether the Team Leads accurately documented the absences or accurately documented attempts made by Ms. Pirck or her mother to notify the employer of the absences.

Ms. Pirck was aware of the three-day "no-call, no-show" policy as well as other aspects of the employer's attendance policy. The employer's written policy required Ms. Pirck to personally notify the employer no later than two hours after the scheduled start of her shift if she needed to be absent. Ms. Pirck frequently experienced laryngitis, which made it difficult for her to personally notify the employer. Despite the employer's written policy, the employer had routinely accepted telephone calls from Ms. Pirck's mother as proper notification of Ms. Pirck's absences.

Ms. Pirck's final absences occurred on July 19-20. On July 19, Ms. Pirck's mother notified the employer that Ms. Pirck would be absent. Neither Ms. Pirck nor the employer knows whether the call came within two hours of the scheduled start of Ms. Pirck's shift. Ms. Pirck does not know whether her mother called in for her on July 20.

REASONING AND CONCLUSIONS OF LAW:

The first question for the administrative law judge is whether Ms. Pirck quit pursuant to the employer's three-days "no-call, no-show" policy or whether she was discharged from the employment. A discharge is a termination of employment initiated by the employer for reasons that may include absenteeism. See 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. See 871 IAC 24.1(113)(b). 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 indicates that Ms. Pirck never formed an intent to sever the employment relationship. In addition, the evidence fails to support the employer's assertion that the separation was prompted by Ms. Pirck being absent three days without notifying the employer. The administrative law judge concludes Ms. Pirck was discharged and did not voluntarily quit the employment.

The next question is whether the evidence in the record establishes that Ms. Pirck 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).

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. Pirck'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). A single unexcused absence does not constitute misconduct. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

The evidence in the record establishes that Ms. Pirck's final absence on July 20 was unexcused. The final absence was due to illness, but the evidence indicates Ms. Pirck made no attempt to properly notify the employer of that absence. Despite the unexcused absence on July 20, the evidence in the record fails to establish prior unexcused absences. Because Ms. Pirck was suffering from laryngitis, it was reasonable for her to have her mother notify the employer with regard to the absence on July 19. The employer's two witnesses provided contradictory testimony. Both witnesses' testimony regarding Ms. Pirck's absences was hearsay based on the documentation, or lack of documentation, of Ms. Pirck's attendance. The testimony of the employer's witnesses revealed lapses in documentation and lapses in communicating Ms. Pirck's attendance information within the employer's organization. The employer had the ability to present much more direct and satisfactory evidence through testimony from the Team Leads, but elected not to do so. The administrative law judge infers that such testimony would have exposed further deficiencies in the employer's case. Since the evidence in the record establishes only one unexcused absence, the evidence fails to demonstrate misconduct that would disqualify Ms. Pirck for unemployment insurance benefits. Accordingly, Ms. Pirck is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Pirck.

DECISION:

The Agency representative's August 16, 2006, reference 01, decision 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs