IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

ANITA M WILLIAMS
Claimant

KREG ENTERPRISES INC
Employer

APPEAL NO. 19A-UI-00495-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/16/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Anita Williams filed a timely appeal from the January 8, 2019, reference 01, decision that held she was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Ms. Williams voluntarily quit on December 11, 2018 without good cause attributable to the employer. After due notice was issued, a hearing was held on February 11, 2019. Ms. Williams participated personally and was represented by attorney John Flynn. Attorney Katherine McKain represented the employer and presented testimony through Stephanie Gott, Josh Terrell, and Dave Brown. The hearing in this matter was consolidated with the hearing in Appeal Number 19A-UI-00496-JTT. Exhibit B and Department Exhibits D-1 through D-27 were received into evidence.

ISSUES:

Whether Ms. Williams voluntarily quit without good cause attributable to the employer.

Whether Ms. Williams was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Anita Williams was employed by Kreg Enterprises, Inc. as a full-time shipping clerk from 2015 until December 14, 2018, when the employer discharged her for attendance. Ms. Williams' separation from the employer occurred in the context of a pending worker's compensation claim. Shipping Supervisor Josh Tyrrell was Ms. Williams' immediate supervisor during the last two years of the employment. Ms. Williams' work hours were 7:30 a.m. to 4:00 p.m., Monday through Friday. The workplace is in Huxley, Iowa. Ms. Williams has at all relevant times resided in Nevada, Iowa. The commuting distance between Nevada and Huxley is 22 miles. The commuting route includes Highway 30 and Interstate Highway 35. Until November 26, 2018, Ms. Williams would drive to work in her own vehicle. There was no arrangement or agreement under which the employer would provide Ms. Williams with transportation to work. Until October 4, 2018, Ms. Williams primarily worked in the LTL (less than truckload) area of the shipping department. Ms. Williams' duties in the LTL area involved building pallets of freight for shipment. Ms. Williams would obtain a copy of the order, would retrieve product from areas in

the employer's warehouse, and then would load the 10-pound to 50-pound boxes onto pallets to fill the order.

On October 4, 2018, Ms. Williams suffered a workplace injury to her right shoulder. Ms. Williams is right-handed. Ms. Williams' shoulder injury gave rise to a worker's compensation claim. The employer's worker's compensation insurance carrier facilitated medical evaluation and treatment of Ms. Williams' shoulder injury. Ms. Williams was diagnosed with a 90 percent tear in her right rotator cuff. The injury required surgical repair. Ms. Williams last performed work for the employer on November 26, 2018. After the injury and until Ms. Williams went off work toward the end of November 2018, Ms. Williams' was medically restricted from performing work with her right hand and was restricted to lifting no more than five pounds with her left arm. The employer initially re-assigned Ms. Williams to perform clerical work while a clerical worker was on an extended absence from the workplace. The employer then had Ms. Williams pick orders for the small parcel area of the shipping department.

Following her shift on November 26, 2018, Ms. Williams commenced an approved medical leave of absence so that she could undergo shoulder surgery on November 27, 2018 and recover from the surgery. Following the surgery, Ms. Williams was fitted with an arm immobilizer that held her right elbow in a 90-degree angle. The immobilized included a four-inch wide pad that attached to Ms. Williams waist and that restricted her ability to bend or turn to the right. Ms. Williams had not worn such an immobilizer prior to her surgery. Following the surgery, Ms. Williams was prescribed narcotic medications to address ongoing pain issues. The narcotic medications came with a warning regarding operation of machinery.

At a December 11, 2018, follow-up medical appointment, the orthopedic surgeon released Ms. Williams to return to "Modified Work," but restricted her from using her right upper extremity, including her right hand and arm. The restrictions were to remain in place until a subsequent follow-up medical appointment on January 15, 2019. At the December 11 appointment, Ms. Williams and the surgeon did not discuss whether Ms. Williams should operate a motor vehicle. Ms. Williams' husband had transported Ms. Williams to Des Moines for the December 11 medical appointment.

The employer received a copy of the Patient Status Report or medical release document on December 11, 2018. At 4:00 p.m. on December 11, Leanne Markley, FMLA Coordinator, and Stephanie Gott, Vice President for Human Resources, contacted Ms. Williams by telephone. Ms. Gott told Ms. Williams that she had received a copy of the Patient Status Report that released Ms. Williams to return to modified work. Ms. Gott told Ms. Williams that the employer could accommodate the restrictions, that Ms. Williams could report for work the next day, and that the employer would discuss with her at that time the work the employer intended to have her perform while she remained on medical restrictions. Ms. Gott inquired whether Ms. Williams was taking narcotic medication. When Ms. Williams stated she was taking narcotic medication for pain, Ms. Gott told Ms. Williams that she could not take narcotic medication at work or after 3:00 a.m., but could take ibuprofen during work hours.

At 5:21 a.m. on December 12, 2018, Ms. Williams sent a text message to Mr. Tyrrell stating, "I am not making it in today." Mr. Tyrell responded, "I'm going to have to talk with HR. Since you've been released for modified work you many get points." Ms. Williams replied, "I know." Ms. Williams added that her absence might be covered by her FMLA paperwork and that she needed to check with the employer's leave coordinator. Mr. Tyrrell replied that he would check on the matter that morning. Ms. Williams then asked how many attendance points she had and Mr. Tyrrell answered that she had one attendance point. Later that morning, Mr. Tyrrell reinitiated the text message correspondence. Mr. Tyrrell wrote: I talked with Stephanie this morning. Based on the information we have and the release, this will not be covered under FMLA and you will accrue 2 points due to being out of PTO and calling off the morning of your shift. Ms. Williams responded only to thank Mr. Tyrrell for the message.

Under the employer's written attendance policy, Ms. Williams was required to call Mr. Tyrrell at least 12 hours prior to the scheduled start of her shift if she needed to be absent. The policy required that Ms. Williams call for each day she was absent. Ms. Williams had most recently acknowledged the policy in August 2018 and was familiar with the absence reporting requirement. However, the employer allowed text messages as an acceptable form of notice. The employer also accepted notice less than 12 hours prior to the scheduled start of the shift, but would still assess attendance points if less than 12 hours' notice was provided.

That same afternoon, Ms. Gott contacted Ms. Williams to discuss the absence and Ms. Williams accrual of attendance points in connection with the absence. Before Ms. Gott called Ms. Williams, Ms. Gott called the orthopedic surgeon's office to inquire whether Ms. Williams was restricted from driving. Ms. Gott learned that the surgeon had not restricted Ms. Williams from driving and that it was the surgeon's practice not to offer an opinion on driving ability. During the call, Ms. Williams told Ms. Gott that she was in pain and that she was uncomfortable with the idea of driving while wearing the immobilizer. Ms. Williams told Ms. Gott that she was unable to fasten a seatbelt. Ms. Gott told Ms. Williams that she understood Ms. Williams' desire not to drive without a seatbelt. Ms. Gott asked Ms. Williams whether she had some other means of getting to work. Ms. Gott recommended that Ms. Williams explore whether she could get a ride from a family member or someone else, whether there was a public transportation option, and to consider hiring Uber. Ms. Williams' husband was unavailable to transport Ms. Williams to and from work due to his own employment obligations. Ms. Williams agreed to explore transportation options. Ms. Gott told Ms. Williams that she expected her to report for work the next day and that Ms. Williams would continue to incur attendance points if she did not report to the workplace.

At 4:55 p.m. on December 12, Ms. Williams initiated text message correspondence with Mr. Tyrrell. Ms. Williams wrote: "Waiting for a call back from Dr. Vincent nurse. Not sure how i can go all day with no pain meds. And if i need a pain med at work what happens?" Mr. Tyrrell replied as follows:

> Why wouldn't you take the pain med at work if you need it? You're not going to be operating powered industrial equipment so there wouldn't be a concern of that[.] You're not operating PIE based on your restrictions[.] I also believe the medication is factored into your release to limited duty[.]

Ms. Williams responded: "Well the phone call from Stephanie and Le Ann said not after 3am and outside work hours. Still not sure about transportation."

The text message correspondence that day concluded with the following message from Mr. Tyrrell: "We can clear that up with Stephanie and Le Ann tomorrow regarding the medication. As far as the restrictions say, there is nothing preventing you from operating a car."

Ms. Williams did not report for work on December 13. At 5:08 a.m. Ms. Williams sent the following text message to Mr. Tyrrell: Sebere [sic] shoulder spasms on amd [sic] off all night. Not making it in today[.] For the record [,] I don't think i should have to choose healing or my job. Mr. Tyrrell replied, "Thanks for the heads up. I may have HR reach out to you today. Thanks!" On that day, Ms. Williams contacted the surgeon's office in an attempt to obtain a prescription for a muscle relaxer to address the muscle spasms to see whether the surgeon would restrict her from driving. Ms. Williams had not experienced muscle spasms in her shoulder prior to the shoulder surgery. Ms. Williams did not receive a timely response from the surgeon's office.

On the afternoon of December 13, Ms. Gott and Mr. Tyrrell telephoned Ms. Williams. Mr. Tyrrell told Ms. Williams that the employer was issuing a final written warning to Ms. Williams for

accrual of five attendance points. Ms. Gott told Ms. Williams that the employer had prepared a "temporary transition agreement" regarding Ms. Williams modified work status. That document did not indicate what work the employer intended to have Ms. Williams perform. Ms. Williams confirmed that she understood. Ms. Williams reiterated that she was not comfortable with driving to work. Ms. Gott asked Ms. Williams whether she had spoken further with the surgeon and Ms. Williams said she had not. Ms. Gott suggested that Ms. Williams see whether a pharmacist would advise her on whether she could drive. Ms. Gott told Ms. Williams that the employer had no other choice but to expect her to be at work the next day and that if Ms. Williams did not appear the employment would be terminated. That same afternoon, Ms. Gott sent Ms. Williams an email message with the written reprimand and the temporary transitional duty agreement attached.

Ms. Williams did not report for work on December 14, 2018. Ms. Williams had slept in a recliner, had attempted to adjust position in the recliner, and had experienced cramps in her shoulder. Ms. Williams was taking a narcotic medication for her pain, but was waiting for the doctor to authorize another. At 5:24 a.m., Ms. Williams sent the following text message to Mr. Tyrrell: "I hurt my shoulder in the middle of the night and. In severe pain. I will not be in[.] Mr. Tyrrell limited his response to "Thanks Anita." On the afternoon of December 14, 2018, Ms. Gott and Mr. Tyrrell notified Ms. Williams that she was discharged from the employment for accruing six attendance points. Ms. Williams had at no point expressed an intention to leave the employment.

In making the decision to discharge Ms. Williams from the employment for attendance, the employer considered Ms. Williams' early departures on June 25 and September 12, 2018. On June 25, Ms. Williams left work early so that she could be with her daughter as her daughter underwent surgery in Iowa City to remove a brain tumor. Ms. Williams had properly notified the employer of her need to leave early. On September 12, Ms. Williams left work early for personal reasons with Mr. Tyrrell's approval.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The disqualification shall continue 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).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 a discharge for no disqualifying issue. The context in which the separation occurred is important. The absences that led to the discharge occurred two weeks after Ms. Williams underwent shoulder surgery for a work-related injury. Ms. Williams was still early in her recovery and was still dealing with significant pain issues. The absences and discharge occurred in the context of a pending worker's compensation claim. The surgeon selected by the employer's worker's compensation carrier had released Ms. Williams to perform light-duty work involving use only of her left, non-dominant hand and arm. The surgeon selected by the employer's worker's compensation carrier declined to

express a medical opinion on whether Ms. Williams could drive. Though Ms. Williams was still taking prescribed pain medication, the employer unreasonably restricted Ms. Williams from taking that prescribed medication at work or before work. In other words, the employer imposed an unreasonable requirement that Ms. Williams choose between proper pain management and reporting for work. Ms. Williams was reasonably concerned about attempting to drive herself to work with use of only her non-dominant hand and arm, with her other hand and arm restricted, with her movement restricted by the immobilizer, and without the ability to fasten a seatbelt. The employer unreasonably expected Ms. Williams to take extraordinary measures to get to work, and to bear the associated expense, despite the fact that the transportation issue arose solely from the workplace injury. The weight of the evidence establishes that the absences on December 12, 13 and 14 were each based on bona fide illness and injury. The employer's 12-hour notice requirement was unreasonable. Ms. Williams provided the employer with reasonable notice of all three absences. Each of the three final absences was an excused absence under the applicable law and cannot serve as a basis for a finding of misconduct or disqualification for unemployment insurance benefits. The weight of the evidence establishes an additional excused absence on June 25, 2018, when Ms. Williams left work early due to a bona fide family emergency and with the employer's approval. The September 12 early departure for personal reasons was the sole unexcused absence under the applicable law.

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

DECISION:

The January 8, 2019, reference 01, decision is reversed. The claimant was discharged on December 14, 2018 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

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