IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DANIELLE K BREW
Claimant

BERTCH CABINET MFG INC
Employer

APPEAL NO. 13A-UI-11372-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/11/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Danielle Brew filed a timely appeal from the October 4, 2013, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on November 1, 2013. Ms. Brew did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Mitzi Tann represented the employer and presented additional testimony through Curt Wildeboer. The administrative law judge took official notice of the agency's administrative record (APLT) that documents the claimant's failure to provide a telephone number for the hearing. Exhibits One through Six 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: Danielle Brew was employer by Bertch Cabinet Manufacturing, Inc., as a full-time face frame apprentice from April 2013 until August 7, 2013, when Lee Homeister, Department Leader, and Mitzi Tann, Human Resources Director, discharged her for attendance. Mr. Lee was Ms. Brew's immediate supervisor. Ms. Brew's work hours were 6:00 a.m. to 4:00 p.m., Monday through Thursday. Ms. Brew was still in probationary status when the employer discharged her for attendance.

If Ms. Brew needed to be absent from work, the employer's attendance policy required that she notify the department leadership prior to the scheduled start of her shift. The policy was contained in the employee handbook that the employer provided to Ms. Brew at the start of her employment. The employer did not have a policy about notifying the employer regarding tardiness.

The final absence that triggered the discharge occurred on August 7, 2013, when Ms. Brew was 23 minutes late getting to work. Ms. Brew told the employer she had experienced car trouble. Ms. Brew had not notified a manager that she would be late, but had called a coworker with that information.

In making the decision to discharge Ms. Brew from the employment, the employer considered absences dating from April 22, 2013. On that day, Ms. Brew was absent due to illness and properly reported the absence to the employer. On May 21, June 6, July 10 and July 11, 2013, Ms. Brew was again absent due to illness and properly reported the absence to the employer. On May 28, 2013, Ms. Brew was four minutes late getting to work.

The employer had provided a verbal reprimand for attendance in May 2013.

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 evidence in the record establishes only two absences that would be unexcused absences under the applicable law. The first was the May 28, 2013 late arrival. The second was the August 7, 2013 late arrival. The rest of the absences were due to illness and were properly reported to the employer. Those absences were excused absences under the applicable law. The evidence does not establish excessive *unexcused* absences. For that reason, the administrative law judge concludes that Ms. Brew was not discharged for misconduct. Instead she was discharged for no disqualifying reason. Ms. Brew is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The agency representative's October 4, 2013, reference 02, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs