IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSHUA C BLOMGREN
Claimant

MASTERBRAND CABINETS INC
Employer

APPEAL NO. 17A-UI-00230-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/27/15
Claimant: Respondent (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 29, 2016, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant's discharge was not based on a current act. After due notice was issued, a hearing was held on January 30, 2017. Claimant Joshua Blomgren did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Amy Mosley, Human Resources Representative, represented the employer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant in connection with the original claim that was effective November 27, 2015 or the additional claim that was effective December 11, 2016. Exhibits 1 through 7 were received into evidence. .

ISSUES:

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

Whether the discharge was based on a current act.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joshua Blomgren was employed by Masterbrand Cabinets, Inc. as a full-time material handler from 2002 until December 9, 2016, when Kyle Roed, Human Resources Manager, discharged him for attendance. Mr. Blomgren's work hours were 8:00 p.m. to 4:30 a.m. Mr. Blomgren's work week began on Sunday evening and ended on Friday morning. Mr. Blomgren's immediate supervisor was Mike Hewitt. If Mr. Blomgren needed to be absent from the employment, the employer's written attendance policy required that Mr. Blomgren telephone a designated phone number at least 30 minutes prior to the start of his shift and leave a voicemail message with his name, his

department, and his supervisor's name. If Mr. Blomgren was on a leave of absence, the employer's written policy required that Mr. Blomgren also provide notice to the leave administrator, MATRIX, each day of the absence. Mr. Blomgren received the attendance policy at the time of hire and was familiar with the absence reporting requirements.

During several years of the employment, Mr. Blomgren's wife had an ongoing serious illness that prompted MATRIX to annually authorize *intermittent* leave for Mr. Blomgren under the Family and Medical Leave Act (FMLA) so that he could care for his wife. Under the employer's written policy, absences that lasted less than five consecutive days were deemed *intermittent* leave and absences of five days or more were deemed *extended* leave. Mr. Blomgren was familiar with the employer's leave policy. Mr. Blomgren, his wife's doctor, and MATRIX had most recently completed the annual recertification process on March 29, 2016. The employer witness does not know the nature of Mrs. Blomgren's chronic illness.

The final period of absence that triggered the employer's decision to discharge Mr. Blomgren from the employment occurred during the period of October 23, 2016 through November 3, 2016. During that time, Mr. Blomgren was absent from 10 consecutive shifts in connection with his wife's illness. Mr. Blomgren properly reported each absence. Mr. Blomgren returned to work on November 6, 2016. In connection with that return to work, MATRIX directed Mr. Blomgren to provide medical certification from his wife's doctor in support of the ongoing leave period. Mr. Blomgren agreed to seek medical certification from his wife's doctor.

On November 6, 2016, Human Resources Representative Amy Mosley spoke with Mr. Blomgren. Ms. Mosley told Mr. Blomgren that absent supporting documentation from his wife's doctor, his absences during the period October 23 to November 3 were not excused and would subject him to consequences under the employer's attendance policy. Ms. Mosley told Mr. Blomgren that the employer could terminate the employment if the absence were not "covered" by FMLA.

Under the employer's leave policy, Mr. Blomgren was required to obtain and complete a request for leave of absence form as soon as he learned he needed the leave. Mr. Blomgren was required to return the form to the employer's human resources staff. Once Mr. Blomgren returned the leave request form, the employer was to issue a medical certification form. Under the policy, Mr. Blomgren then had 15 days to return a completed medical certification form documenting the need for the requested leave. Under the employer's policy, "[u]nauthorized time away from work due to delay or denial of a requested leave shall result in the assessment of attendance points under the Time Management Policy unless covered by Scheduled PTO."

On November 8, 2016, Mr. Blomgren contacted Ms. Mosley regarding his effort to obtain medical certification in support for the ongoing absence. Mr. Blomgren told Ms. Mosley that he did not know what to do because his wife's doctor would not complete the medical certification paperwork. Mr. Blomgren told Ms. Mosley that his wife's doctor had said that Mr. Blomgren did not need to be off work.

From November 6, 2016 until December 9, 2016, Mr. Blomgren continued to work his regular full-time schedule. On November 9, 2016, the employer notified Mr. Blomgren that he was discharged from the employment for attendance.

In making the decision to discharge Mr. Blomgren from the employment, the employer considered prior absences on August 2, 2015 and March13, May 22, August 17 and September 25, 2016. Each absence was based on Mr. Blomgren being ill. Mr. Blomgren did not properly report the 2015 absence, but properly reported the 2016 absences.

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.
>
> 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 weight of the evidence in the record fails to establish a current act of misconduct. As indicated in the law cited above, the question for the administrative law judge is not whether the employer was within its rights as an employer to discharge Mr. Blomgren from the employment, but rather whether Mr. Blomgren was discharged for a reason that would disqualify him for unemployment insurance benefits. The weight of the evidence establishes that each of the absences during the period of October 23, 2016 and November 3, 2016 was based on the previously recognized chronic illness of Mr. Blomgren's wife. Each of the absences was properly reported to the employer. The first four absences fell under the prior certification of intermittent leave. Mr. Blomgren's inability to get a doctor to produce a medical note after the fact in connection with the absences does not make them unexcused absences under the applicable law. See Gaborit, 743 N.W.2d at 557. The weight of the evidence in the record establishes only one absence that factored in the discharge that was an unexcused absence under the applicable law. That absence was in 2015. It was unexcused because it was not properly reported to the employer. The absence in 2015 did not constitute a current act. After Mr. Blomgren gave notice on November 8 that he could not obtain medical certification for the final absences, the employer allowed Mr. Blomgren to work for an additional month before discharging him from the employment. This additional period of employment precludes any of the absences considered by the employer from constituting current acts for the purpose of determining Mr. Blomgren's eligibility for unemployment insurance benefits.

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

DECISION:

The December 29, 2016, reference 01, decision is affirmed. The discharge was not based on a current act. 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.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/rvs