IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHARLES W VAN RYCKE
Claimant

KRAFT PIZZA CO
Employer

APPEAL NO. 08A-UI-00431-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/16/07 R: 04
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Required

STATEMENT OF THE CASE:

Kraft Pizza Company filed a timely appeal from the January 4, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 29, 2008. The claimant did not respond to the hearing notice and did not participate. Jodi Martin, Human Resources Specialist, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

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" of misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Charles Van Rycke was employed by Kraft Pizza Company as a full-time production worker from June 21, 2006 until October 4, 2007, when Production Supervisor John Flemming discharged him for attendance. Mr. Flemming was Mr. Rycke's immediate supervisor. Mr. Flemming is still with the employer, but did not testify at the appeal hearing.

The employer has a written attendance policy that was reviewed with Mr. Van Rycke at the start of his employment. Mr. Van Rycke signed his acknowledgment of the attendance policy. The attendance policy required that Mr. Van Rycke contact his immediate supervisor prior to the halfway point of his shift if he needed to be absent. The employer's witness does not know which shift Mr. Van Rycke was assigned to.

The final absence that prompted the discharge occurred on September 28, 2007, when Mr. Van Rycke was absent due to illness and properly reported the absence. Mr. Van Rycke's next most recent absence had occurred on September 14, 2007. On that date, Mr. Van Rycke was absent due to illness and properly reported the absence.

On May 27, a supervisor other than Mr. Flemming had issue Mr. Van Rycke a step three attendance warning, or final attendance warning. The warning limited the number of days Mr. Van Rycke could be absent during the period that followed the warning. The warning was triggered by Mr. Van Rycke's early departure from work on May 20, 2007. The employer recorded the reason for the early departure as "personal." The employer records an absence for any reason other than personal illness as "personal," including family member illness or emergencies. On May 20, 2007, Mr. Van Rycke missed 7.5 hours of his shift.

Between the May 20 early departure and the September 14 absence due to illness properly reported, Mr. Van Rycke had the following absences. On June 3 and 9, Mr. Van Rycke was tardy. On June 16, Mr. Van Rycke was absent due to a "personal" reason. One June 23, Mr. Van Rycke was tardy. On July 7, Mr. Van Rycke was absent due to illness and properly reported the absence. On August 31, Mr. Van Rycke was tardy.

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).

The evidence in the record indicates that the final absence that prompted the discharge was for illness properly reported to the employer. Accordingly, the absence was an excused absence under the applicable law. Because the absence that prompted the discharge was an excused absence, the evidence fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). Because there was no current act of misconduct, the administrative law judge concludes that Mr. Van Rycke was not discharged for misconduct in connection with the employment that would disqualify him for unemployment insurance benefits. See 871 IAC 24.32(8). Because there was not current act, the administrative law judge need not consider the prior absences and whether they were excused or unexcused under the applicable law. However, the administrative law judge notes that the next most recent absence on September 14 was also for illness properly reported to the employer and, accordingly, an excused absence under the applicable law.

Mr. Van Rycke was discharged for no disqualifying reason. Mr. Van Rycke is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Van Rycke.

DECISION:

The Agency representative's January 4, 2008, reference 01, decision is affirmed. 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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