IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

VERONICA R DAVIS
Claimant

FAMILY FIRST CHIROPRACTIC CLINIC
Employer

APPEAL NO. 18A-UI-05108-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/08/18
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 26, 2018, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on April 9, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on May 25, 2018. Dr. Nichole Gevock, D.C., represented the employer. Claimant Veronica Davis participated. Exhibits 1 and A and Department Exhibits D-1 and D-2 were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant.

ISSUES:

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

Whether Ms. Davis was overpaid benefits.

Whether Ms. Davis must repay benefits.

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: Nichole Gevock, D.C., owns and operates Family First Chiropractic Clinic in Ottumwa. Dr. Gevock employed Veronica Davis at the clinic as a receptionist from June 2017 until April 9, 2018, at which time Dr. Gevock discharged Ms. Davis from the employment. Though Ms. Davis' job title was receptionist, she had several duties that were in addition to receptionist duties. Ms. Davis' duties included greeting patients, having patients sign in for appointments, answering the telephone, scheduling appointments, rescheduling appointments as needed, reviewing the clinic's financial policy with patients, ensuring required documentation was completed for patients covered by Medicare, reviewing advance beneficiary notices with patients, responding to therapy machine alarms when Dr. Gevock was unavailable to respond, collecting fees at the time of service, and keeping work areas clean. Ms. Davis' regular work schedule corresponded to the clinic's hours of operation: 8:00 a.m. to noon and 1:00 p.m. to 5:30 p.m. on Monday and

Wednesday, 3:00 p.m. to 7:00 p.m. on Tuesday, 1:00 p.m. to 6:00 p.m. on Thursday, 8:00 a.m. to 1:00 p.m. on Friday. Ms. Davis was also expected to assist with community screening events scheduled on weekends. Dr. Gevock was Ms. Davis' immediate supervisor. The clinic staff consisted of Dr. Gevock, Ms. Davis, and, at times, another support staff person.

The final incident that triggered Dr. Gevock's decision to discharge Ms. Davis from the employment concerned Ms. Davis' interaction with a male patient in the workplace and outside the workplace. On March 12, 2018, Ms. Davis chatted with the patient for an extended period at the front desk after the patient's appointment had concluded. Ms. Davis and the patient subsequently corresponded via private messaging on Facebook. The patient disclosed to Ms. Davis that he felt worse after his chiropractic treatment and would not be returning to the chiropractic clinic if he did not begin to feel better. Ms. Davis encouraged the patient to bring his concern to Dr. Gevock's attention. When Ms. Davis brought the patient's concern to the attention of Dr. Gevock, Dr. Gevock verbally warned Ms. Davis on March 20, 2018 that conversations with patients about non-work related matters and speaking with patients outside of work violated clinic confidentiality policies. On March 22, 2018, Dr. Gevock issued a written warning to Ms. Davis, based on Ms. Davis' conversation and contact with the patient. Also on March 22, Dr. Gevock counseled Ms. Davis not to use a flash drive to move files from one clinic computer to another. Ms. Davis had brought a flash drive to work and had used the flash drive to transfer files. Dr. Gevock was concerned about patient information being accidentally or intentionally shared via the flash drive. Dr. Gevock later requested that Ms. Davis relinquish the flash drive to Dr. Gevock and Ms. Davis complied. Dr. Gevock subsequently decided, based on Ms. Davis' interaction with the male patient, the flash drive concern, and several sundry prior concerns, to discharge Ms. Davis from the employment. Dr. Gevock planned to discharge Ms. Davis from the employment on Friday, April 6, 2018. However, Ms. Davis was absent due to illness that day. When Ms. Davis arrived for work on Monday, April 9, 2018, Dr. Gevock told Ms. Davis that she was sorry, but that the employment relationship was not working out and she needed Ms. Davis' key. Dr. Gevock had not warned Ms. Davis prior to the April 9, 2018 that the employment was in jeopardy.

Dr. Gevock considered Ms. Davis' attendance record when making a decision to discharge her from the employment. The final absence that Dr. Gevock considered was the absent on April 6, 2018, when Ms. Davis was absent due to illness. The clinic's written policy required that Ms. Davis telephone Dr. Gevock prior to the scheduled start of her shift if she needed to be absent or late. At the start of the employment, Dr. Gevock had Ms. Davis sign to acknowledge her obligation to review and follow the written work rules, which were kept in a binder in the workplace. In practice, Dr. Gevock accepted text message notice of absences and Ms. Davis consistently communicated such information via text message. On April 6, 2018, Ms. Davis notified Dr. Gevock prior to the scheduled start of her shift that she was vomiting, was suffering from diarrhea, and would be absent from work. After the shift ended, Ms. Davis sent a text message to Dr. Gevock asking what time she should report the next day to assist with a weekend screening event. Dr. Gevock responded that in light of Ms. Davis illness, Dr. Gevock would decide later whether the weekend screening warranted Ms. Davis' involvement. Dr. Gevock suspected that Ms. Davis was absent on April 6 for reasons other than illness.

Dr. Gevock considered several earlier absences when making the decision to discharge Ms. Davis from the employment. On August 30, 2017, Ms. Davis was absent due to a migraine headache and properly notified the employer. On September 29, Ms. Davis was absent so that she could take her 17-year-old son to the oral surgeon for wisdom teeth removal and transport her son home afterwards. Ms. Davis had requested the time off in advance and Dr. Gevock had approved the request in advance. On November 1 and 6, Ms. Davis was absent due to a migraine headache and properly notified the employer. On December 7, Ms. Davis left work during her shift to collect her young grandson from school at the end of the school day due to a family emergency. The child's mother, Ms. Davis' daughter, had been rushed to the hospital due to complications in her pregnancy. The child's father, Ms. Davis' son-in-law, worked as a

truck driver and was working out of town. There was no one else available to collect the child and care for the child until the child's father could return to town and collect him. At the time Ms. Davis received word that she needed to collect her grandchild from school, Dr. Gevock was with a patient. Rather than interrupt Dr. Gevock, Ms. Davis telephoned Dr. Gevock's mother. Dr. Gevock's mother sometimes assists at the front desk of the clinic. Ms. Davis spoke with Dr. Gevock's mother, who was unavailable to assist but advised Ms. Davis to call Dr. Gevock's father. Dr. Gevock's father came to the clinic to man the front desk for the two hours Ms. Davis was away. Ms. Davis returned to the clinic with her grandchild and kept the grandchild with her at the clinic until the child's father could collect the child. Dr. Gevock was in the habit of allowing her nieces and nephews to visit her at the clinic, though not at the front desk. On December 13 and 14, Ms. Davis was absent due to illness and properly notified the employer. On December 28, 2017, Ms. Davis was two hours late for work with proper notice to the employer after she slipped on ice and hit her shoulder. Ms. Davis was late for work so that she could seek emergency room evaluation of her shoulder. On January 8, 2018, Ms. Davis was absent due to a migraine headache that had prompted an early morning trip to the emergency room and a shot to address the migraine symptoms. Ms. Davis properly notified the employer of her need to be absent. On January 29, 30 and 31, Ms. Davis was absent with the flu and properly notified the employer of her need to be absent. Dr. Gevock advised Ms. Davis that she would need to be away from the workplace for 72 hours due to the flu diagnosis. On February 14, Ms. Davis was absent so that she could travel to Des Moines to be with her hospitalized father-in-law, who had been transported to a Des Moines hospital for heart disease treatment. Ms. Davis properly notified the employer of her need to be absent. On March 8, Ms. Davis was absent due to strep throat and properly notified the employer.

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:
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> 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). 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).

The administrative law just will address the attendance matters first and then address the other basis for the discharge.

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 fails to establish a current act of misconduct in connection with the employment based on attendance matters. The weight of the evidence in the record establishes a final absence on April 6, 2018 that was due to illness, was properly reported to the employer, and therefore was an excused absence under the applicable law. The weight of the evidence fails to support the employer's suspicion that the April 6 absence was based on something other than bona fide illness. The fact that Ms. Davis sent a text message on the afternoon of April 6 asking what time she was supposed to report for work the next day is not proof that she was not ill that

morning or that she provided a bogus reason for being absent that day. The next most recent absence was in early March, was due to illness, was properly reported to the employer, and was an excused absence under the applicable law. The evidence establishes only two absences, out of the several absences, that were unexcused absences under the applicable law. These included the December 7 absence to collect the grandchild without notifying Dr. Gevock and the February 14 absent to visit the hospitalized father-in-law in Des Moines. In the first instance, Ms. Davis should have notified Dr. Gevock. In the second instance, the evidence fails to establish necessity for Ms. Davis to skip her entire shift to visit the ill family member rather than simply travel to Des Moines following her shift. The evidence does not establish excessive unexcused absences.

The evidence fails to establish a current act of misconduct in connection with the non-attendance concerns that factored in the discharge. The incident that the employer identifies as the final incident that triggered the discharge concerned Ms. Davis' lengthy chat with the patient on March 12 and the Facebook contact that the employer addressed with Ms. Davis on March 20 through the verbal reprimand and on March 22 through the written reprimand. None of these concerns remained a "current act" as of the planned April 6 discharge date or the April 9 actual discharge date. The evidence fails to establish a reasonable basis for the delay between the point when these final concerns came to the employer's attention and the discharge date. The same analysis applies to the concern regarding the flash drive. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not further consider the earlier concerns or whether they involved misconduct. Even if the delay between the employer's knowledge of the conduct and the discharge had been reasonable, the evidence fails to establish an intention to violate work rules or act contrary to the employer's interests in connection with these final concerns that triggered the discharge.

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

DECISION:

The April 26, 2018, reference 01, decision is affirmed. The claimant was discharged on April 9, 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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