IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MELISSA M BURGET
Claimant

RISEN SON CHRISTIAN VILLAGE
Employer

APPEAL NO. 13A-UI-03113-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/17/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Melissa Burget filed a timely appeal from the March 12, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 12, 2013. Ms. Burget participated. Debra Weihs, Director of Human Resources, represented the employer and presented additional testimony through Rosie Koons, Director of Nursing. Exhibits One through Eight and A 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: Melissa Burget was employed by Risen Son Christian Village as a certified nursing assistant from 2007 until February 18, 2013, when Rosie Koons, Director of Nursing, and Debra Weihs, Director of Human Resources, discharged her for excessive tardiness. Ms. Koons was Ms. Burget's supervisor. Ms. Burget was assigned to the 6:00 a.m. to 2:00 p.m. shift. Ms. Burget had been a full-time employee until a couple months before the employment ended, when she elected to go to part-time status.

The final absence that triggered the discharge was Ms. Burget's late arrival on February 18, 2013. On that day, Ms. Burget called the employer at 6:30 a.m. to indicate that she was running late. Ms. Burget had overslept. Ms. Burget appeared at the workplace at 7:30 a.m. and was discharged later the same day.

The final incident of tardiness was part of a pattern of chronic tardiness. Ms. Burget had been late for work for personal reasons on February 1, 9, 11, and 15. Ms. Burget has been late for work on January 26 for personal reasons. In December 2012, Ms. Burget was last for work for personal reasons on December 12, 15, 16, 20 and 31. In 2012, Ms. Burget was additionally late to work for personal reasons eight times in March, eleven times April, five times in May, three times in June, eight times in July, nine times in August, and ten times in September.

The instances of tardiness during the last few months of the employment occurred in the context of repeated warnings for excessive tardiness. On September 11, the employer issued a written "final warning" to Ms. Burget for attendance and warned her that her job was in jeopardy. In the section of the reprimand reserved for employee comments, Ms. Burget wrote only, "I will do better, I love my job." On October 11, the employer again issued a written "final warning" to Ms. Burget for attendance and warned her that her job was in jeopardy. Ms. Burget's punctuality then improved until her several late arrivals in December 2012. At no time did Ms. Burget tell the employer that her late arrivals were due to any medical condition or the affect of medication. At no time did Ms. Burget notify the employer that she been forced to clock in late due to a malfunctioning time clock. Rather, Ms. Burget regularly provided the employer with no reason for her late arrival or notified the employer she had overslept. Ms. Burget had not provided an medical documentation to the employer indicating that she had any ongoing medical condition that made it necessary for her to be late. Ms. Burget did not ask for a change of shift. Ms. Burget thought she worked on the hardest floor of the facility, but had worked on the same floor for more than two years prior to her discharge. It would take Ms. Burget about ten seconds to clock in when she got to work. All she would have to do is scan her ID and scan her finger print. No more than three other employees would need to clock in at the same time. The employer allowed employees to clock early if necessary.

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 that Ms. Burget was habitually late for personal reasons. They weight of evidence fails to support Ms. Burget's assertion that she had a medical condition that made it necessary for her to be late. The weight of the evidence fails to support Ms. Burget's assertions that the time clock made her late. Despite back to back reprimands for attendance in September and October 2012, and after more than a month of punctuality that demonstrated Ms. Burget's ability to get to work on time, Ms. Burget reverted to her habitual tardiness in December 2012 and continued the pattern until February 18, 2013, when the employer finally made good on its prior warnings to discharge her from the employment. Ms. Burget's unexcused tardiness was excessive and constituted misconduct in connection with the employment. Ms. Burget is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The Agency representative's March 12, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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