IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MURRAY, DAN
Claimant

CURLYS FOODS
Employer

APPEAL NO. 12A-UI-15080-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/18/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Dan Murray filed a timely appeal from the December 12, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 28, 2013. Mr. Murray participated. Kathy Peterson, Human Resources Manager, represented the employer. Exhibits One through Seven were received into evidence.

ISSUE:

Whether Mr. Murray was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits. The administrative law judge concludes that Mr. Murray was discharged for no disqualifying reason and is eligible for benefits, provided he meets all other eligibility requirements.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dan Murray was employed by Curly's Foods as a full-time lead person from 2008 until October 2, 2012, when the employer discharged him for attendance. Mr. Murray's usual work hours were 2:30 p.m. to 11:00 or 11:30 p.m., Monday through Friday. If Mr. Murray needed to be absent from work, the employer's written attendance policy required that he telephone the workplace prior to the scheduled start of the shift and speak to someone or leave a message on the answering machine. Mr. Murray had received a copy of the policy and was aware of the policy. The employer assigned attendance points to absences based on the nature of the absence. The employer assigned one point to an absence due to illness properly reported. The employer discharged Mr. Murray for exceeding the allowable number of attendance points.

In making the decision to discharge Mr. Murray from the employment, the employer considered absences going back to November 12, 2011. On that date, Mr. Murray was absent from work so that he could attend the funeral of his brother's mother-in-law. Mr. Murray notified the employer prior to the shift that he would be absent for personal reasons. On December 6, 2011, Mr. Murray was late getting to work because his car battery was dead. The car battery was three years beyond its expiration date. On January 20, 2012, Mr. Murray left work early, with proper notice to the supervisor, so that he could take his 84-year-old mother to the hospital for

treatment for pneumonia. Mr. Murray and his mother shared a household. Mr. Murray had been absent due to illness properly reported to the employer on December 12, 2011, and in 2012 had similar absences due to illness properly reported on February 10 and 17, June 4 and 5, July 7, and September 25, 26, 27, and 28. The final absence the triggered the discharge was a no-call/no-show absence on October 1, 2012.

The employer had issued reprimands for attendance to Mr. Murray on June 11 and July 9, 2012. The employer prepared an additional reprimand on October 2, 2012 in connection with the decision to discharge Mr. Murray from the employment.

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 three absences that were unexcused absences under the applicable law. The first was the November 12, 2011, absence when Mr. Murray was late getting to work because he had not changed the car battery that was three years beyond its expiration date. The second, was the December 6, 2011 absence when Mr. Murray was gone so he could attend the funeral of his brother's mother-in-law. The third was the no-call/no-show absence on October 1, 2012.

The rest of the absences were excused absences under the applicable law. All but one of those absences was for personal illness that Mr. Murray properly reported to the employer. The remaining absence on January 20, 2012 was so Mr. Murray could take his elderly mother to the hospital so she could be treated for pneumonia. That absence was also properly reported to the employer.

Thus the evidence establishes only one absence in 2012 that would be an unexcused absence under the applicable law. That was the absence on October 1 that triggered the discharge. The two unexcused absences in 2011 and the one additional unexcused absence in the fall of 2012 are insufficient to establish excessive unexcused absences for purposes to disqualify

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

DECISION:

The Agency representative's December 12, 2012, reference 01, decision is reversed. 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

jet/pjs