IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RAPP, MARY, E
Claimant

PARKVIEW CARE CENTER INC
Employer

APPEAL NO. 13A-UI-03166-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/10/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Mary Rapp filed a timely appeal from the March 13, 2013, reference 01, decision that disqualified her for benefits. After due notice was issued, a hearing was held on April 15, 2013. Ms. Rapp participated. Pamela Gordy represented the employer.

ISSUE:

Whether Ms. Rapp 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: Mary Rapp was employed by Parkview Care Center, Inc., as a full-time laundry worker from 2009 until February 5, 2013, when Pamela Gordy, Housekeeping and Laundry Supervisor, discharged her for attendance. Ms. Gordy was Ms. Rapp's immediate supervisor for at least the last year of the employment. Ms. Rapp's work hours were 6:00 a.m. to 2:30 p.m. five days a week.

If Ms. Rapp needed to be absent from work, the employer's established policy required that Ms. Rapp notify Ms. Gordy at least one hour prior to the scheduled start of the shift. Ms. Gordy had provided Ms. Rapp with her home number and her cell phone number for this purpose. Ms. Rapp was aware of the policy.

The final absences that triggered the discharge were consecutive no-call/no-show absences on February 4 and February 5, 2013.

In 2013, Ms. Rapp was absent from work nine times before the final two absences on February 4 and 5. Though Ms. Rapp often called off due to purported illness, the employer suspected the absences were not based on bona fide illness. On January 22, Ms. Rapp was absent because her car would not start and provided proper notice to the employer. On January 24, Ms. Rapp was absent because she wanted to sit with her hospitalized son-in-law while her daughter went to work. The son-in-law was hospitalized in Iowa City. Ms. Rapp

notified Ms. Gordy the night before the absence. On January 30, Ms. Rapp was absent with proper notice to the employer and told Ms. Gordy the roads were bad. On January 31, Ms. Rapp was absent with proper notice and told the employer she was too nervous to drive to work. Ms. Rapp lived about 20 miles from the workplace. Ms. Rapp's commute was all on hard surface roads. A few years earlier, Ms. Rapp had been in an accident involving a deer. On February 1, Ms. Rapp notified Ms. Gordy that she had put her car in the ditch while enroute to work. Ms. Gordy did not hear from Ms. Rapp after that contact.

On February 5, Ms. Gordy sent Ms. Rapp a letter indicating that the employment was terminated based on the two most recent no-call/no-show absences and another no-call/no-show absence from March 9, 2012. Under the employer's policy, three no-call/no-show absences subjected Ms. Rapp to discharge from the employment. Ms. Rapp received the letter within a day or two of February 5. Ms. Rapp did not contact the employer to challenge the assertion that she was a no-call/no-show on February 4 and 5.

In 2012, Ms. Gordy had issued both verbal and written reprimands to Ms. Rapp for attendance. The first verbal reprimand was issued on February 27, when Ms. Rapp refused to assist with finding someone to cover her shift. At the time, the employer's policy required that the absent employee find a replacement. On March 12, Ms. Gordy issue a second verbal warning for attendance in response to the no-call/no-show absence on March 9. Ms. Rapp told Ms. Gordy that she had overslept to the afternoon and then did not feel obligated to notify Ms. Gordy. On October 17, Ms. Rapp issued a written reprimand to Ms. Rapp for attendance.

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 administrative law judge found substantial portions of Ms. Rapp's testimony not credible. Ms. Rapp had a rather convenient lack of memory concerning several incidents that occurred fairly recently. However, Ms. Rapp asserted clear memory of her alleged contact with the employer on February 4, 2013. Despite that purported contact on February 4, Ms. Rapp made no meaningful contact on February and made not contact with the employer to contest the assertion in the termination letter that she had been no-call no-show on February 4. In addition, Ms. Rapp claimed to have no knowledge of prior reprimands. The employer presented

sufficient evidence to establish that there were indeed prior reprimands. The administrative law judge found no similar deficits in the employer's testimony. Where Ms. Rapp's testimony conflicted with the employer's testimony, the administrative law judge found the employer's testimony more credible.

The evidence in the record establishes excessive unexcused absences. The weight of the evidence in the record establishes two consecutive no-call/no-show absences on February 4 and 5, 2013. Those absences together were sufficient to establish excessive unexcused absences. They occurred in the context of multiple prior warnings for attendance and in the context of another no-call/no-show absence in March 2012. The evidence in the record also establishes an unexcused absence on January 22, when Ms. Rapp was absent due to transportation issues, and on January 24, when Ms. Rapp was absent so that she could keep her son-in-law and/or her daughter company at an Iowa City hospital. In additional, the weight of the evidence establishes an unexcused absence on January 31, when Ms. Rapp was absent because she was too anxious to drive to work.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Rapp was discharged for misconduct. Accordingly, Ms. Rapp 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 paid to Ms. Rapp.

DECISION:

The Agency representative's March 13, 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

_____
Decision Dated and Mailed

jet/pjs