IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PAMELA J HANNUM
Claimant

SHANER OPERATING CORP
DES MOINES SAVERY HOTEL
Employer

APPEAL NO. 10A-UI-08151-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/18/10
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 28, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 22, 2010. Claimant participated. Tom Kuiper of TALX represented the employer and presented testimony through Sondra Rivera, Mike Petherbridge, and Rick Gaede. Exhibits One through Ten 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: Pamela Hannum was employed by the Des Moines Savory Hotel as a full-time executive housekeeper from April 2008 until April 1, 2010, when Sondra Rivera, Director of Human Resources, and Mike Petherbridge, Controller and Director of Rooms, discharged her from the employment. Mr. Petherbridge was Ms. Hannum's immediate supervisor.

On February 1, 2010, Mr. Petherbridge had issued a reprimand to Ms. Hannum for attendance. At that time, Mr. Petherbridge directed Ms. Hannum to report for work at 7:30 a.m. each morning. Mr. Petherbridge directed Ms. Hannum to make arrangements with him if she needed to miss work. Mr. Petherbridge directed Ms. Hannum to submit requests for time off at least two weeks prior to the date requested off. Mr. Petherbridge indicated the employer's expectation that Ms. Hannum, as a manager, would work 50 hours per week. The reprimand was issued after Ms. Hannum missed work meetings and other important events in January due illness and inclement weather.

Shortly before she left work early on March 29, 2010, Ms. Hannum sent the following e-mail message to Mr. Petherbridge:

> Mike,
>
> I'm going to come in late Tuesday, probably around 10 if this is a problem call me on my cell. I'm also thinking about taking wed off I'll let you know Tuesday. I have just put in so many hours I'm tired.

Mr. Petherbridge responded within a couple minutes with the following e-mail: "Will you be taking PTO for tomorrow morning or staying later?" Ms. Hannum immediately replied, "Really, all the hours I have put in and I need to use pto for two hours, Never mind I'll be here." Ms. Hannum then left work for the day.

Ms. Hannum set her own work schedule pursuant to the needs of the employer's business. Ms. Hannum had scheduled herself off work for Saturday and Sunday, March 20-21, and had scheduled herself to start work at 7:30 a.m. on Monday through Friday, March 22-26. Ms. Hannum scheduled herself for a 3:00-11:00 p.m., manager-on-duty shift on Saturday, March 27, scheduled herself off on Sunday, March 28, scheduled herself to start work at 7:30 a.m. on Monday through Thursday, March 29-April 1.

In response to the above e-mail exchange, Mr. Petherbridge investigated the hours Ms. Hannum had recently worked. On March 22, Ms. Hannum had arrived sometime between 7:30 a.m. and 8:00 a.m. and had departed around 4:00 p.m. Mr. Petherbridge reviewed surveillance video that documented Ms. Hannum's arrival and departure from the workplace during the period of March 23-30, 2010. After reviewing the surveillance data showing Ms. Hannum's actual arrival and departure times, Mr. Petherbridge concluded Ms. Hannum had been dishonest in asserting she had been working long hours. On March 23, Ms. Hannum arrived at 8:22 a.m. and left at 4:00 p.m. On March 24, Ms. Hannum arrived at 7:50 a.m. and left at 3:40 p.m. On March 25, Ms. Hannum arrived for her manager-on-duty shift at 3:00 p.m. and left at 11:00 p.m. On March 26, Ms. Hannum arrived at 8:18 a.m. and left at 3:20 p.m. On March 27, Ms. Hannum arrived for her manager-on-duty shift at 2:42 p.m. and left at 12:08 a.m. On March 29, Ms. Hannum arrived at 10:23 a.m. and left at 3:19 p.m. On March 30, Ms. Hannum arrived at 8:09 a.m. and left at 4:23 p.m. On March 31, Ms. Hannum worked from 7:15 a.m. to 7:30 p.m.

In making the decision to discharge Ms. Hannum, the employer considered prior reprimands issued for non-attendance matters.

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.
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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.

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 weight of the evidence indicates that Ms. Hannum was late to work on March 23, 24, 26, 29, and 30. The weight of the evidence indicates that Ms. Hannum left work early on March 24, 26, and 29. The weight of the evidence indicates Mr. Petherbridge had issued a directive to Ms. Hannum at the time of the February 1, 2010 reprimand that she was to appear for work by 7:30 a.m. or make arrangements with him. The weight of the evidence indicates that not only was Ms. Petherbridge not working the long hours she alleged she had been working, but Ms. Hannum had actually shortened her work hours *eight* times for personal reasons between March 23 and March 30. The February reprimand made clear that whatever flexibility had existed prior to that reprimand no longer existed as of the issuance of the reprimand. The weight of the evidence establishes excessive unexcused absences during the period of March 23-30.

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

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's May 28, 2010, reference 01, decision is reversed. 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.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css