IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KARLA J EVANS
Claimant

TMI EMPLOYEE MANAGEMENT
Employer

APPEAL NO. 17A-UI-07136-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/04/17
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 6, 2017, reference 03, 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 claims deputy's conclusion that the claimant was discharged on June 5, 2017 for no disqualifying reason. After due notice was issued, a hearing was started on August 15, 2017 and concluded on August 28, 2017. Claimant Karla Evans participated and presented additional testimony through Tammy Stephens and Marjorie Hattig. Jeanne Mathews represented the employer and presented additional testimony through Ryan Matlock. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant is required to 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: Karla Evans was employed by TMI Employee Management, doing business as Comfort Inn, until June 5, 2017, when Jeanne Mathews, General Manager, and Ryan Matlock, Area Regional Director, discharged her from the employment. Ms. Mathews hired Ms. Evans in November 2016 to be Breakfast Host and with the agreement that Ms. Evans would quickly become

Executive Housekeeper. Ms. Mathews had just joined the company in mid-2016. Within two weeks of hire, Ms. Evans transitioned to the full-time Executive Housekeeper position. In that position, Ms. Evans worked as an hourly employee, worked in excess of 40 hours per week, but was paid only for 40 hours per week. Rather than paying Ms. Evans an overtime wage, Ms. Mathews instructed Ms. Evans to keep track of her overtime hours with the promise that she would later be able to use that accrued time for paid time off. Ms. Mathews kept track of her overtime hours, performed in excess of 50 hours of overtime work, but did not receive commensurate paid time off.

In December 2016, the Assistant Manager, who was preparing to leave the company, trained Ms. Evans in the Assistant Manager duties in anticipation of Ms. Evans becoming the new Assistant Manager. The training included training in the steps required when hiring a new employee. These steps included complying with United States Citizenship and Immigration Service (USCIS) requirements by obtaining proof from the employee, at the time of hire, that the employee was who they represented themselves to be and that they were authorized to work in the United States. The training covered completing an electronic USCIS Form I-9 and an electronic IRS Form W-4 with an employee. The training covered entry of all necessary payroll information into the employer's computer system at the time of hire. In January 2017, Ms. Mathews promoted Ms. Evans to the full-time Assistant Manager position. Until April 2017, Ms. Evans had to use Ms. Mathews' company login credentials to enter the new hire information into the company's computer system. By the beginning of May 2017, Ms. Evans had received her own login PIN for the company's computer system.

Once Ms. Evans began the Assistant Manager duties, she became a salaried employee. Ms. Evans' salary was $1,038.00 every two weeks. Ms. Evans' Assistant Manager duties included supervising about 12 employees, manning the hotel's front desk from 7:00 a.m. to 3:00 p.m. on Saturdays and Sundays, ordering supplies, and assisting with housekeeping and maintenance as needed. Until the end of April 2017, Ms. Evans was also responsible for preparing the employee work schedule.

When Ms. Evans became the Assistant Manager, Ms. Mathews advised Ms. Evans that her work hours might vary greatly in the position. Outside of the weekend front desk duties, Ms. Evans worked without an established work schedule. Instead, Ms. Mathews and Ms. Evans engaged in daily discussion to establish when each would be present at the hotel. If Ms. Evans needed all or part of a particular day off, the understanding between Ms. Mathews and Ms. Evans was that Ms. Evans would communicate that to Ms. Mathews by telephone call, voice mail message, or text message. Ms. Mathews was frequently unavailable by telephone. Other staff was expected to provide notice of an absence at least two hours prior to the scheduled start of the shift. Ms. Mathews maintained no such requirement for Mr. Evans. In the absence of an establish work schedule, Ms. Evans would usually arrive for work at some time between 6:00 a.m. and 7:30 a.m., depending on business needs. In April or May, Ms. Mathews posted a schedule showing work hours for herself and Ms. Evans in an attempt to give staff some idea of when each could be expected at the hotel, but with the expectation that Ms. Evans or Ms. Mathews would only loosely adhere to the schedule. At some point, Mr. Matlock, the Area Regional Director, directed Ms. Mathews to ensure she or Ms. Evans was present at the hotel until 8:00 p.m. At that point, Ms. Evans' tentative work schedule shifted later in the day, from 10:00 a.m. to 8:00 p.m. Ms. Evans' actual work hours continued to depend on daily discussion with Ms. Mathews. Ms. Evans began to document her actual work hours in a personal log.

The employer's primary basis for discharging Ms. Evans from the employment was Ms. Evans' failure to complete appropriate documentation and onboarding steps at the time Ms. Evans

hired two housekeepers. Ms. Evans commenced allowing the employees to perform work on behalf of the employer during May 2017, while Ms. Mathews was at a convention. Ms. Mathews' absence began May 7, 2017. Ms. Mathews returned to work on May 15, 2017. Sometime between May 16 and 18, she learned that Ms. Evans had allowed one of the new housekeepers to work shifts on May 11, 12, 13 and 14 without generating any documentation of the hire and without requiring the employee to produce a Social Security card to verify the new employee's eligibility to work. Ms. Evans had reviewed a Washington state photo ID, but was required to obtain two forms of ID from the employee and copy the IDs to comply with the United States Citizenship and Immigration Services (USCIS) Form I-9 requirements. Ms. Evans allowed a second employee, the daughter-in-law of the first, to perform work for a shift without generating any documentation in connection with the hire. That employee worked for a day and did not return for additional work. However, that employee subsequently required payment for the work she had performed. Ms. Evans actions were in violation of federal law and exposed the employer to potential governmental sanction.

The employer's secondary basis for discharging Ms. Evans from the employment was based on Ms. Evans' attendance.

On May 15, Ms. Evans was tentatively scheduled to work 10:00 a.m. to 8:00 p.m. On that day, Ms. Evans sent Ms. Mathews a text message asking permission to work from home to complete online training. Ms. Mathews approved the request.

On May 16, Ms. Evans was tentatively scheduled to work from 10:00 a.m. to 8:00 p.m., but did not appear for the shift. On the evening of May 15, Ms. Evans sent Ms. Mathews a text message indicating that she would not be at work on May 16 because she was experiencing pain behind her eye.

On May 17, Ms. Evans was tentatively scheduled to work from 10:00 a.m. to 8:00 p.m., but did not appear for her shift. At 7:30 a.m. Ms. Evans sent Ms. Mathews a text message indicating that she had a doctor appointment at 9:30 that morning. Ms. Evans did not state that she would absent from the entire shift.

On May 18, Ms. Evans was tentatively scheduled to work from 10:00 a.m. to 8:00 p.m., but did not appear for her shift. At 7:30 a.m., Ms. Evans sent a text message to Ms. Mathews indicating that she was on her way to work, but was feeling under the weather. Ms. Mathews appeared for work and worked until 5:00 p.m. that day.

On May 19, Ms. Evans was tentatively scheduled to work from 10:00 a.m. to 8:00 p.m. Ms. Evans worked from 9:00 a.m. to 11:00 p.m. that day.

On May 20, Ms. Evans was tentatively scheduled to work from 10:00 a.m. to 8:00 p.m. Ms. Evans worked from 7:00 a.m. to 9:30 p.m. that day.

On May 22, Ms. Evans was tentatively scheduled to work 10:00 a.m. to 8:00 p.m., but was absent due to illness. Ms. Evans tried to call Ms. Mathews' cell phone at 6:30 a.m., but was unable to make contact with Ms. Mathews or leave a voice mail message. Ms. Evans contacted the hotel front desk staff to leave a message that she would not be at work that day.

On May 23, Ms. Evans was tentatively scheduled to work from 10:00 a.m. to 8:00 p.m., but was again absent due to illness. Ms. Evans sent a text message to Ms. Mathews at 4:54 a.m. to advise hat her head and her ear were hurting.

Ms. Evans was scheduled to commence an approved vacation on May 24, 2017. Ms. Evans was preparing to leave for Colorado and had prior approval from Ms. Evans to be gone through May 31, 2017. On the afternoon of May 23, Ms. Mathews sent Ms. Evans a text message indicating that she needed to speak with Ms. Evans before she left on her vacation. Ms. Evans did not respond to the message. Ms. Mathews had wanted to discuss the absence of paperwork concerning the two new housekeepers. Ms. Mathews had taken off the work schedule the new hire who had worked several shifts without presenting a Social Security card.

Ms. Evans returned to work on the morning on June 1. Ms. Mathews had planned to issue a reprimand to Ms. Evans that day. Ms. Evans was tentatively scheduled to work from 10:00 a.m. to 8:00 p.m. Ms. Evans worked for a couple hours that morning, left for a family luncheon, said she would be back and then did not return for the remainder of the day.

Ms. Evans was scheduled to work the front desk from 3:00 p.m. to 11:00 p.m. on June 2, but did not appear for work. At 5:06 p.m., Ms. Evans sent a text message to Ms. Mathews letter her know that she had told the front desk staff she would not be in. Ms. Mathews stated that she had taken an allergy medication and was going back to bed.

On June 3, Ms. Evans was tentatively scheduled to work 10:00 a.m. to 8:00 p.m., but did not appear for work or contact Ms. Mathews to indicate she would be absent.

On June 4, Ms. Evans was tentatively scheduled to work from 10:00 a.m. to 8:00 p.m., but did not appear for work. At 5:56 p.m., Ms. Evans sent a text message to Ms. Mathews indicating that she planned to appear for work the next morning at 7:00 a.m. and that her body was swollen.

On June 5, 2017, Ms. Evans appeared for work. On that day, Mr. Matlock came to the workplace to assist Ms. Mathews in discharging Ms. Evans from the employment.

Ms. Evans established a claim for benefits that was deemed effective June 4, 2017. Workforce Development set Ms. Evans' weekly benefit amount at $447.00. Ms. Evans' base period consists of the four quarters of 2016. TMI Employee Management is a base period employer for purposes of the claim. Ms. Even's base period wages credits from TMI, and the employer maximum liability for benefits paid during the current claim year, is $546.65.

Iowa Workforce Development has approved $2,965.00 in benefits in connection with the claim and has credited that amount to Ms. Evans through disbursement of benefits and by offsetting benefits against a prior overpayment. For the week that ended June 10, 2017, Ms. Evans reported wages that exceeded her weekly benefit amount and did not receive any benefits for that week. For each of the four weeks between June 11, 2017 and July 8, 2017, Ms. Evans reported zero wages, and received $447.00 in weekly benefits. For the week that ended July 15, 2017, Ms. Evans reported zero wages and was credited $447.00 in benefits. However, the benefits were withheld and offset against a prior overpayment. For the week that ended July 22, 2017, Ms. Evans reported zero wages, was credited $447.00 in benefits, but the benefits were withheld and offset against a prior overpayment. For the week that ended July 29, 2017, Ms. Evan reported $275.00 in wages, was credited $283.00 in benefits, but the benefits were withheld and offset against a prior overpayment.

On July 3, 2017, a Workforce Development claims deputy held a fact-finding interview that addressed Ms. Evans' separation from the employment. Ms. Evans provided an oral statement at the fact-finding interview. However, Ms. Evans' oral statement has not been scanned into the Workforce Development computer records and, therefore, is not available for the administrative

law judge to review. The employer's representative of record is ADP/Talx. On June 30, 2017, an ADP Unemployment Claim Specialist faxed a letter to the Benefits Bureau in which she acknowledged the date and time of the fact-finding interview. The ADP representative indicated in the letter that Danielle Koenig would represent the employer at the fact-finding interview and provided a telephone number at which Ms. Koenig could be reached for the fact-finding interview: 1-888-805-5142, extension 2870. The claims deputy made two attempts to reach Ms. Koenig for the fact-finding interview at the number ADP provided. Ms. Koenig did not answer either call. The claims deputy left a voice mail message for Ms. Koenig in connection with each call. The employer's contribution to the fact-finding interview was limited to cursory information contained in the SIDES protest and a June 30, 2017 letter from ADP. The letter from ADP provided a June 5, 2017 last date of employment a boilerplate statement: "The claimant was discharged for violation of a reasonable and known policy." The SIDES protest information provided a start date, end date, the claimant's job title and the following two brief narrative statements.

> The claimant hired an employee without submitting the required information through TMI and allowed the employee to work for 2 weeks. She had been trained on the hiring process. She didn't enter the employees into the payroll system.
>
> Certain procedures must be followed in order to correctly hire employees and to make sure they employees are eligible to work and. Not processing the forms could lead to large fines from the government.

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:
>
> 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 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.

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 evidence in the record establishes misconduct in connection with the employment based on Ms. Evans' decision to allow two new employees to perform work for the employer without complying with the employer's onboarding policy or federal law. Ms. Evans was aware of all relevant requirements. Ms. Evans' subsequent attendance issues and vacation prevented the employer from addressing those issues with Ms. Evans any soon that the employer did. In addition, Ms. Evans' failure to rectify the violation of onboarding policy and federal law was ongoing in nature. For these reasons, the mid-May failure to obtain appropriate verification of identity and work authorization still constituted a current act at the time of discharge on June 5.

The evidence in the record also establishes misconduct in connection with the employment based on excessive unexcused absences. The weight of the evidence in the record establishes an unexcused absence on May 17, based on Ms. Schrader's failure to return to work after her medical appointment and failure to notify Ms. Mathews that she would not be returning. The weight of the evidence in the record establishes an unexcused absence on June 1, when Ms. Schrader left work for the family luncheon and failed to return for the remainder of her shift or give notice that she would not be returning. The evidence establishes an unexcused absence on June 2, when Ms. Schrader provided late notice that she would be absent due to her purported allergic condition. The weight of the evidence establishes an unexcused absence on June 3, when Ms. Schrader was a no-call/no-show. The evidence establishes a final unexcused absence on June 4, when Ms. Schrader provided late notice that she would be absent due to illness.

Because Ms. Evans was discharged for misconduct in connection with the employment, she is disqualified for unemployment insurance benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefits. Ms. Evans must meet all other eligibility requirements.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid $2,965.00 in benefits for the period of June 4, 2017 through July 29, 2017. Because the claimant did not receive benefits due to fraud or willful misrepresentation and because the employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits. The employer's account shall be relieved of liability for benefits for the period beginning on the entry date of this decision.

DECISION:

The July 6, 2017, reference 03, decision is reversed. The claimant was discharged for misconduct in connection with the employment. The claimant is disqualified for unemployment insurance benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefits. The claimant must meet all other eligibility requirements. The claimant is overpaid $2,965.00 in benefits for the period of June 4, 2017 through July 29, 2017. The claimant is not required to repay the overpaid benefits. The employer's account may be charged for the overpaid benefits. The employer's account shall be relieved of liability for benefits for the period beginning on the entry date of this decision.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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