IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DOUGLAS D LEWIS
Claimant

HY-VEE INC
Employer

APPEAL NO. 11A-UI-06243-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/03/11
Claimant: Appellant (5)

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

STATEMENT OF THE CASE:

Douglas Lewis filed a timely appeal from the April 27, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 22, 2011. Alice Rose Thatch of Corporate Cost Control represented the employer and presented testimony through Connie Heidemann and Greg Wery. Exhibits One through Six and A were received into evidence.

Claimant Douglas Lewis did not make himself available for the hearing on June 22, 2011. Mr. Lewis had provided a telephone number for the hearing: 319-693-1050. The administrative law judge made contact with a person at that number at the scheduled time of the hearing. That person said that the administrative law judge would need to call Mr. Lewis at his new number: 319-651-6730. The administrative law judge did so and made contact with Mr. Lewis. Mr. Lewis asserted that the June 22 hearing had been postponed. The hearing had in fact not been postponed. After the administrative law judge advised the claimant that the hearing needed to go forward, the claimant terminated his participation. The administrative law judge attempted to further contact the claimant so that he could participate in the hearing, but the claimant did not answer his phone. During the course of speaking with the claimant, the administrative law judge noted no technical problems with the telephone connection. The events of June 22, 2011, followed similar events on June 8, 2011, when the administrative law judge attempted to contact the claimant for the hearing when it had been originally set on June 8, 2011. See the order entered June 9, 2011.

ISSUE:

Whether Mr. Lewis separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Douglas Lewis was employed by Hy-Vee as a part-time cashier from May 17, 2010 and last performed work for the employer on December 10, 2011. While Mr. Lewis' immediate supervisors were the assistant managers, the employer had Mr. Lewis report directly to Connie Heidemann,

human resources manager, because Mr. Lewis had a personnel conflict with the assistant manager who made his work schedule, Angie Kirschner.

In October 2010, Mr. Lewis underwent knee surgery for a non-work-related injury. Mr. Lewis' doctor released him to return to work on November 18, 2010. On November 19, 2010, Mr. Lewis brought the medical release to Ms. Heidemann. Mr. Lewis indicated at that time that despite the medical release from his doctor, he did not feel he was ready to return to the employment. Ms. Heidemann agreed to extend Mr. Lewis' approved leave to December 9, 2010, but told him he would be on the work schedule for that day.

On December 9, Mr. Lewis telephoned Ms. Heidemann at 8:30 a.m. to ask whether and when he was on the schedule to work that day. Ms. Heidemann told him he was scheduled to work at 10:00 a.m. Mr. Lewis appeared and worked his shifts on December 9 and 10. The employer provided Mr. Lewis with a bench or stool he could use as needed while working at his cash register.

Mr. Lewis was next scheduled to work on December 18, 2010. At 3:00 p.m., Mr. Lewis telephoned the store, spoke with an assistant manager, and told that person that he had reinjured his knee at home and would not appear for his December 18 shift. This notice complied with the employer's requirement that Mr. Lewis notify the management staff at least two hours before his shift if he needed to be absent. Mr. Lewis had signed his acknowledgment of that policy at the time he was hired.

On December 19, Mr. Lewis contacted the store at 5:00 p.m. Mr. Lewis told an assistant manager that his knee was still hurting and that he would not be appearing for his 5:15 p.m. shift that day. This short notice did not comply with the employer's policy.

Mr. Lewis was then a no-call, no-show for shifts on December 20, 22, and 23, 2010. After each absence, Ms. Heidemann attempted to call Mr. Lewis, left a message on his phone, but did not hear back from Mr. Lewis.

Finally, on December 27, Mr. Lewis contacted Ms. Heidemann about the messages she had left for him. Mr. Lewis referenced his call to the assistant manager on December 19 and the information he had provided at that time about his knee still hurting. Ms. Heidemann reminded Mr. Lewis that the employer's policy required that he contact the employer each day he was absent unless he had provided the employer with a medical excuse that would cover an extended absence. Mr. Lewis told Ms. Heidemann that he wanted to come speak with her. Ms. Heidemann told Mr. Lewis that she would need to speak with Store Director Greg Wery to learn what he wanted to do about Mr. Lewis' employment. The employer's written attendance policy deemed three no-call, no-show absences grounds for termination of the employment. The policy did not call such absences a voluntary quit.

Ms. Heidemann called Mr. Lewis back on December 27, after speaking with Mr. Wery. Ms. Heidemann told Mr. Lewis that three days of no-call, no-show absences were usually treated as termination of employment. Ms. Heidemann told Mr. Lewis that the employer was willing to allow him to come back to the employment, but only after he provided a full medical release. Because Mr. Lewis still wanted to come speak with Ms. Heidemann, Ms. Heidemann scheduled an appointment for December 29.

On December 29, Mr. Lewis appeared for his meeting with Ms. Heidemann. At that time, Mr. Lewis told Ms. Heidemann that he suffers from panic attacks and that this is why he did not contact the employer regarding the absences on December 20, 22, and 23. Ms. Heidemann

acknowledged that Mr. Lewis had previously mentioned only the knee injury and that he had not mentioned anything previously about panic attacks. Mr. Lewis also mentioned that he doctor had told him he could not do the job because of his knee. Mr. Lewis provided no medical documentation to support that assertion. Mr. Lewis asked Ms. Heidemann for a written statement that he had not been working so that he could use that to obtain rental assistance. Ms. Heidemann provided the requested statement.

The employer heard nothing further from Mr. Lewis until March 14, 2011, when Mr. Lewis went to the store to request payment of the small amount he had accrued in a 401k deferred compensation account. Mr. Lewis indicated that he would not be returning to the employment. Mr. Lewis asserted that his doctor had not released him to return. Mr. Lewis provided no documentation to support that assertion.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
>
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
>
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
>
> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

The weight of the evidence in the record establishes a discharge for attendance that was effective December 27, 2010. At that point, Mr. Lewis had been absent for four consecutive shifts without giving proper notice to the employer. Three of those shifts had been no-call, no-show absences that subjected Mr. Lewis to discharge from the employment. It was on December 27, 2010 that the employer placed conditions on Mr. Lewis' return to the employment. These conditions effectively discharged Mr. Lewis from the employment.

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).

The evidence in the record establishes excessive unexcused absences. Prior to the December 19 absence, Mr. Lewis had demonstrated the ability to understand and follow the employer's attendance policy to request time off from work. The weight of the evidence does not support Mr. Lewis' assertion to the employer that he was suddenly unable to follow the policy as of December 20. Mr. Lewis' ability to recommence and continue with meaningful contact with the employer as of December 27 further supports the conclusion that he had the ability all along to comply with the employer's policy, but chose not to on December 19 through 23. The four absences between December 19 and 23 was each an unexcused absence. The unexcused absences were excessive and constituted misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Lewis was discharged for misconduct. Accordingly, Mr. Lewis is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Lewis.

DECISION:

The Agency representative's April 27, 2011, reference 01, decision is modified as follows. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he 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

jet/kjw