IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOHN E BEAVERS
Claimant

TSI ENTERPRISES INC
Employer

APPEAL NO. 16A-UI-01614-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/10/16
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 February 1, 2016, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on January 11, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on March 9, 2016. Claimant John Beavers participated. Sarah Fiedler represented the employer and presented additional testimony through Charity Garrison. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through 10 and Department Exhibits D-1 through D-4 into evidence.

ISSUES:

Whether the claimant separated from the employment for a reason that disqualifies him 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: TSI Enterprises, Inc., is a temporary employment agency that provides contract workers to Grain Processing Corporation (GPC) in Davenport. John Beavers was employed by TSI as a full-time employee of TSI and was assigned to GPC. Mr. Beavers' employment began on December 9, 2015. Mr. Beavers last performed work for TSI and GPC in a shift that started at 7:00 p.m. on January 8, 2016 and that ended at 7:00 a.m. on January 9, 2016.

Mr. Beavers was next scheduled to work at 7:00 p.m. on January 9. Mr. Beavers was also scheduled to work at 7:00 p.m. on January 10, 2016. Mr. Beavers was absent both days without notifying the TSI or GPC.

The employer's policy required that Mr. Beavers notify both companies at least an hour before the scheduled start of his shift if he needed to be absent. The employer's written work rules also indicated that an employee who was absent two consecutive scheduled workdays without notice to the employer would be subject to immediate termination. The policy did not say that the employer would deem such absences a voluntary quit. Mr. Beavers was aware of the absence reporting policy and had elected not to provide notice of his absences because he was frustrated that other workers assigned to the overnight shift were napping at work and that one acutely emotional coworker had on one occasion indicated that she would not train Mr. Beavers. Earlier in the assignment Mr. Beavers had a concern with a supervisor. In that earlier instance, he brought his concern to the attention of GPC and TSI and the issue was been resolved. With regard to his most recent concerns, Mr. Beavers waited until January 11 to notify TSI of his concerns. However, GPC declined to have Mr. Beavers return to the assignment in light of his two consecutive days of no-call, no-show. That decision ended not only the assignment with GPC, but also the employment with TSI.

Mr. Beavers established a claim for benefits that was effective January 10, 2016. Workforce Development set his weekly benefit amount at $431.00. Mr. Beavers has received $3,879.00 in benefits for the period of January 10, 2016 through March 12, 2016. TSI Enterprises is not a base period employer for purposes of the claim that was effective January 10, 2016 and has not been charged for benefits paid to Mr. Beavers.

On January 29, 2016, a Workforce Development claims deputy held a fact-finding interview to address Mr. Beavers' separation from TSI. Sarah Fiedler, Human Resources Generalist, provided a written statement on January 26, 2016 that provided the particulars of the separation. Ms. Fiedler also invited the claims deputy to contact Charity Stone if additional information was needed and provided a number where Ms. Stone could be reached. The claims deputy did not contact Ms. Stone for additional information.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

Iowa Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section

> 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Mr. Beavers' two-day no-call, no-show absence was insufficient to establish a voluntary quit. Mr. Beavers had not told anyone that he intended to quit. Mr. Beavers had not walked off the job. He was simply absent two days without providing proper notification. The employer's written policy did not indicate that a particular number of no-call, no-show absences would be deemed a voluntary quit. Mr. Beavers was discharged for attendance.

Iowa Code § 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.

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).

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 two consecutive no-call, no-show absences during a month-long employment. Mr. Beavers was fully aware of the need to provide proper notice to TSI and GPC regarding his need to be absent from the assignment, but elected not to provide such notice. Mr. Beavers' frustration was no excuse for failing to comply with the attendance policy notice requirement. Each of the absences was an unexcused absence under the applicable law. Mr. Beavers' consecutive no-call, no-show absences constituted excessive unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Beavers was discharged for misconduct. Accordingly, Mr. Beavers is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. He must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible 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 base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

This decision disqualifies Mr. Beavers for the benefits he has received since the separation. Accordingly, Mr. Beavers is overpaid $3,879.00 in benefits for the period of January 10, 2016 through March 12, 2016. Because TSI is not a base period employer, the employer's account has not yet been charged for benefits paid to Mr. Beavers and is not subject to be charged for benefits paid to Mr. Beavers in connection with the benefit year that began for Mr. Beavers on January 10, 2016. However, the question of whether the employer participated in the fact-finding interview remains important in determining whether Mr. Beavers must repay the overpaid benefits.

Iowa Administrative Code rule 817 IAC24.10(1) defines employer participation in fact-finding interviews as follows:

> Employer and employer representative participation in fact-finding interviews.
> 24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

The employer satisfied the participation requirement. The employer's written statement provided the particulars of the separation. The employer invited the Workforce Development claims deputy to contact Charity Stone, aka Charity Garrison, for further information. Ms. Garrison was available to take such a call, but the claims deputy did not contact her for information. Because the employer satisfied the participation requirement, Mr. Beavers must repay the overpaid benefits.

DECISION:

The February 1, 2016, reference 01, decision is reversed. The claimant was discharged effective January 12, 2016 for excessive unexcused absences that constituted misconduct in connection with the employment. 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 amount. The claimant must meet all other eligibility requirements. The employer is not a base period employer. The employer has not been charged for benefits paid to the claimant and will not be charged. The claimant is overpaid $3,879.00 in benefits for the period of January 10, 2016 through March 12, 2016. The claimant must repay that amount.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs