IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PARKER WASHINGTON
Claimant

HY-VEE INC
Employer

APPEAL NO. 16A-UI-13563-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/13/16
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 13, 2016, reference 02, 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 the claims deputy's conclusion that the claimant was discharged on July 6, 2016, for no disqualifying reason. After due notice was issued, a hearing was held on January 23, 2017. Claimant Parker Washington participated. Keith Mokler of Corporate Cost Control represented the employer and presented testimony through Marc Badeaux. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 14 and A, B, and D through I into evidence. Department Exhibits D-1 and D-2 were received into evidence. 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 separated from the employment for a reason that disqualifies him for unemployment insurance 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: Parker Washington was employed by Hy-Vee in West Des Moines as a part-time night stocker. Mr. Washington began the employment in 2014. Mr. Washington's work hours were 10:30 p.m. to 7:00 a.m. Mr. Washington regularly worked shifts that started on Monday, Tuesday and Wednesday evenings. Mr. Washington worked additional shifts as needed. In June 2016, Clancy Maudle joined Hy-Vee as a Night Manager and became Mr. Washington's immediate supervisor.

Mr. Washington last performed work for the employer on a shift that started at 10:30 p.m. on June 30, 2016. The shift was scheduled to end at 7:00 a.m. on July 1, 2016. At about 5:45 a.m. on July 1, West Des Moines police officers went to the Hy-Vee store to arrest Mr. Washington on an outstanding warrant related to a non-work related criminal charge. Mr. Maudle or another member of management pointed out Mr. Washington to the law enforcement officers so they could make contact with Mr. Washington. The law enforcement officers had Mr. Washington step outside, and then arrested him on the outstanding warrant.

At the time Mr. Washington was booked into the Polk County Jail, he contacted a friend to have that friend let Hy-Vee know that he was incarcerated and to have the friend retrieve his bike from the Hy-Vee store. Mr. Washington's friend did indeed retrieve Mr. Washington's bike from the Hy-Vee store. Mr. Washington was unable to provide notice to the employer beyond the notice he attempted to provide through his friend. After Mr. Washington was absent from shifts on July 4, 5 and 6, 2016, Marc Badeaux, Human Resources Manager, concluded that Mr. Washington had abandoned the employment. On or about July 11, 2016, Mr. Badeaux documented that the employment was terminated.

Mr. Washington remained incarcerated in the Polk County Jail for 82 days. During the period of incarceration, Mr. Washington's ex-wife contacted the employer in July or August. During that contact, Mr. Washington's ex-wife discussed with Mr. Badeaux the fact that Mr. Washington was incarcerated. Mr. Washington was released from custody in connection with the dismissal of the pending charge. Upon his release from custody, Mr. Washington went directly home and immediately contacted the employer. Mr. Washington told Mr. Badeaux that he had just been released from the Polk County Jail. Mr. Washington asked Mr. Badeaux whether he still had a job at Hy-Vee. Mr. Badeaux told Mr. Washington that his position had been filled.

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 Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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.

The Supreme Court of Iowa has recently concluded a claimant does not voluntarily quit when the separation is based on incarceration, attempts to give notice of the absence, and the pending charge is dropped. The court ruled that separation is not voluntary under such circumstances. *Irving v. EAB*, 883 N.W.2d 179 (Iowa 2016). Under the ruling in Irving, the administrative law judge must conclude that Mr. Washington did not voluntarily quit. His absence was due to involuntary incarceration. The employer was aware of his arrest, because it had taken place at work and had been facilitated by a member of management. Mr. Washington attempted to communicate through a friend that he was incarcerated and reasonably concluded that the friend had been in contact with Hy-Vee management with that information. Mr. Washington testified that the charges for which he was incarcerated were eventually dismissed. The employer provided no evidence to rebut that assertion.

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 a discharge 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 that the employer's decision to call the employment done on or about July 11, 2016 was triggered by absences on July 4, 5 and 6, 2016. Each of those absences was based on Mr. Washington's incarceration. Here too the Iowa Supreme Court's ruling in *Irving* is key. "[I]nvoluntary incarceration, at least where the charges are dismissed, all falls within the 'other reasonable grounds' for absence contemplated under rule 871-24.32(7)." *Irving* at 203. Mr. Washington provided the employer with the notice he was able to provide under the circumstances. Again, the employer was aware of the arrest. Mr. Washington attempted to communicate through a friend his continued need to be absent due to the incarceration, because he was unable to provide direct notice. Under the applicable law, the absences that triggered the discharge cannot be deemed unexcused absences and cannot serve as a basis for disqualifying Mr. Washington for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Washington was discharged for no disqualifying reason. Accordingly, Mr. Washington is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The December 13, 2016, reference 02, decision is affirmed. The claimant was discharged in July 2016 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs