IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ELLEN A ROBINSON
Claimant

HY-VEE INC
Employer

APPEAL NO. 12A-UI-13800-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/21/12
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 November 14, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 8, 2013. Claimant Ellen Robinson participated personally and was represented by Attorney Willis Hamilton. Julia Day of Corporate Cost Control represented the employer and presented testimony through Gary McCormick and Jennie Snyder. Exhibits Two through Eight, Eleven and Fourteen were received into evidence.

ISSUE:

Whether Ms. Robinson 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: Ellen Robinson was employed by Hy-Vee Drug Store as a full-time camera manager until October 18, 2012, when Gary McCormick, Store Director, discharged her from the employment. Mr. McCormick was Ms. Robinson's immediate supervisor. Ms. Robinson had started with the employer in 1988 and had been camera manager since 2007. Ms. Robinson's usual work hours were 7:00 a.m. to 4:00 p.m., Monday through Friday. Ms. Robinson would take an hour for lunch at around noon. Ms. Robinson would not get a formal 15-minute break in the morning or afternoon, but could take time as needed for restroom breaks and so forth.

The chain of events that prompted the discharge began on October 15, 2012. On that day, Ms. Robinson reported for work at 7:00 a.m. Ms. Robinson did not clock in when she arrived, though the employer's policy and practice required that she clock in upon arrival. Shortly after her arrival, Ms. Robinson told Mr. McCormick that she needed to take her mother to and from a dental appointment that day. Ms. Robinson had not previously requested the time off. Despite the short notice, Mr. McCormick acquiesced in Ms. Robinson taking time from work to assist her mother. Sometime between 9:00 a.m. and 10:00 a.m., Ms. Robinson left for at least 20 minutes to take her mother to the dental appointment. Ms. Robinson then returned to the workplace. Ms. Robinson did not clock out when she left and did not clock back in when she returned,

though it was the employer's policy and procedure that employees had to clock out when leaving the store for non-work-related business. Less than an hour later, Ms. Robinson left for at least another 20 minutes to collect her mother from the dental appointment. Ms. Robinson then returned to the workplace. Again, Ms. Robinson did not clock out when she left and did not clock back in when she returned. When Ms. Robinson returned to the store the second time, Mr. McCormick noted that she did not take steps to clock in. Mr. McCormick investigated and discovered that Ms. Robinson had not used the timekeeping system at all that morning. However, the timekeeping system documented an attempt by Ms. Robinson to clock out for lunch at 12:02 p.m. an attempt to clock back in from lunch at 12:59 p.m., and at attempt to clock out at 4:26 p.m. The timekeeping system registered these uses of the timekeeping system as attempts only, not normal timekeeping entries. Ms. Robinson knew the employer's timekeeping policies and how to properly document her work time.

When the timekeeping system registered something other than a normal clock at 12:02 p.m. on October 15, Ms. Robinson contacted Jennie Snyder, Store Account Coordinator. Ms. Snyder was the store's bookkeeper. Ms. Robinson told Ms. Snyder that she needed Ms. Snyder to deduct 10 minutes from Ms. Robinson's work time for that morning for time Ms. Robinson spent taking her mother to the dentist. Ms. Robinson did not mention to Ms. Snyder that she had actually left the store twice or that she was gone for at least 20 minutes each time. In other words, Ms. Robinson intentionally understated her time away from work that morning by at least 30 minutes when she reported her time for the purpose of being paid for her time. On October 16, Mr. McCormick learned about this conversation between Ms. Robinson and Ms. Snyder in the course of speaking to Ms. Snyder about the matter.

At the end of Ms. Robinson's workday on October 16, Mr. McCormick confronted Ms. Robinson about not having clocked out on October 15 for the trips to assist her mother. Ms. Robinson then told Mr. McCormick that she had spoke to Ms. Snyder the previous day and had told Ms. Snyder to deduct 30 minutes from her work time on October 15 for the time Ms. Robinson spent assisting her mother. At that point, Ms. Robinson was intentionally misrepresenting the conversation she had with Ms. Snyder the previous day. Ms. Robinson had *not* told Ms. Snyder to deduct 30 minutes from her worked. Before Mr. McCormick ended the discussion with Ms. Robinson, he stressed the need for Ms. Robinson to clock out anytime she left the store on non-Hy-Vee business.

On the evening of October 16, Ms. Robinson called Ms. Snyder on Ms. Snyder's personal cell phone. Both were off-duty at the time. Ms. Robinson told Ms. Snyder that Mr. McCormick had questioned her timekeeping for October 15. Ms. Snyder told Ms. Robinson that she had documented a 10-minute unpaid absence based on the information Ms. Robinson had provided to her. Ms. Robinson told Ms. Snyder that Mr. McCormick thought she had been gone longer. Ms. Snyder repeated that she had documented the 10-minute absence pursuant to the information Ms. Robinson had provided to her. Ms. Robinson said she did not know how long she had been gone. Ms. Robinson did not ask Ms. Snyder to change her time report from the 10-minute unpaid absence Ms. Robinson had reported. Ms. Robinson did not ask Ms. Snyder to contact Mr. McCormick about the matter or to take any additional steps.

On October 17, Mr. McCormick followed up with Ms. Snyder about Ms. Robinson's statement at the end of the previous workday that she had asked Ms. Snyder to deduct an additional 30 minutes from her work time on October 15. Ms. Snyder told Mr. McCormick that there had been no such request. Ms. Snyder then told Mr. McCormick about the call she had received from Ms. Robinson after hours on October 16. Ms. Snyder told Mr. McCormick that she had confirmed with Ms. Robinson during that phone call that it had been 10 minutes Ms. Robinson wanted deducted from her work time on October 15. Ms. Snyder told Mr. McCormick that

Ms. Robinson had mentioned during the phone call that Mr. McCormick believed she had been gone longer than 10 minutes.

On October 18, Mr. McCormick met with Ms. Robinson and Ms. Snyder at the same time. During that meeting, Ms. Robinson conceded she had been gone at least 15 minutes each time she had left the store on October 15. Ms. Robinson also conceded that it was her responsibility to accurately report her time away from the employment by using the timekeeping system or by accurately reporting her time to Ms. Snyder. During the October 18 meeting, Ms. Robinson told Mr. McCormick that she had asked Ms. Snyder to follow up with Mr. McCormick regarding the amount of time she needed to deduct. That statement to Mr. McCormick was an untrue statement. Mr. McCormick told Ms. Robinson that he believed she had stolen time from the employer and that she had lied about the matter. Mr. McCormick told Ms. Robinson that she could be discharged for such conduct and that he needed time to think about what to do with her employment.

On October 19, Mr. McCormick again met with Ms. Robinson and Ms. Snyder together. Mr. McCormick told Ms. Robinson that he needed to be able to trust her and that she had undermined his ability to trust her by stealing time from the employer and by being dishonest. Mr. McCormick told Ms. Robinson she was discharged from the employment.

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.
>
> 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).

The weight of the evidence indicates that Ms. Robinson failed to use the timekeeping system multiple times on the morning of October 15 despite being fully aware that she was required to use the system to accurately report her time. The weight of the evidence indicates that on October 15, Ms. Robinson intentionally misrepresented to the bookkeeper the amount of time that needed to be deducted from her work time. Ms. Robinson knew that she was not entitled to a 15-minute break on the morning or afternoon of October 15. Ms. Robinson knew that she was required to clock out when she left the store on personal business. Ms. Robinson's assertion that she thought she had a 15-minute break that could be factored in to her time away from the store appears to be a further fabrication presented at the hearing for the purpose of suggesting that the discharge was based on misunderstanding or miscommunication. The weight of the evidence indicates instead multiple instances of intentional dishonesty. Ms. Robinson was intentionally dishonest on October 16 when she told Mr. McCormick that she had told Ms. Snyder to deduct an additional 30 minutes from her time. Ms. Robinson was intentionally dishonest on October 18 when she told Mr. McCormick that she had asked Ms. Snyder to follow up with Mr. McCormick regarding the amount of time that should be deducted from her work time.

Over and above the repeated instances of dishonesty, there is the issue the employer characterizes as theft of time. The weight of the evidence indicates that Ms. Robinson knowingly attempted to mislead the employer into paying her for at least a half hour of work she knew she had not performed. Ms. Robinson's lengthy tenure with the employer is not a mitigating factor in the context of the repeated instances of dishonesty. Ms. Robinson's conduct in the matters that factored in the discharge demonstrated a willful and wanton disregard of the employer's interests.

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

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 the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's November 14, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and 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 the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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