IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

DIAMISHIA R HEMPHILL
Claimant

KINSETH HOTEL CORPORATION
Employer

APPEAL NO. 19A-UI-01630-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/19/18
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 12, 2019, reference 05, decision that held the claimant was eligible for benefits provided she met all other eligibility requirements and the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on January 5, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on March 21, 2019. On March 11, 2019, the hearing had been rescheduled by agreement of the parties from March 11, 2019 to 10:00 a.m. on March 21, 2019. At the time of the rescheduled hearing, claimant Diamishia Hemphill was not available at the telephone number she registered for the hearing and did not participate. Megan Milligan of Employers Unity represented the employer and presented testimony through Elliot Rhoad, Tasia Jones-Cowan, Emily Klauer and Coral Erickson. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. Exhibit 1 and Department Exhibits D-1 through D-17 were received into evidence.

ISSUES:

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

Whether the claimant has been overpaid unemployment insurance benefits.

Whether the claimant must repay overpaid 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: Diamishia Hemphill was employed by Kinseth Hotel Corporation, doing business as Holiday Inn in Dubuque, as a full-time housekeeper from October 2018 until January 5, 2019, when Tasia Jones-Cowan, Executive Housekeeper, discharged her for attendance. Ms. Jones-Cowan was Ms. Hemphill's immediate supervisor.

The final incident that triggered the discharge occurred on December 21, 2018. On that day, Emily Klauer, Assistant Executive Housekeeper, was the manager on duty. Ms. Hemphill was scheduled to start work at 9:00 a.m. At 8:06 a.m. Ms. Hemphill called the hotel office phone and left a voicemail message in which she stated that she would be late for work because she needed to take her child to school later than usual as part of a delayed school start time. Ms. Hemphill stated in her message that she would report for work at 11:00 a.m. Ms. Hemphill did not appear for work at 11:00 a.m., but arrived at some later point when Ms. Klauer was working elsewhere in the hotel. Ms. Hemphill did not contact the front desk staff to alert them to her arrival so that the front desk staff could alert Ms. Klauer to Ms. Hemphill's arrival. Ms. Jones-Cowan had previously directed Ms. Hemphill to use this procedure to give notice of her arrival when she arrived for work later than scheduled. Ms. Hemphill came and went from the workplace without making contact with Ms. Klauer and without receiving authorization to leave. Ms. Hemphill elected not to use the time clock to document her arrival and departure, though it was standard procedure to use the time clock and a separate written log to document work hours. Ms. Hemphill documented in the written log that she had been at the workplace from 11:59 a.m. to 12:45 p.m. When Ms. Klauer made her way to the hotel office at 12:50 p.m., she found a note from Mr. Hemphill that stated, "Diamisha Hemphill was Here 12:45." At that time, Ms. Hemphill was no longer in the workplace.

If Ms. Hemphill needed to be absent from work, the employer's attendance policy required that Ms. Hemphill called the workplace at least three hours prior to the scheduled start of the shift to give notice. The employer reviewed this policy with Ms. Hemphill at the start of the employment.

On or about Monday, December 24, 2018, Ms. Jones-Cowan notified Ms. Hemphill that she was suspended pending a decision regarding her employment. Ms. Jones-Cowan subsequently made multiple attempts to reach Ms. Hemphill for the purpose of notifying Ms. Hemphill that she was discharged from the employment. Ms. Jones-Cowan was eventually able to reach Ms. Hemphill on January 5, 2019 to give notice of the discharge decision.

The employer considered several prior absences when making the decision to discharge Ms. Hemphill from the employment. Ms. Hemphill was a no-call/no-show for shifts on November 10, November 24, and December 7 and December 9, 2018. The employer issued multiple warnings to Ms. Hemphill in connection with the absences.

Ms. Hemphill established an original claim for benefits that was effective August 19, 2018. Ms. Hemphill subsequently established an additional claim for benefits that Iowa Workforce Development deemed effective December 30, 2018. In connection with that additional claim for benefits, Ms. Hemphill received $913.00 in unemployment insurance benefits for 11 weeks between December 30, 2018 and March 16, 2019. Kinseth Hotel Corporation is not a base period employer in connection with the claim year that began for Ms. Hemphill on August 19, 2018 and, therefore, has not been charged for benefits paid to Ms. Hemphill in connection with the claim year.

On February 11, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Hemphill's separation from the employment. Coral Erickson of Employers Unity lacked personal knowledge regarding the employment, but provided the deputy with a verbal statement indicating that Ms. Hemphill had been discharged for attendance, with the final incident being a purported no-call/no-show absence on December 21, 2018. Employers Unity had submitted substantial documentation at the time of the protest that included the written warnings and statements from Ms. Jones-Cowan and Ms. Klauer.

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).

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 a discharge for misconduct in connection with the employment based on excessive unexcused absences. Each of the absences that factored in the discharge was an unexcused absence. Several were no-call/no-show absences. The final absence involved a later arrival for personal reasons and an early unauthorized departure. In light of the prior absences and written warnings, Ms. Hemphill was well aware that her employment was jeopardy at the time of the suspension and discharge. Ms. Hemphill is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Hemphill 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 base period 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) and (b).

Ms. Hemphill received $913.00 in unemployment insurance benefits for 11 weeks between December 30, 2018 and March 16, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Hemphill received constitute an overpayment of benefits.

Iowa Administrative Code rule 817-24.10(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 through the documentation submitted at the time of the protest. Because the employer participated in the fact-finding interview within the meaning of the law, Ms. Hemphill is required to repay the overpaid benefits. The employer is not a base period employment and, therefore, the employer's account has not been charged for the benefits paid to Ms. Hemphill. The employer's account shall not be charged for benefits.

DECISION:

The February 12, 2019, reference 05, decision is reversed. The claimant was suspended and discharged for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid $913.00 in unemployment insurance benefits for 11 weeks between December 30, 2018 and March 16, 2019. The claimant must repay the overpaid benefits. The employer's account shall not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs