**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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| **DOMINICK L RIVERA**<br>Claimant<br><br>**CATHOLIC HEALTH INITIATIVES - IOWA**<br>Employer | **APPEAL NO. 21A-UI-08481-JTT**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 01/17/21**<br>**Claimant: Appellant (5)** |

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

**STATEMENT OF THE CASE:**

The claimant, Dominick Rivera, filed a timely appeal from the March 16, 2020, reference 01, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant voluntarily quit on December 28, 2020 without good cause attributable to the employer. After due notice was issued, a hearing was held on June 8, 2021. Claimant participated. Mary Podrebarac represented the employer. Exhibits 1,13, 16, 13, A and B were received into evidence.

**ISSUES:**

Whether the claimant voluntarily quit without good cause attributable to the employer.
Whether the claimant 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: The claimant, Dominick Rivera, was employed by Catholic Health Initiatives – Iowa, doing business as MercyOne, as a full-time Patient Care Technician at Des Moines Medical Center. The claimant began the employment in March 2020 and last performed work for the employer on December 14, 2020. The claimant's work hours were 6:45 a.m. to 7:15 p.m. the claimant's work days varied from week to week. Mary Podrebarac, Director of Nursing for 5 South, Mercy Main Hospital, was the claimant's primary supervisory. The charge nurses on duty were secondary supervisors.

The employer has an attendance policy that the employer reviewed with the claimant at the start of the employment. If the claimant needed to be absent from work, the claimant was required to notify the unit supervisor, the charge nurse on duty, at least two hours prior to the shift so that the employer could recruit a substitute worker to ensure proper patient care. The claimant was at all relevant times aware of the policy. Under the policy, the employer deemed three consecutive no-call/no-show absences a voluntary quit. If the claimant was absent for more than three consecutive work days, the claimant was required also to contact the employee

health services staff for approval to return to the employment. The claimant was able to electronically access the work schedule from work or from away from work.

On December 14, 2020, the claimant left work early due to illness, after providing the required notice. The claimant was concerned that he might have COVID-19. The employer directed the claimant to contact employee health services to get tested for COVID-19.

The claimant was next scheduled to work on December 17, 19, and 20, 2020. The claimant was absent from all three shifts due to illness and properly notified the employer. In each instance, the claimant called and spoke with the charge nurse on duty. During this time away from work, the claimant was tested for COVID-19 and tested negative.

The claimant was next schedule to work on December 24, 25 and 28, 2020. On each of those days, the claimant was absent without notifying the unit supervisor. The claimant concedes he was absent without proper notice on December 24, 2020. On the afternoon of December 24, the claimant called employee health services. The claimant understood that he needed to make contact with employee health services to be cleared to return to work. On December 24, the claimant obtained a medical release from his primary care provider. The release was dated December 24, 2020. The release stated that the provider had met with the claimant on December 14 and hat the claimant was able to return to work on December 28, 2020.

At about 1:00 a.m. on December 28, 2020, the claimant called the hospital unit and asked to speak with the charge nurse. The claimant waited five minutes on the phone. When the charge nurse did not get on the line, the claimant hung up and did not further attempt to reach the employer to give notice of his need to be absent that day.

In response to the absence on December 28, the employer deemed the claimant to have voluntarily quit the employment. On December 30, 2020, the employer mailed a letter to the claimant that referenced the three no-call/no-show absences and the employer's determination that the claimant had voluntarily resigned. In the letter, the employer invited the claimant to contact with the employer with questions. The employer did not hear from the claimant.

The claimant has also been absent without notice on December 10, 2020. The unit supervisor tried to reach the claimant that day to summon his to work his scheduled shift. The claimant ignored the calls because he erroneously believed he was not scheduled to work that day.

The claimant has also been late for work for personal reasons on December 7, 2020.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Administrative Code rule 871-24.1(113) characterizes the different types of employment separations as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
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> 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.

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 Iowa Administrative Code rule 871-24.25.

Where a claimant was absent for three days without giving notice to employer in violation of company rule, the claimant is presumed to have voluntarily quit without good cause attributable to the employer. Iowa Admin. Code r. 871-24.25(4).

The weight of the evidence establishes a discharge, rather than a voluntary quit. The employer cites December 24, 25 and 28 as the three consecutive no-call/no-show dates. While the claimant was absent each date without providing proper notice, the evidence does not indicate an intention to voluntary quit the employment. The claimant contacted employee health services on December 24. The claimant made one attempt to give proper notice on December 28.

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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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. The evidence establishes an unexcused tardy on December 7, an unexcused no-call/no-show absence on December 10, and four excused absences on December 14, 17, 19

and 20. The evidence establishes an unexcused absence on December 24, when the claimant was absent due to illness, but failed to notify the unity supervisor. The evidence establishes an unexcused no-call/no-show absence on December 25, 2020. The evidence establishes an additional unexcused absence on December 28. A reasonable person in the circumstances on December 28 would appreciate that the charge nurse would be involved with patient care at the time of the claimant's call and would have stayed on the line or called back to provide proper notice of the need to be absent. There was still ample time to do that. The weight of the evidence establishes that the claimant knew on December 24, 25 and 28 that he was required to notify the unit supervisor of his need to be absent, that the claimant had the ability to make appropriate contact, but that the claimant failed to make appropriate contact each day. Thus, there are five unexcused absences between December 7 and December 28, 2020. The unexcused absences were excessive and constituted misconduct in connection with the employment. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

**DECISION:**

The March 16, 2020, reference 01, decision is modified without change to the determination regarding the claimant's eligibility for benefits or the employer's liability for benefits. The claimant was discharged on December 30, 2020 for misconduct in connection with the employment. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

September 22, 2021
Decision Dated and Mailed

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