

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRAVIS J PIPER
Claimant

APPEAL NO. 15A-UI-06200-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ATHENE ANNUITY AND LIFE COMPANY
Employer

OC: 05/10/15
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 May 21, 2015, 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 April 28, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on July 9, 2015. Claimant Travis Piper participated. Julie Baker represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two and Three 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 was discharged for misconduct in connection with the employment that disqualifies the claimant 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: Travis Piper started his full time employment with Athene Annuity and Life Company in August 2014 and last performed work for the employer on November 14, 2014. Mr. Piper performed work for the employer as a contact center representative. The work was sedentary in nature and involved handling inbound calls. On November 17, 2014, Mr. Piper commenced an approved leave of absence in connection with a non-work-related back injury. Despite the short duration

of the employment, the employer provided short-term disability benefits to Mr. Piper. After Mr. Piper commenced his leave of absence, the leave and the short-term disability benefits were extended several times. The leave period was ultimately extended through April 28, 2015. Mr. Piper understood at the beginning of April 2015 that the employer expected him to return to return to the employment on May 4, 2015, unless he provided medical documentation to support the leave. Mr. Piper knew early on during the leave period that he would have to provide a medical release to return to the employment after the extended leave period.

Mr. Piper did not return to the employment on May 4, 2015. Mr. Piper was absent from shifts on May 4, 5, and 6, 2015 without properly reporting the absences to the employer. Mr. Piper knew that the employer's written attendance policy required that he telephone his supervisor or the human resources department prior to the scheduled start of the shift on each day he was absent but not on an approved leave. When Mr. Piper did not return to work on May 4, the employer sent him an email message asking whether he would be reporting for work. Mr. Piper replied that he was waiting for his doctor's office to complete paperwork and that he had to drop off a second copy of the paperwork to the doctor's office because the doctor's office had lost the paperwork he had previously provided to the doctor's office.

When Mr. Piper did not report for work on May 5, 2015 or make contact with the employer to report the absence, the employer again sent an email to Mr. Piper. Mr. Piper sent an email response indicating that he intended to be off work on May 5 for medical appointments. Mr. Piper had not previously mentioned this to the employer and not requested the time off. Mr. Piper indicated that he planned to report for work on May 6.

When Mr. Piper did not report for work on May 6, 2015 or report an absence to the employer, the employer sent written notice to Mr. Piper that the employer was ending the employment due to the three unexcused absences on May 4, 5 and 6, 2015. Mr. Piper did not make further contact with the employer. At no time did Mr. Piper mention to the employer that a doctor had extended his leave period to May 15, 2015 or that he had medical documentation indicating such.

Mr. Piper established a claim for unemployment insurance benefits that was effective May 10, 2015. Mr. Piper received \$2,440.00 in benefits for the period of May 10, 2015 through July 4, 2015.

On May 20, 2015, a Workforce Development claims deputy held a fact-finding interview to address Mr. Piper's separation from the employment. Mr. Piper participated and provided a statement that included an assertion that he was supposed to continue off work until May 15, 2015 in light of a May 5, 2015 medical appointment. Mr. Piper otherwise provided a statement that did not include fraud or intentional misrepresentation. Workforce Development had mailed appropriate notice of the fact-finding interview to the employer on May 13, 2015. The notice was directed to Teresa Allen. Ms. Allen did not notify the employer's human resources staff of the fact-finding interview and no one participated on behalf of the employer in the fact-finding interview. At the time of the fact-finding interview, the claims deputy attempted to contact Ms. Allen at the number the Agency had on record for Ms. Allen. The claims deputy left a message for Ms. Allen at that number.

REASONING AND CONCLUSIONS OF LAW:

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 three consecutive no-call/no-show absences on May 4, 5 and 6, 2015. Mr. Piper was fully aware of the absence reporting policy and his obligation to comply with that policy. Mr. Piper elected not to comply with the absence reporting policy. The three consecutive unexcused absences were excessive and constituted misconduct in connection with the employment. Accordingly, Mr. Piper is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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

The employer did not participate in the fact-finding interview. There is insufficient evidence to establish that Mr. Piper made any assertions at the fact-finding interview that were motivated by an intention to misrepresent or to commit fraud. The claimant received benefits, but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$2,440.00 in benefits for the period of May 10, 2015 through July 4, 2015. Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment. The employer's account remains subject to charge for the overpaid benefits. However, the employer's account will not be charged for benefits paid to the claimant for the period on or after the entry date of this decision.

DECISION:

The May 21, 2015, reference 01, decision is reversed. The claimant was discharged for misconduct on May 6, 2015. 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 allowance, provided he meets all other eligibility requirements. The claimant was overpaid \$2,440.00 in benefits for the period of May 10, 2015 through July 4, 2015. The claimant is not required to repay the overpayment. The employer's account remains subject to charge for the overpaid benefits. However, the employer's account will not be charged for benefits paid to the claimant for the period on or after the entry date of this decision.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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