IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHADD P PTACEK
Claimant

SEVENTH AVENUE INC
Employer

APPEAL NO. 16A-UI-01405-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/10/16
Claimant: Respondent (5)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 28, 2016 (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 was on an approved leave of absence until December 31, 2015, that the employer declined to return the claimant to the employment, and that the claimant was laid off. After due notice was issued, a hearing was held on February 29, 2016. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate in the hearing. John Indra 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 through Nine 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.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a mail order catalog company. The claimant, Chadd Ptacek, was employed as a full-time maintenance mechanic/electrician from 2004 and last performed work for the employer on November 2, 2015. The claimant's work hours were 7:00 a.m. to 3:00 a.m., Monday through Friday but the claimant was allowed to clock out at 2:57 p.m. The claimant's immediate supervisor was Terri Luett, Facility Manager. On November 2, 2015, the claimant left work early without permission, without speaking to supervisor, and without clocking out. At 4:00 p.m. on November 2, 2015, the claimant telephoned the employer's human resources coordinator and said he needed to immediately commence a leave of absence under the Family and Medical Leave Act (FMLA) so that he could check himself into substance abuse rehabilitation. Thereafter, John Indra, Human Resources Manager, attempted to contact the

claimant by telephone and by email to obtain from the claimant the exact time of his departure on November 2, 2015 so that the employer could use the departure time for payroll processing purposes. On November 3, the claimant responded by email. The claimant indicated he had just received the employer's email message, that he was going into rehabilitation for addiction, and that his phone was not working. Mr. Indra sent an email message asking the claimant what time he had left on November 2. On November 4, the claimant replied through email that he had left at 2:57 p.m. as usual. The claimant further indicated that he was at that point in the hospital. Though Mr. Indra believed the claimant's statement that he had left at 2:57 p.m. on November 2 was not accurate, the employer nonetheless used that information for payroll purposes and paid the claimant for a full day's work on November 2.

The claimant submitted an formal application for FMLA leave. On November 4, 2015, the employer approved FMLA leave through December 7, 2015 so that claimant could participate in the substance abuse treatment. The employer received the certification of healthcare provider on November 6, 2015. The need for leave and the period of the leave were certified by a doctor of osteopathy associated with the treatment center. The employer, thereafter, approved extensions of the FMLA leave that ultimately amended the leave end date to January 4, 2016. While the claimant continued on the approved FMLA leave, the employer's policy did not require him to make further contact with the employer so long as the basis for his absence from work continued to be the basis upon which the FMLA leave approval was based. In other words, so long as the claimant was on the approved FMLA leave and was participating in the substance abuse treatment program, the claimant was not obligated to contact the employer regarding the continued absence. The employer's written attendance policy otherwise required that the claimant notify the employer no later than one hour after the scheduled start of the employment if the claimant needed to be absent from work.

Though Mr. Indra had wanted to meet with the claimant on December 7, the initial leave end date to further discuss the claimant's departure on November 2, Mr. Indra deferred further conversation with the claimant until December 30.

On December 29, 2015, the employer received documentation from the substance abuse treatment program that indicated the claimant had been discharged from the substance abuse treatment program after last participating in treatment on or about December 22, 2015. The documentation indicated that the claimant had been discharged from the treatment program for "non-compliance." By the time of discharge from the treatment program, Mr. Ptacek had transitioned to outpatient treatment but was also dealing with a medical issue related to his foot. The medical issue necessitated surgery on the foot on or about December 22. Mr. Ptacek later told the employer that he believed that he continued to be on an approved FMLA absence through January 4, 2016 and for that reason had not contacted the employer regarding his need to continue off work. Once the employer received the documentation indicating that the claimant had been discharged from the treatment facility after participating on December 22, the employer erroneously documented the claimant as a no-call/no-show for work on December 22. The employer also documented the claimant as a no-call/no-show on December 23. December 24, and 25; dates included in the employer's holiday shutdown and the employer did not document absences for the claimant on those dates. The next work day after December 25, 2015 was Monday, December 28. The employer erroneously documented the claimant as a no-call/no-show on December 28 and 29. Earlier in the year, the claimant had requested and had been approved for paid time off for the period of December 28-31, 2015.

On December 30, while Mr. Ptacek was still on approved paid time off, Mr. Indra contacted him for the purpose of asking further questions about his departure time on November 2 and for the purpose of discharging him from the employment. Mr. Indra referenced the discharge

documentation the employer had received from the treatment program. Mr. Ptacek referenced his leg issue and the need to interrupt the substance abuse treatment so that he could address his leg issue. Mr. Ptacek had not received anything from the substance abuse treatment program indicating that he had been discharged from the treatment program. Mr. Indra again asked Mr. Ptacek about his departure time on November 2 and Mr. Ptacek asserted he had left at his normal time. At that point, it had been almost two months since Mr. Ptacek had been at work and since he had started inpatient substance abuse treatment. When asked by the employer, the claimant conceded that the basis for his FMLA approval had been his participation in substance abuse treatment and not his leg. The claimant also referenced that he had been approved for paid time off. Mr. Indra erroneously concluded that the claimant was providing inconsistent statements regarding the basis for his time off, whereas the claimant was actually listing the multiple bases for which he believed himself to be on approved time off. Mr. Indra told the claimant that he had strong evidence indicating that the claimant had left work early on November 2. Mr. Indra notified the claimant that he was being terminated immediately for failure to return from approved FMLA leave, for violating the attendance policy by being a no-call/no-show for more than two consecutive days, and for falsifying timekeeping records. Mr. Indra informed the claimant of his right to challenge the discharge. As part of the challenge that followed, the claimant provided seemingly contradictory information that on the one hand asserted he had gone home at his usual time and on the other hand had left because he was physically sick.

The claimant established a claim for benefits that was effective January 10, 2016. Workforce Development set the claimant's weekly benefit amount at $431.00. The claimant received $3,017.00 in benefits for the seven weeks between January 10, 2016 and February 27, 2016. The employer is the sole base-period employer for purposes of the claimant's unemployment insurance claim.

On January 27, 2016, a Workforce Development Claims Deputy held a fact-finding interview to address the claimant's separation from the employment. The employer had appropriate notice of the fact-finding interview. The employer elected to submit documentation in lieu of having a person participate in the fact-finding interview. The materials that the employer submitted for the fact-finding interview were largely the same materials that the employer submitted as exhibits for the appeal hearing. The claimant provided an oral statement as part of the fact-finding interview. The claimant's statement does not suggest an intent to misrepresent or engage in fraud.

REASONING AND CONCLUSIONS OF LAW:

Iowa Admin. Code r. 871-24.22(2)j(1)(2) provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
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> (2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service.

> Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.
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> j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.
>
> (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.
>
> (2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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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 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.
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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 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 Mr. Ptacek was on an approved leave of absence through at least December 22, 2015. The basis for the FMLA leave approval was the claimant's need to participate in substance abuse treatment. The leave for that purpose was not set to expire until January 4, 2016. The claimant had to interrupt the substance abuse treatment to undergo surgery on his leg. The claimant had not received notice from the substance abuse treatment program that he was discharged from the program. Accordingly, at the time the claimant spoke to the employer on December 30, 2016, it was not unreasonable for the claimant to assume that he was still on an approved FMLA leave of absence. The employer's documentation of no-call/no-show absences on December 22, December 28, and December 29 was erroneous. Those errors call into question the reliability of other evidence presented by the employer. The claimant's reasonable conclusion that he was still on an approved leave of absence as of December 23, 2016 leads to the conclusion that the employer's conclusion that he was a no-call, no-show on that date was also erroneous. Though the evidence suggests an

early departure on November 2, the employer elected not to present evidence from the supervisor who allegedly went looking for Mr. Ptacek that day or from others with firsthand knowledge of that event. Even if the claimant did leave early on November 2 without permission, that unexcused absence would not be sufficient to disqualify the claimant for unemployment insurance benefits. The administrative law judge cannot conclude, based on the evidence in the record, that the claimant intentionally misrepresented his November 2, 2015 departure time to the employer. Accordingly, the employer had presented insufficient evidence to establish misconduct in connection with the employment that would disqualify the claimant for benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged on December 30, 2015 for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The January 28, 2016 (reference 01) decision is modified as follows. The claimant was discharged on December 30, 2015 for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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