IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TYLER O PRICE
Claimant

HY-VEE INC
Employer

APPEAL NO. 15A-UI-02250-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/25/15
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 February 11, 2015, reference 01, decision that 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 for no disqualifying reason. After due notice was issued, a hearing was held on March 23, 2015. Claimant Tyler Price participated. Molly Rooney of Corporate Cost Control represented the employer and presented testimony through Jason Van Vactor, Brook Alloway, and Ryan Hartley. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five and A 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 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: Tyler Price was employed by Hy-Vee in Clarinda as the full-time Kitchen Manager from 2007 until January 23, 2015 when Jason Van Vactor, Store Director, discharged him based on a pattern of tardiness. Mr. Van Vactor was Mr. Price's immediate supervisor. Mr. Price had mental health issues that negatively impacted the employment and his ability to get to work on time. Several years ago, Mr. Price was diagnosed with bipolar disorder. Mr. Price receives care from a registered nurse practitioner who specializes in psychiatric matters. Mr. Price's mental health issues took a turn for the worse in September 2014, due to the dissolution of marriage. Mr. Price regularly spoke to Mr. Van Vactor about his mental health issues and other personal issues.

During the period leading up to Mr. Price's discharge from Hy-Vee, the nurse practitioner had Mr. Price on four different psychotropic medications. Each medication had drowsiness as a known side effect. In October 2014, the nurse practitioner had increased Mr. Price's Paroxetine dosage from 20 to 40 mg. At the beginning of December the nurse practitioner has increased Mr. Price's Seroquel dosage from 50 to 100 mg. The nurse practitioner has also decreased Mr. Price's Alprazolam from 5 to 1 mg.

In October 2014, Mr. Van Vactor had suspended Mr. Price for a week based on a pattern of tardiness and other issues.

Mr. Price had not requested, and the employer had not offered, any accommodation in light of Mr. Price's mental health issues or medication issues. Rather, in December 2014, Mr. Van Vactor instructed Mr. Price to begin scheduling himself for an 8:00 a.m. start time because Mr. Van Vactor thought all of the managers should start work by 8:00 a.m. Mr. Price had previously scheduled himself for a 9:00 a.m. or 10:00 a.m. start time.

In January 2015 alone, Mr. Price was late 12 times leading up to his discharge from the employment. In none of those instances had Mr. Price had given proper notice to the employer of a need to be late for work. Mr. Price had a similar pattern of tardiness going back at least as far as September 2014. Mr. Price indicates that he used multiple alarms but was still not able to get up in time to get to work on time. On January 7, Mr. Price arrived at 11:31 a.m. for a 8:00 a.m. shift. On January 8, Mr. Price arrived at 8:30 a.m. for an 8:00 a.m. shift. On January 11, Mr. Price arrived at 12:16 a.m. for an 11:00 a.m. shift. On January 12, Mr. Price arrived at 8:34 a.m. for an 8:00 a.m. shift. On January 14, Mr. Price arrived at 8:29 a.m. for a 8:00 a.m. shift. On January 15, Mr. Price arrived at 8:49 a.m. for an 8:00 a.m. shift. On January 16, Mr. Price arrived at 9:11 a.m. for an 8:00 a.m. shift. On January 18, Mr. Price arrived at 9:38 a.m. for an 8:00 a.m. shift. On January 19, Mr. Price arrived at 8:50 a.m. for a 8:00 a.m. shift. On that day, Mr. Price provided the employer with a note from the nurse practitioner that stated as follows: "Tyler Price … is experiencing side effects, including excessive sleepiness, as we are changing medications. He may have difficulty getting to work on time due to this." On January 21, the Human Resources Manager, Brook Alloway, telephoned Mr. Price at about 10:00 a.m. to ask why he was not at work for his 8:00 a.m. shift. Mr. Price apologized and indicated he would be right there. On January 22, 2015, Mr. Van Vactor telephoned Mr. Price at 10:20 a.m. to ask why he had not appeared for his 8:00 a.m. shift. The call awakened Mr. Price. Mr. Van Vactor asked Mr. Price why he was not there. Mr. Van Vactor instructed Mr. Price to stay home that day while Mr. Van Vactor decided whether to allow Mr. Price to continue in the employment. Mr. Price reported for work the next day, but did so almost an hour after his scheduled start time.

Hy-Vee has a written attendance policy that requires employees to personally notify the employer as soon as possible, but prior to the start of the shift, if the employee needs to be absent from work. Mr. Price was aware of the policy and was responsible for enforcing the policy in the kitchen department.

In making the decision to discharge Mr. Price from the employment, the employer considered additional earlier absences similar in nature. In October 2014, the employer has suspended Mr. Price for a week based on his attendance issues and other issues. The other issues included directing profanity has subordinates. Mr. Price was in the habit of directing profanity at kitchen staff. On one occasion, Mr. Price broke a broom handle over his knee in an intimidating demonstration of rage. Two kitchen clerks complained to the employer out of fear in response to that incident.

Mr. Price established a claim for benefits that was effective January 25, 2015. Mr. Price has received $3136 in benefits for the seven-week period of February 1, 2015 through March 21, 2015.

The employer participated in the February 10, 2015 fact-finding interview through Mr. Van Vactor.

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.
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> 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 decision in this case is made more difficult by the bonafide mental health issues, by the medication side effects, by the note from the nurse practitioner, by the clearly established pattern of tardiness without proper notice to the employer, and by the employer's decision to move up the start time of Mr. Price's work day despite knowing that Mr. Price already had an established pattern of tardiness with a later start time. Most of the instances of tardiness were remarkably similar. The absences appear at first glance to be unexcused absences because they were all due to oversleeping or otherwise running late and none was properly reported to the employer prior to the start of the shift. The question becomes whether Mr. Price's mental health issues and medication side effect issues were so severe that they prevented him not only from getting to work on time, but also from providing proper notice to the employer. The weight of the evidence fails to support Mr. Price's assertion that the consistent pattern of tardiness was wholly attributable to side effects of the psychotropic medications. On January 21 and 22, Mr. Price was able to awaken and answer the phone when the employer called to inquire where he was. That would suggest that Mr. Price would also be able to awaken in response to an alarm clock, assuming Mr. Price went to bed at a reasonable hour. Mr. Price had known since the October 2014, the time of the suspension, which his employment was in jeopardy. A reasonable person interested in maintaining his employment would have taken appropriate steps at or before that point to ensure that he got to bed early enough to be fully rested the next morning so that he would not have any difficulty getting up or getting to work. A reasonable person in Mr. Price's position would have taken into account any drowsiness side effect to the

psychotropic medications in decided how much sleep was needed. A reasonable person would have had a sufficient alarm, or alarms, set to assist him in getting up and getting to work on time. Despite Mr. Price's assertions to the contrary, the weight of the evidence indicates that he did not set a sufficient alarm to assist him in getting up on time in the morning. Even a drowsy person would be capable of using the phone to notify the employer of his need to be late. Mr. Price's note from the nurse practitioner gives no indication that Mr. Price lacked the ability to notify the employer by telephone of his need to be late. The fact that one of the instances of unexcused tardiness was for a shift that started at 11:00 a.m. also indicates there was more to the pattern of tardiness than the side effects of the psychotropic medications. The weight of the evidence indicates that each of the absences discussed at the hearing was an unexcused absence and that the unexcused absences were excessive.

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984).

Threats of violence in the workplace constitute misconduct that disqualifies a claimant for benefits. The employer need not wait until the employee acts upon the threat. See Henecke v. Iowa Dept. Of Job Services, 533 N.W.2d 573 (Iowa App. 1995).

Though the evidence does not establish a current act based on profanity or a threat of violence, these incidents further indicate Mr. Price's disregard for the employer's work rules, the employer's opinion, or the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Price was discharged for misconduct. Accordingly, Mr. Price 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 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 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 claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid $3136 in benefits for the seven-week period of February 1, 2015 through March 21, 2015. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The February 11, 2015, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The claimant was overpaid $3136 in benefits for the seven-week period of February 1, 2015 through March 21, 2015. The claimant is required to repay the overpayment. The employer's account is relieved of liability for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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