IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

MATHEW A KUENNEN
Claimant

WHIRLPOOL CORPORATION
Employer

APPEAL NO. 19A-UI-00509-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/01/18
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 7, 2019, reference 02, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on November 13, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on February 4, 2019. Claimant Matthew Kuennen participated. Amih Sallah represented the employer. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant. 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 Mr. Kuennen was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

Whether Mr. Kuennen voluntarily quit the employment without good cause attributable to the employer.

Whether Mr. Kuennen was laid off.

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: Matthew Kuennen commenced his full-time employment with Whirlpool Corporation in 2013 and worked as a material handler/forklift driver. Mr. Kuennen was assigned to the first shift and his regular work hours were 7:00 a.m. to 3:30 p.m. Monday through Friday. Supervisor Jessica Christopher was Mr. Kuennen's immediate supervisor. Mr. Kuennen last performed work for the employer on November 13, 2018. On that day, Mr. Kuennen spoke Ms. Christopher and to a human resources representative regarding his issues with alcohol and depression. At that time,

Ms. Christopher directed Mr. Kuennen to leave the workplace and resolve his personal issues before he returned. The human resources representative gave Mr. Kuennen telephone numbers for the employer's third-party leave facilitator, Matrix, and for a third-party employee assistant program (EAP) provider. Neither Ms. Christopher nor the human resources representative mentioned a need for Mr. Kuennen to report his absences to the employer during this period pursuant to the regular absence reporting protocol. The employer had reviewed the absence reporting protocol with Mr. Kuennen at the start of the employment. Under the attendance policy, an employee who needed to be absent from work was required to call the designated absence reporting number at least 30 minutes prior to the scheduled start of the shift and leave appropriate information in response to the automated prompts.

After Mr. Kuennen left work on November 13, 2018, he continued off work for an extended period. During this period, Mr. Kuennen did not report absences to the employer. The employer documented no-call/no-show absences on November 14, 15 and 16, 2018. Under the employer's attendance policy, three consecutive no-call/no-show absences would subject an employee to discipline that could include discharge from the employment. On Monday, November 19, 2018, Mr. Kuennen contacted Matrix, the third-party leave coordinator and left a voicemail message for a Matrix representative. On November 20, 2018, Mr. Kuennen spoke directly to a Matrix representative. Matrix eventually approved Mr. Kuennen for leave under the Family and Medical Leave Act (FMLA) for the period of November 16 through December 16, 2018. Matrix did not approve leave for November 14 or 15. Mr. Kuennen commenced outpatient mental health and substance abuse treatment on November 29, 2018. The treatment provider recommended that Mr. Kuennen return to work on December 17, 2018.

During the first week of December 2018, a Whirlpool Corporation representative contacted Mr. Kuennen regarding his absences on November 14, 15 and 16. The human representative told Mr. Kuennen that she would take steps to get those absences approved by the employer.

Mr. Kuennan returned to the workplace on December 17, 2018 with the intention of reporting for his regular duties. Mr. Kuennen clocked in for work and went to Ms. Christopher's office. Mr. Kuennen asked Ms. Christopher whether she had received documentation from Matrix releasing him to return to work at that time. Ms. Christopher had Mr. Kuennan take a seat while she found work for him to perform. Ms. Christopher mentioned a particular work assignment she wanted Mr. Kuennen to perform. Mr. Kuennen was willing to perform the work. Ms. Christopher returned a few minutes later and notified Mr. Kuennen that he had actually been discharged in November 2018 in response to the purported no-call/no-show absences. Ms. Christopher told Mr. Kuennen that a human resources representative would contact him, but none did. On the following day, Mr. Kuennen contacted a union representative to start the grievance process in response to his separation from the employment.

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.
> 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.

Iowa Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
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> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The weight of the evidence in the record establishes an involuntary separation from the employment, not a voluntarily quit. The administrative law judge notes that the employer did not have anyone with personal knowledge of the relevant events participate in the appeal hearing. The employer did not present sufficient evidence, or sufficiently direct and satisfactory evidence, to rebut Mr. Kuennen's testimony regarding the relevant events. Mr. Kuennen never communicated to the employer an intention to sever the employment relationship. Instead, Mr. Kuennen merely notified the employer of his need for help with his mental health and substance abuse issues. The employer then sent Mr. Kuennan off work on November 13, 2018 with instructions to contact the employer's leave coordinator and instructions to obtain the needed assistance with the mental health and substance issues. The employer said nothing to Mr. Kuennen in connection with that contact regarding a need to report absences pursuant to the absence reporting protocol. Under the circumstances, the purported no-call/no-show absences on November 14, 15 and 16 did not establish an intention to voluntarily quit the employment. Following a period of leave approved by the employer's third-party leave coordinator, Mr. Kuennen attempted to return to the employment and the employer refused to reinstate him to the employment.

Whether the administrative law judge deems the separation to be a discharge or a layoff, the evidence establishes a non-disqualifying, involuntary separation.

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 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).

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 employer points to purported no-call/no-show absences on November 14, 15 and 16, 2018 as evidence of misconduct in connection with the employment. The weight of the evidence establishes that all three of those absences were due to illness. The employer did not mention a requirement that Mr. Kuennen follow the absence reporting policy when the employer sent him off work. Mr. Kuennen reasonably relied on the guidance provided by the employer. The employer appears to have recognized during the first week of December 2018 that the absences in question warranted a second look and were not bona fide no-call/no-show absences. The employer had reasonable notice of Mr. Kuennen's need to away from work and the absences in question cannot be deemed unexcused absences under the applicable law.

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

The weight of the evidence also establishes that the employer failed to reemploy Mr. Kuennen at the end of what he reasonably believed was an approved leave of absence. If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee, the employee is considered laid off and eligible for benefits. See Iowa Administrative Code rule 871-24.22(2)(j)(1). Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes in alternative that Mr. Kuennen was laid off when the employer failed to reemploy him at the end of an approved leave of absence. Mr. Kuennen is eligible for benefits, provided he meets all eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The January 7, 2019, reference 02, decision is modified as follows. The claimant was discharged for no disqualifying reason. In the alternative, the claimant was laid off. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs