IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LOUISE J STEVENS
Claimant

BELLE/SIOUX CITY RIVERBOAT
Employer

APPEAL NO. 14A-UI-03029-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/23/14
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 March 12, 2014, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged. After due notice was issued, a hearing was held on April 10, 2014. Claimant Louise Stevens did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Donna Beck-Willems represented the employer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials, but did so only for the purpose of determining whether the employer participated in the fact-finding interview. Exhibits One through 12 were received into evidence.

ISSUES:

Whether Ms. Stevens separated from the employment for a reason that disqualifies her for benefits.

Whether Ms. Stevens has been overpaid benefits.

Whether Ms. Stevens must repay benefits.

Whether the employer's account may be assessed for benefits already paid and/or for future benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Louise Stevens was employed by Belle/Sioux City Riverboat as a part-time beverage server from July 2013 until January 29, 2014, when the employer discharged her for attendance. The final incident that triggered the discharge occurred on January 27, 2014, when Ms. Stevens was absent from her shift and did not provide proper notice to the employer. The employer's witness, Donna Beck-Willem, Human Resources Business Partner, does not know why Ms. Stevens was absent that day. If Ms. Stevens needed to be absent from work, the

employer's policy required that she call in and speak with her supervisor, who would document the absence. The employer's policy required that notice be provided at least four hours in advance for weekend shifts and at least one hour in advance in connection with non-weekend shifts. The policy was contained in the employer's handbook. Ms. Stevens received a copy of the handbook. The employer reviewed the attendance policy with Ms. Stevens at the time of hire. The policy indicated that an employee who exceeded 10 attendance points during a 12-month period would be discharged from the employment.

The employer made the decision to end Ms. Stevens' employment in response to the January 27, 2014 absence. Ms. Stevens' absence on January 27, 2014 placed her *at* 10 points, but did not put her *over* 10 points. The employer prepared a reprimand and separation documentation for the purpose of discharging Ms. Stevens when she arrived for her shift on January 28, 2014. However, Ms. Stevens was a no-call, no-show on January 28, 2014. Ms. Stevens came to the workplace on January 29, 2014 and brought her company issued items. Ms. Stevens indicated that she knew she was going to be terminated for attendance and for that reason had not reported for work or made contact with the employer on January 28, 2014. The employer proceeded with discharging Ms. Stevens at that time.

Ms. Stevens had previously been tardy to work on August 15, September 30, November 12, 19, 21, and 24, and December 5, 2013. Ms. Stevens had been absent with proper notice to the employer on July 29, August 16, October 23 and 29, and December 9, 2013. The employer witness does not know why Ms. Stevens was late or absent on any of these days. The employer had issued reprimands to Ms. Stevens for attendance matters on November 25, December 10, 2013.

Ms. Stevens established a claim for unemployment insurance benefits that was effective February 23, 2014 and received $750.00 in benefits for the period of February 23, 2014 through April 5, 2014.

On March 11, 2014, the employer had participated in the fact-finding interview that led to the March 12, 2014, reference 01, decision that allowed benefits. Donna Beck-Willems, Human Resources Business Partner, provided a statement to the Claims Deputy at that time. Ms. Beck-Willems had participated in ending Ms. Stevens' employment. The employer had also submitted documentation of Ms. Stevens's attendance issues and company policy materials for the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). 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 871 IAC 24.25.

The weight of the evidence establishes a separation based on a discharge for attendance, not a voluntary quit. The evidence indicates that the employer had made a decision to end the employment, that Ms. Stevens' correctly perceived that to be the employer's intention, and that the employer did indeed end the employment on January 29, 2014.

Iowa Code section 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.

871 IAC 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.

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.

There are some problems with the employer's case in light of the burden of proof. The employer testified to several absences wherein Ms. Stevens gave proper notice of the absence to a supervisor, but the documentation the employer generated in connection with the absence does not indicate a reason for the absence. The documentation the employer provided for such matters were the summary notes Ms. Beck-Willem made based on information forwarded to her by the supervisors who spoke with Ms. Stevens at the time of absences. The employer could have presented the raw documentation created by the supervisors or, better yet, could have presented testimony from those supervisors regarding the incidents in question. The employer did not present such testimony and did not present sufficient evidence to establish *unexcused* absences in connection with any of the full-day absences other than the no-call, no-show absence on January 28, 2014. The absence on January 28, 2014 was an unexcused absence under the applicable law. The employer had not yet communicated a discharge decision to Ms. Stevens. Indeed, according to the plain language of the employer's attendance policy, Ms. Stevens was not subject to discharge until she *exceeded* 10 attendance points. That happened on January 28, 2014, when Ms. Stevens was a no-call, no-show. The weight of the evidence indicates that the January 28, 2014 no-call, no-show absence should be included as the final absence that factored in the discharge.

In addition to the final unexcused absence, the evidence established several instances of tardiness. Ms. Stevens' tardiness is somewhat different than full-day absences insofar as her late arrivals indicate that she was well enough and able to work, but failed to get to work on time. There is nothing in the record to suggest that any of these late arrivals was due to illness or some other issue outside Ms. Stevens' control. Accordingly, each of instances of tardiness constitutes an unexcused absence under the applicable law. Ms. Stevens had seven such absences between August and December. Ms. Stevens' unexcused absences were excessive and constituted misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Stevens was discharged for misconduct. Accordingly, Ms. Stevens is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she 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 claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid $750.00 in benefits for the period of February 23, 2014 through April 5, 2014. 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 already paid or for future benefits based on this employment.

DECISION:

The claims deputy's March 12, 2014, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant was overpaid $750.00 in benefits for the period of February 23, 2014 through April 5, 2014. The claimant is required to repay the overpayment. The employer will not be charged for benefits already paid or for future benefits based on this employment.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs