IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

MARCUS A BLUNT
Claimant

CENTRUM VALLEY FARMS LLP
Employer

APPEAL NO. 19A-UI-02822-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/02/18
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 April 2, 2019, reference 07, 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 the deputy's conclusion that the claimant was discharged on March 13, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on April 24, 2019. Claimant Marcus Blunt did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Kellie Moen represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 2 through 9 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 must 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: Marcus Blunt has been employed by Centrum Valley Farms, L.L.P. during multiple distinct periods. The most recent employment began in October 2018 and ended on March 14, 2019, when Kellie Moen, Human Resources Generalist, discharged him from the employment for attendance.

Mr. Blunt was employed full-time in the shipping department. Mr. Blunt last performed work for the employer on March 6, 2019 and completed his shift on that day.

If Mr. Blunt needed to be absent from work, the employer's written attendance policy required that he call the workplace and speak directly with his supervisor at least 30 minutes prior to the scheduled start of his shift. The employer's written attendance policy explicitly prohibited providing notice of an absence via answering machine, voicemail or text. The attendance policy was set forth in the employee handbook the employer provided to Mr. Blunt at the start of the most recent employment.

Mr. Blunt was next scheduled to work at 6:30 a.m. on Saturday, March 9, 2019. Mr. Blunt was absent from the shift and failed to provide proper notice to the employer. On the afternoon of the same day, Mr. Blunt sent a text message to his former supervisor, Scott Jensen, via Facebook Messenger. Mr. Blunt stated in the text message that he was without his phone, was sick, and would report for work the next day. Mr. Blunt asked Mr. Jensen to notify his current supervisors "Lupita or Alberto." Lupita Torrez, Interim Plant Manager, was Mr. Blunt's immediate supervisor at the time of the absence. Mr. Jensen replied "Ok" to Mr. Blunt's text message.

Mr. Blunt was next scheduled to work on at 6:30 a.m. on Sunday, March 10, 2019, but was absent from the shift without proper notice to the employer. At 7:12 a.m., Mr. Blunt sent a text message to Mr. Jensen via Facebook Messenger indicating that he had been vomiting, that he thought he had the flu, and that he would try to get a doctor appointment. Mr. Blunt again asked Mr. Jensen to pass the information to his new supervisor. Mr. Jensen replied "Ok."

Mr. Blunt was next scheduled to work on Monday, March 11, 2019, but was absent from the shift without notice to the employer. At 8:28 p.m., after the was shift over, Mr. Blunt sent another text message to Mr. Jensen via Facebook Messenger. Mr. Blunt wrote that his stomach was still upset and "It's probably going to be Saturday." Mr. Jensen did not respond to the text message until the following morning.

Mr. Blunt was next scheduled to work on Tuesday, March 12, 2019, but was absent without proper notice to the employer. At 7:12 a.m., Mr. Jensen sent a text message response to Mr. Blunt's message from the previous evening. Mr. Jensen wrote "Ok." Mr. Blunt did not make any other contact with the employer regarding his need to be absent on March 12.

On the afternoon of March 12, 2019, Ms. Moen attempted to reach Mr. Blunt by telephone and then sent a text message to him at his cell phone number. The message indicated that Mr. Blunt needed to call Ms. Moen "ASAP." On the evening of March 12, after Ms. Moen had left work for the day, Mr. Blunt attempted to reach Ms. Moen by telephone. Ms. Moen was on another call at the time and missed Mr. Blunt's call. By that point, Mr. Blunt was in possession of his cell phone.

Mr. Blunt was next scheduled work on Wednesday, March 13, 2019, but was absent without proper notice to the employer. At 6:54 a.m., Ms. Moen sent a text message to Mr. Blunt's cell phone number stating that she had been on another call the previous evening, stating that she would be at her office by 7:30 a.m., and stating that she needed to speak with Mr. Blunt by noon that day. Mr. Blunt did not call Ms. Moen. At 12:27 p.m., Ms. Moen sent a text message to Mr. Blunt's cell phone number stating that Mr. Blunt needed to call her "ASAP." Ms. Moen further wrote that she needed to hear from him by 4:00 p.m. that day or she would assume he was abandoning his job. Mr. Blunt did not respond to the message. At 4:43 p.m., Mr. Blunt sent

a text message to Mr. Jensen via Facebook Messenger. Mr. Blunt wrote that he had a doctor appointment set for Friday afternoon. Mr. Jensen did not respond to the message.

Mr. Blunt would next have been scheduled to work on Saturday, March 16, 2019, but the employer discharged him before that date arrived. On March 14, 2019, Ms. Moen mailed a termination letter to Mr. Blunt via certified mail. On that same day, Mr. Blunt sent a text message attachment to Mr. Jensen via Facebook Messenger. The attachment was a medical note was dated March 14, 2019. The note stated Mr. Blunt had been seen on March 14, 2019 and could return to work on March 18, 2019.

At 1:42 p.m. on March 15, 2019, Mr. Blunt called Ms. Moen. At that time, Ms. Moen told Mr. Blunt she had been trying to reach him and that he was discharged from the employment based on his failure to properly communicate with the employer regarding his need to be absent pursuant to the attendance policy. Mr. Blunt asserted that he had been sick, that he had been communicating with Mr. Jensen, that he did not knew who his new supervisor was, and that he had been without his phone. The assertion that he did not know who his supervisor was false. The assertion that he had been without his cell phone, at least as it related to March 12 and beyond, was also false.

Mr. Blunt established an additional claim for benefits that was effective March 31, 2019 and received $934.00 in benefits for the two-week period of March 31, 2019 through April 13, 2019. Centrum Valley Farms is a base period employer for purposes of the claim, but has not yet been charged for benefits in connection with the claim.

On April 1, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Blunt's March 2019 separation from the employer. Ms. Moen represented the employer at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

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:
>
> 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 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.
>
> 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).

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 weight of the evidence in the record establishes a discharge for misconduct in connection with the employment based on excessive unexcused absences. Mr. Blunt was at all relevant times aware of the employer's attendance policy and absence reporting requirement. Even if

Mr. Blunt was without his phone prior to March 12, 2019, he was still aware that the employer's attendance policy required that he notify the employer at least 30 minutes prior to the scheduled start of his shift and a means to provide such notice. Mr. Blunt provided late notice of his need to be absent on March 9, March 10, March 11, and March 12. Accordingly, each of those absences was an unexcused absence under the applicable law. Mr. Blunt was thereafter again absent without proper notice to the employer on March 13, 2019. That absence was also an unexcused absence under the applicable law. Mr. Blunt's consecutive unexcused absences were excessive and constituted misconduct in connection with the employment. Accordingly, Mr. Blunt is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Blunt must meet all other eligibility requirements.

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 base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Blunt received $934.00 in benefits for the two-week period of March 31, 2019 through April 13, 2019, but this decision disqualifies him for those benefits. Accordingly, the benefits constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. Blunt is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid in connection with the March 31, 2019 additional claim.

DECISION:

The April 2, 2019, reference 07, decision is reversed. The claimant was discharged for misconduct in connection with the employment. The discharge was effective March 14, 2019. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid $934.00 in benefits for the two-week period of March 31, 2019 through April 13, 2019. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid in connection with the March 31, 2019 additional claim.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/rvs