IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CRYSTAL L SIEFKAS
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 14A-UI-11640-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/12/14
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 October 31, 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 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 December 2, 2014. Claimant Crystal Siefkas participated. Alyce Smolsky of Equifax Workforce Solutions represented the employer and presented additional testimony through Casey Stephens, Hank Miler, and Kristy Knutson. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. Exhibits One and Two were received into evidence. The administrative law judge took official notice of the materials submitted for and generated in connection with the fact-finding interview for the limited purpose of determining whether the employer participated in the fact-finding interview and determining whether the claimant engaged in fraud or dishonesty in connection with the fact-finding interview.

ISSUES:

Whether Ms. Siefkas was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether Ms. Siefkas was overpaid unemployment insurance benefits.

Whether Ms. Siefkas must repay the benefits she has received.

Whether the employer's account may be charged for benefits already paid to Ms. Siefkas or for future benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a nursing home facility. Crystal Siefkas was employed by Care Initiatives as a full-time housekeeping aide from 1998 until October 14, 2014, when Casey Stephens,

Administrator, and Hank Miler, Environmental Services Supervisor, discharged her for attendance. Mr. Miler was Ms. Siefkas' immediate supervisor. Ms. Siefkas was assigned to the day shift and her regular working hours were 6:00 a.m. to 2:00 p.m. Ms. Siefkas had a two-week work schedule that had remained the same at least since February or March 2014. That work scheduled included work on every other weekend.

The absences that triggered the discharge occurred on October 11 and 12, 2014, when Ms. Siefkas was absent without notifying the employer. Ms. Siefkas had spoken to Mr. Miler two or three weeks earlier about her desire to attend a weekend wedding, but had not specified the weekend of the wedding and had not requested October 11 or 12 off. The employer's policy and established practice required that employees complete a written request for time off in advance of the day of the requested day off. On August 19, 2014, Ms. Siefkas had submitted a written request to be off work on October 13, 2014. On September 17, 2014, Mr. Miler had approved that request. On October 1, 2014, Ms. Siefkas submitted a written request to leave two hours early on October 10, 2014. Mr. Miler had approved that request. If Ms. Siefkas needed to be absence from work without a prior request and prior approval, the employer's policy required that Ms. Siefkas telephone the workplace at least two hours prior to the scheduled start of her shift and speak with the charge nurse. Ms. Siefkas was aware of the employer's attendance policies. The employer would also allow employees to be absent so long as they had made arrangements for an employee to cover the shift. Though the employer's formal policy required written notice to the supervisor of any exchange of shifts, Mr. Miler merely required verbal notice of the request. Ms. Siefkas had not traded with another employee to have another employee cover her shifts on October 11 and 12. Ms. Siefkas has spoken to the other housekeeping aide who was also scheduled to be at work on those same days. Ms. Siefkas and the other employee, Pat Jones, had concluded it would be okay for Ms. Jones to cover the shifts on October 11 and 12. Neither had cleared this with Mr. Miler, who learned on October 11 that the weekend was short-staffed due to Ms. Siefkas' absence to attend the wedding. On October 14, the employer notified Ms. Siefkas that she was discharged from the employment based on the two no-call, no-show absences. Under the employer's attendance policy, two no-call, no-show absences subjected the employee to discharge from the employment.

Ms. Siefkas established a claim for benefits that was effective October 12, 2014 and received $2,238.00 in benefits for the eight-week period of October 12, 2014 through December 6, 2014.

A fact-finding interview was set for October 30, 2014 and both parties had proper notice of the proceeding. Phyllis Farrell, Equifax Unemployment Insurance Consultant represented the employer at the fact-finding interview. Ms. Farrell did not have personal knowledge of the particulars of Ms. Siefkas' employment or separation from the employment. However, Ms. Farrell provided a copy of the written reprimand regarding the two no-call, no-show absences, along with the attendance policy material and a letter giving dates of employment and the basis for the discharge.

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.

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 evidence in the record establishes two consecutive unexcused absences on October 11 and 12, 2014. The weight of the evidence indicates that Ms. Siefkas was fully aware of the steps that she needed to take to request time off, but failed to make any request for October 11 and 12 off. Ms. Siefkas was aware of the employer's attendance policy, including the provision that subjected her to discharge from the employment if she had two no-call, no-show absences. Ms. Siefkas' two consecutive no-call, no-show absences were sufficient to establish excessive unexcused absences. According, the administrative law judge concludes that Ms. Siefkas was discharged for misconduct. Ms. Siefkas 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 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 $2,238.00 in benefits for the eight-week period of October 12, 2014 through December 6, 2014.

Iowa Administrative Code rule 817 IAC24.10(1) defines employer participation in fact-finding interviews as follows:

> Employer and employer representative participation in fact-finding interviews.
> 24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or

> documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

The employer participated in the fact-finding interview within the meaning of the law through the participation of Ms. Farrell and submission of documentation that detailed the basis for the discharge. 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 claims deputy's October 31, 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 $2,238.00 in benefits for the eight-week period of October 12, 2014 through December 6, 2014. The claimant must repay that amount. The employer's account will not be charged for benefits already paid to claimant and shall be relieved of liability for future benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs