IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KEVIN J HUNTER
Claimant

NORDSTROM INC
Employer

APPEAL NO. 17A-UI-00055-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/04/16
Claimant: Appellant (2/R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Kevin Hunter filed a timely appeal from the December 23, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Hunter was discharged on November 30, 2016 for failure to follow instructions in the performance of his job. After due notice was issued, a hearing was held on February 9, 2017. Mr. Hunter participated. Michele Hawkins of Equifax represented the employer and presented testimony through Stacey Hoffman. Exhibits 1, 2, 3 and A through I were received into evidence.

ISSUE:

Whether Mr. Hunter separated from the employment for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kevin Hunter began his employment with Nordstrom, Inc. in 2009. The employment was initially full-time. Mr. Hunter last performed work for the employer on September 15, 2016. During the Nordstrom employment, Mr. Hunter became a college student at the University of Northern Iowa. The employer amended Mr. Hunter's full-time employment to part-time employment at Mr. Hunter's request to accommodate his school schedule. During the 15 months before the September 15, 2016 final work day, Mr. Hunter worked as a part-time shoe fit processor at the employer's fulfillment center. The duties involved testing newly arrived men's shoes to determine whether they fit true to size and posting such sizing information on the Nordstrom website for customer use. Mr. Hunter's immediate supervisors were Corey Clarke, Quality Assurance Manager, and Shannon Baethke, Assistant Quality Assurance Manager.

Nordstrom uses a third-party leave and disability administrator, Sedgwick. In 2010, Mr. Hunter was diagnosed with cluster headaches. At times during the employment, Sedgwick approved Mr. Hunter for intermittent leave under the Family and Medical Leave Act (FMLA) based on his cluster headaches.

On September 14, 2016, Ms. Baethke, Assistant Quality Assurance Manager, issued a written warning to Mr. Hunter for attendance. The document indicated that pertained to the period of August 14, 2016 through September 13, 2016. The typed employer comments contain a number of computer-generated extraneous letters, numbers and symbols. The meaningful text in the document states as follows:

> This…Notification is being reviewed and given to Kevin Hunter…Kevin currently has…19.50 attendance points. The attendance guidelines state, "8 points will be subject [the employee to]…termination of employment. Patterns of any kind will be addressed on an individual basis."
>
> Kevin...must understand…he needs to strive to improve his attendance and meet the expectation of all employees being at their workstation on time and as scheduled… Kevin must begin to improve [his] attendance record by erasing attendance points by having perfect months of attendance. Thirty days of perfect attendance will erase up to one attendance point. If…Kevin continues his current pattern of absences, the result will…be further disciplinary action, up to and including termination of employment.

Mr. Hunter signed the warning on September 14, 2016 and attached substantial comments in response to the warning. These included the following:

> As my assistant manager (Shannon Baethke) explained to me, the above comments (in the Next Steps area) do not pertain to my situation. She explained that those same comments always show. The situation here is that my FMLA time has not fully converted over into SoftTime. My job is protected through FMLA time so I really don't understand the reasoning behind this warning.
>
> Initially, I thought the time for my Cluster Headaches would all be covered under just FMLA; however, the scam artists at Sedgwick began converting my time over to Short Term Disability (STD). They had my physician and me fax documentation for the STD. Then, they denied the STD and began switching things back to FMLA (which was a messy process). I advised my physician that I was experiencing depression as a result of the Cluster Headaches. The depression and initial denial from Sedgwick regarding the STD delayed me reporting my intermittent leave in August.

Mr. Hunter then set forth how each of his reported absences between July 13, 2016 and September 8, 2016 has been categorized by Sedgwick. Mr. Hunter added that he still needed to report his absences for September 9, 12, 13 and 14, 2016 to Sedgwick. Mr. Hunter then added the following:

> I have appealed the denial of STD benefits with Sedgwick. I am hopeful that some of the FMLA time taken (even confirmation numbers not shown here) will convert to STD. If that happens, I hope it will not mess things up more in SoftTime.
>
> I feel this warning is unwarranted considering the circumstances. I do not agree with this warning being part of my employee file. Thank you.

Mr. Hunter last performed work for the employer on September 15, 2016. On September 16, Mr. Hunter commenced providing daily, proper notice to the employer of his need to be absent due to illness by calling the designated absence reporting line prior to the scheduled start of his shift.

The employer has a written attendance policy. Under the attendance policy, an employee who needs to be absent from work was required to call the Scheduling Attendance Line prior to the start of his shift. Under the written policy, the employee is required to leave a message that includes the reason for the absence. Under the written policy, an employee whose absence was related to an approved leave of absence is required to notify the Nordstrom Leave and Disability Unit within 7 days of being absent. Mr. Hunter was familiar with the employer's absence reporting policy.

Between September 16, 2016 and November 30, 2016, Mr. Hunter properly notified the employer of his need to be absent for 50 consecutive shifts due to illness. The employer concedes that each of the absences was indeed due to illness.

Toward the beginning of the leave period, Mr. Hunter made appropriate contact with Sedgwick to advise he had commenced a period of continuous leave and to apply for short-term disability benefits.

On October 17, 2016, Mr. Hunter met with his mental health therapist. On October 18, 2016, the therapist provided Mr. Hunter with a document in support of Mr. Hunter's appeal of Sedgwick's denial of short-term disability benefits. The document states, in relevant part, as follows:

> Kevin Hunter was seen by John Sondag, LMHC for an Assessment on October 17, 2016. He has a diagnoses of Major Depressive Disorder recurrent moderate … and Panic Disorder… Kevin is being referred to a Psychiatrist for medication management.

Mr. Hunter met with Rachel Bish, Psychiatric-Mental Health Nurse Practitioner, on October 19, 2016. Nurse Practitioner Bish prescribed multiple psychotropic medications to address the major depressive disorder and anxiety disorder. Mr. Hunter continued to have follow-up appointments with Nurse Practitioner Bish that included appointments on November 8 and November 30.

On October 18, 2016, Stacey Hoffman, Nordstrom Human Resources Assistant, mailed Mr. Hunter a letter regarding his leave status. The letter states as follows:

> This letter comes as follow up to the email your manager sent you on Thursday, October 13, 2016. We have been trying to touch base with you. As of today, you have not contacted HR or your manager.
>
> You are currently on an unapproved leave of absence and you are accruing attendance points. You currently have 25 attendance points. According to our attendance guidelines, "…if you reach or exceed eight (8) points you may be separated from employment with Nordstrom."
>
> I would like to speak with you regarding your recent absences. Please contact me by **Tuesday, October 25, 2016. If we have not heard from you by that date, we will assume you are resigning your position with Nordstrom, effective immediately.**

On October 19, 2016, Mr. Hunter telephoned Corey Clarke, Quality Assurance Manager, in response to Ms. Hoffman's letter. Mr. Hunter told Mr. Clarke that he did not intend to quit the employment. Mr. Clarke told Mr. Hunter that he no longer needed to report his absences on a daily basis via the Scheduling Attendance Line and could instead commence reporting his absences on a weekly basis.

On October 20, 2016, Mr. Hunter telephoned and spoke with Ms. Hoffman. Mr. Hunter told Ms. Hoffman that he did not intend to resign his position and that he believed he would be able to return to work soon. Ms. Hoffman directed Mr. Hunter to call Sedgwick to report continuous leave for the period of September 16, 2016 through October 31, 2016 because his leave during that period had not yet been approved. Ms. Hoffman told Mr. Hunter that if his leave was not approved by Sedgwick, he could possibly lose his job. Ms. Hoffman told Mr. Hunter that if his need for leave went into November, he should notify Sedgwick of those requested leave dates after October 31, 2016. Mr. Hunter agreed to contact Sedgwick and did indeed contact Sedgwick that same day. Mr. Hunter had already notified Sedgwick of his need for continuous leave during the period of September 16-27, 2016. Sedgwick reopened that pending leave claim to add the additional absence dates through October 31, 2016.

Mr. Hunter sought mental health counseling through Robert Tucker, M.A., L.M.H.C. and met with Mr. Hunter on October 25 and 31, as well as on November 8, 15, 22 and 29.

On November 21, 2016, Ms. Hoffman sent a second letter to Mr. Hunter. Prior to sending the letter, Ms. Hoffman had accessed the Sedgwick leave records and observed that Sedgwick still had not approved Mr. Hunter's period of continuous leave that began September 16, 2016. Ms. Hoffman's letter to Mr. Hunter stated as follows:

> This letter comes as a follow up from the letter I sent you on October 18, 2016. You recently applied for Family Medical Leave through Nordstrom Leave and Disability Unit. You leave of absence was denied, because they did not receive the required medical paperwork.
>
> As a result, you have been on an unapproved leave of absence since September 16, 2016. You currently have 32 attendance points. According to our attendance guidelines, "…if you reach or exceed eight (8) points you may be separated from employment with Nordstrom."
>
> I have tried to reach you by telephone to discuss your return to work date. **If I have not heard from you by Friday, November 25, 2016 I will assume you are resigning from your position with Nordstrom effective immediately.**

At 1:30 a.m. on November 25, Mr. Hunter left a voice mail message for Ms. Hoffman at her work phone number. Mr. Hunter acknowledged receipt of the Ms. Hoffman's letter and advised that he did not intend to resign his position. Mr. Hunter advised Ms. Hoffman that he expected to return to work on December 5, 2016. At 8:37 a.m. on November 25, Ms. Hoffman left a voice mail message for Mr. Hunter in which she acknowledged receipt of his message and the reference to the planned December 5, 2016 return to work.

On November 30, 2016, Ms. Hoffman received an email message from Sedgwick manager Helen Davis regarding Mr. Hunter's leave status. The email stated as follows:

> Kevin's leave, started September 16, 2016, was denied as medical was not received to approve the leave. A denial letter was sent to Kevin. The employees have 20 days in which to submit supporting medical documentation. If medical is not received with the 20 days, the denial will be processed on the leave on day 21. There is a silent 25 day grace period. If medical is received, it will be reviewed retro the start date of the leave. This grace period is not provided and discussed with the employee. The leave will be denied on day 21, but kept open. A denial letter will be sent. On day 46, the leave will be closed if additional medical is not received. An additional denial letter is not sent to the employee. However, an employee notification be sent to HR. Medical that is received after day 45 will be reviewed for possible approval starting on the date the medical is received.

The only denial letter Mr. Hunter had received from Sedgwick referenced a 180 day appeal period. Mr. Hunter did not receive a letter from Sedgwick that indicated his request for leave had been denied for failure to submit supporting medical documentation.

Upon receipt of the email message from Sedgwick, Ms. Hoffman phoned Mr. Hunter on November 30, 2016 and notified him that he was being discharged for exceeding the allowable number of attendance points. Mr. Hunter protested that he was still within the 180 days to appeal Sedgwick's denial of his leave. Ms. Hoffman told Mr. Hunter that the 180 days appeal deadline pertained to Mr. Hunter's application for short-term disability, not to leave approval. Ms. Hoffman provided Mr. Hunter no additional opportunity to cure any deficiency in submission of supporting medical documentation. Until Ms. Hoffman's phone call on November 30, Mr. Hunter was unaware that he had failed to submit necessary medical documentation to Sedgwick.

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 conduct of the parties during the period of September 16, 2016 through November 30, 2016 establishes a discharge from employment, not a voluntary quit. Mr. Hunter consistently and properly reported his need to be absent. Mr. Hunter responded to both of the employer's letters with an affirmation that he intended to remain in the employment.

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 weight of the evidence in the record establishes a discharge for no disqualifying reason. The weight of the evidence establishes that Mr. Hunter properly reported each absence due to illness during the period of September 16, 2016 through November 30, 2016. Accordingly, each absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Mr. Hunter for unemployment insurance benefits.

The question then becomes whether Mr. Hunter was insubordinate in connection with his request for leave for the period of September 16, 2016 through November 30, 2016.

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence in the record establishes that Mr. Hunter complied with the employer's directives to make contact with Sedgwick. During the relevant period, Mr. Hunter was suffering from serious mental illness that decreased his functioning ability. The weight of the evidence establishes that Mr. Hunter responded in a timely manner to the correspondence that he received from the employer and from Sedgwick. The weight of the evidence fails to

establish that Mr. Hunter received a letter from Sedgwick that denied his leave request or that notified him he had 20 days in which to respond to the denial letter. Mr. Hunter learned of the purported deficiency in the medical documentation pertaining to his leave on November 30, 2016 at the same time Ms. Hoffman notified him that he was discharged from the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Hunter was discharged on November 30, 2016 for no disqualifying reason. Accordingly, Mr. Hunter is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

This matter is remanded to the Benefits Bureau for determination of whether Mr. Hunter has been able to work and available for work within the meaning of the law since he established his claim for unemployment insurance benefits.

DECISION:

The December 23, 2016, reference 01, decision is reversed. The claimant was discharged on November 30, 2016 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has been able to work and available for work within the meaning of the law since he established his claim for unemployment insurance benefits.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/rvs