IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

LAKISHA R BROWN
Claimant

TYSON PET PRODUCTS INC
Employer

APPEAL NO. 18A-UI-06012-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/06/18
Claimant: Appellant (5)

Iowa Code Section 96.5(1) – Voluntary Quit
Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Lakisha Brown filed an appeal from the May 21, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Brown was discharged on May 1, 2018 for excessive unexcused absences. After due notice was issued, a hearing was held on June 15, 2018. Ms. Brown participated. Dakota Cunningham represented the employer.

ISSUE:

Whether Ms. Brown separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lakisha Brown was employed by Tyson Pet Products, Inc. as a full-time laborer/food handler from November 2017 and last performed work for the employer on the morning of Thursday, April 26, 2018. Ms. Brown was assigned to the overnight shift, which started at 10:00 p.m. and ended at 6:30 a.m. Ms. Brown's work week began on Monday evening and ended either on Saturday morning or Sunday morning, depending on whether the employer required an overnight shift from Saturday evening to Sunday morning. The employer required Ms. Brown to perform the weekly overtime shift on all but one weekend during the employment. The employer would post notice of the required overtime work in the break room on the Thursday or Friday that preceded the Saturday overtime shift. Ms. Brown was familiar with this process of receiving notice of required overtime work.

At 2:30 a.m. on Thursday, April 26, 2018, the employer sent Ms. Brown and handful of other employees home early due to a lack of work. The employer had not yet posted notice requiring overtime work on Saturday, April 28. A week earlier, Ms. Brown had requested Thursday, April 26 and Friday, April 27 off and the employer had approved her request. In the absence of a Saturday overtime shift, Ms. Brown would next have been scheduled to report for work on Monday evening, April 30.

During Ms. Brown's April 26-27 approved absence, the employer posted notice of required overtime on Saturday, April 28, 2018. On Thursday, April 26, one of more of Ms. Brown's coworkers and Facebook "friends" sent Ms. Brown an instant message advising her that there might be overtime work on Saturday. On the afternoon of Friday, April 27, Ms. Brown called the workplace to inquire whether the employer had scheduled overtime work for Saturday, April 28. Ms. Brown left a voice mail message at a human resources extension, but did not hear back. Ms. Brown erroneously assumed that no news was good news. Ms. Brown did not contact her coworkers/Facebook "friends" to ask whether the employer had posted notice of required overtime work for that Saturday. When Ms. Brown did not appear for the Saturday, April 28 overtime shift and did not give notice of her need to be absent from that shift, the employer deemed Ms. Brown a no-call/no-show for the April 28 shift.

The employer has an absence reporting policy that the employer reviewed with Ms. Brown at the start of her employment and reviewed with her again as she accrued attendance points. Under the policy, if Ms. Brown needed to be absent, she was required to telephone the automated absence reporting line at least 30 minutes prior to the start of her shift and provide information in response to the automated prompts.

Ms. Brown did not appear for her shift on Monday, April 30, 2018. At 9:45 p.m., Ms. Brown provided notice that she would be late for work. Ms. Brown resides in Waterloo. The workplace is in Independence. Ms. Brown's commute usually took about 25 minutes. On April 30, Ms. Brown left her home at 9:30 p.m. At about 9:40 p.m., Ms. Brown stopped to put gasoline in her car, but then could not restart her car. Ms. Brown then made her telephone call to report that she would be late. However, Ms. Brown did not appear for any part of the shift or give the employer notice that she would be absent from the entire shift.

Ms. Brown was next scheduled to work on the evening of May 1, 2018. At about 11:00 a.m. on May 1, Ms. Brown telephoned the workplace and spoke with a human resources representative. The human resources representative told Ms. Brown that her absence from the April 28 overtime work had put her over the allowed number of attendance points. The human resources representative did not tell Ms. Brown that she was discharged from the employment. Ms. Brown explained that her absence from the April 30 shift had been due to problems with her car. The human resources representative asked Ms. Brown to report to the workplace by 4:00 p.m. that day and to bring documentation supporting her absences on Saturday, April 28 and Monday, April 30. Ms. Brown did not have any such documentation. Ms. Brown elected not to report to the workplace and made no further contact with the employer.

The employer considered earlier absences when measuring Ms. Brown's attendance points. On February 8, 2018, Ms. Brown was absent due to transportation issues and properly notified the employer. On March 15 and 19, Ms. Brown was absent in connection with a move and properly reported the employer. Ms. Brown had not requested the time off in advance and the employer had not approved the time off in advance. Ms. Brown was absent due to illness and with proper notice to the employer on February 10, 16, 17, 22, and 23, March 5, 6, and 8, and April 2 and 13.

Ms. Brown's separation from the employment followed three written warnings for attendance. On February 27, the employer warned Ms. Brown that she had accrued four attendance points. On March 8, the employer warned Ms. Brown that she had accrued eight attendance points. On March 22, the employer warned Ms. Brown that she had accrued 11 attendance points. Ms. Brown knew that accruing 14 attendance points would subject her to possible discharge from the employment.

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. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(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 Iowa Administrative Code rule 871-24.25.

The weight of the evidence in the record establishes a voluntary quit. On May 1, 2018, the employer told Ms. Brown she was over the allowed number attendance points and requested that Ms. Brown appear for a meeting to discuss her attendance. The employer representative did not notify Ms. Brown that she was discharged from the employment. Ms. Brown elected not to appear for the meeting and elected not to make further contact with the employer.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

The weight of the evidence in the record establishes a voluntary quit that was without good cause attributable to the employer. Accordingly, Ms. Brown is disqualified for unemployment insurance benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Brown must meet all other eligibility requirements. The employer's account shall not be charged.

This case can be analyzed in the alternative as a discharge for attendance.

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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.

If the case is analyzed as a discharge for attendance, the evidence in the record establishes that such discharge was for misconduct in connection with the employment based on excessive

unexcused absences. The evidence in the record establishes unexcused absences on February 8, 2018, Ms. Brown was absent due to transportation issues, a matter of personal responsibility. The evidence also establishes unexcused absences on March 15 and 19, when Ms. Brown was absent in connection with a move, but had not requested the time off in advance. The evidence further establishes an unexcused absence in connection with the April 28, 2018 overtime shift. Ms. Brown knew the employer's practice for notifying employees of the Saturday overtime work. Ms. Brown's coworker/friend told her the might be overtime work on the day. Ms. Brown had worked a Saturday overtime shift on all but one prior weekend during the employment. Ms. Brown failed to take reasonable steps to ascertain whether there was or was not overtime work and unreasonably assumed that no news was good news. The evidence establishes an unexcused absence on April 30. Though Ms. Brown appears to have experienced unforeseen circumstances with her car not starting, the weight of the evidence indicates that she would have been late for work regardless, due to her need to stop for gas on the way to work, and her failure to get gas ahead of time. Though Ms. Brown promptly notified the employer she would be late, she never notified the employer she would be absent from the entire shift. Finally, the evidence establishes an additional unexcused absence through Ms. Brown's failure to appear for the appointment to discuss her attendance. Ms. Brown's unexcused absences occurred in the context of repeated warnings for attendance. Ms. Brown's absences that were due to illness were excused absences under the applicable law due to the illness-based nature of the absences and the fact that Ms. Brown properly reported the absences to the employer. Thus, if the separation had indeed been a discharge, the discharge for misconduct would have relieved the employer's account of liability for benefits and would have disqualified Ms. Brown for unemployment insurance benefits until she worked and was paid wages for ten times her weekly benefit amount. Ms. Brown would have to meet all other eligibility requirements.

DECISION:

The May 21, 2018, reference 01, decision is modified as follows. The claimant voluntarily quit on May 1, 2018 without good cause attributable to the employer. In the alternative, the claimant was discharged effective May 1, 2018 for misconduct in connection with the employment based on excessive unexcused absences. 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 amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs