

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STACY L REIDINGER
Claimant

APPEAL NO. 16A-UI-05092-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HIGBEE WEST MAIN LP
Employer

OC: 04/10/16
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 28, 2016, 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 was discharged on January 13, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on May 17, 2016. Claimant Stacy Reidinger participated. Bridget Miller represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Department Exhibits D-1 through D-7 into evidence.

ISSUES:

Whether the claimant separated from the employment for a reason that disqualifies her for benefits?.

Whether the claimant has been overpaid benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Stacy Reidinger was employed by Higbee West Main, L.P., d/b/a Dillard's, as a full-time Daniel Cremeix Specialist at the employer's Davenport department store from September 2015 until January 20, 2016, when Bridget Miller, Store Manager, discharged her for attendance. Ms. Reidinger's duties included sales, properly arranging new merchandise, and processing markdowns. When Ms. Reidinger was caught up on work in her area, her secondary duties included assisting in other areas of the store. Ms. Reidinger's immediate supervisor was Tom O'Brien, Men's Selling Manager. Mr. O'Brien and the stores other department managers had authority to supervise the store in the absence of Ms. Miller and the assistant store

manager. Amanda MacQuarrie, Women's Selling Manager, and Jessica Bali, Shoe Manager, were two of the department managers with authority to supervise the store. Lonnie, Sales and Shipping Manager, was yet another department manager.

If Ms. Reidinger needed to be absent from work, the employer's policy required that she telephone the store and speak to a manager prior to the scheduled start of her shift. The employer had provided Ms. Reidinger with a copy of the policy at the start of the employment.

On January 13, 2016, Ms. MacQuarrie sent Ms. Reidinger home for the day 30 minutes prior to the scheduled end of her shift. Ms. MacQuarrie's decision to send Ms. Reidinger home early followed a disagreement concerning the footwear Ms. Reidinger wished to wear while completing markdowns. The employer's dress code called for Ms. Reidinger to wear dress shoes when performing her sales duties. On January 13, 2016, Ms. Reidinger wore stiletto heels while performing her sales duties but planned to wear Sketchers slip-on casual shoes while she worked on markdowns. Ms. Reidinger believed, after speaking with Mr. O'Brien, that she had permission from a regional manager to wear the more comfortable shoes while she was working on markdowns. Ms. MacQuarrie and/or Ms. Bali confiscated the shoes from under the sales counter when Ms. Reidinger was on her lunch break. When Ms. Reidinger returned from a break and could not locate her casual shoes, she slipped off her high heels and worked on markdowns. Ms. MacQuarrie and Ms. Bali approached Ms. Reidinger and verbally counseled Ms. Reidinger about being out of dress code. Later in the shift Ms. Reidinger requested the return of her slip-on shoes but the department managers declined to give them back at that time. When Ms. Reidinger expressed her displeasure with what she perceived as ill treatment, Ms. MacQuarrie sent her home early. Ms. Reidinger knew at the time she was sent home early that she had only been sent home for the day and had not been discharged.

Ms. Reidinger was next scheduled to work at 9:45 a.m. on January 15, 2016. Ms. Reidinger appeared for work on time but did not complete her shift. She was scheduled to work until 6:30 p.m. but left at about 11:00 a.m. Before she left, Ms. Reidinger told the shipping manager that she was taking "personal time." Ms. Reidinger left before Ms. Miller arrived to start her work day. Ms. Reidinger left early because she was uncomfortable with working in the store while either Ms. MacQuarrie or Ms. Bali was present but Mr. O'Brien was not present.

Ms. Reidinger was next scheduled to work on January 17, from noon to 9:00 p.m., but did not report for work. Ms. Reidinger decided not to return to work until she had an opportunity to speak to Mr. Obrien regarding her concerns about Ms. MacQuarrie and Ms. Bali. On the morning of January 17, Ms. Reidinger telephoned the store and spoke with the cosmetics manager, Julia. Ms. Reidinger asked to speak with Mr. O'Brien but learned that Mr. O'Brien was not yet at the workplace. Ms. Miller also was not at the workplace. Ms. Reidinger told the cosmetics manager that she was not sure that she would make it to work on time. Ms. Reidinger did not appear for any part of the shift. Ms. Reidinger was next scheduled to work at noon on January 19, 2016 but did not appear for any part of the shift.

On the afternoon of January 19, 2016, Ms. Miller had printed attendance warnings concerning Ms. Reidinger's absences. There was a warning for the partial day absence on January 15, when Ms. Reidinger left early. There was a warning for a absence on January 16. There was a third warning document that again referenced the January 15 and 16 absences. There was a fourth warning document that yet again referenced the January 16 absence but also referenced a January 18 absence. Finally, there was a warning that referenced a January 19 absence. Ms. Miller signed each of the warnings on January 20, 2016. At that same time, Ms. Miller drafted and signed a separation form to document a discharge for attendance.

Ms. Reidinger telephoned the store on January 20, 2016 and spoke with Mr. O'Brien. Mr. O'Brien transferred the call to Ms. Miller. Ms. Reidinger told Ms. Miller that she would like to have a meeting with Mr. O'Brien and Ms. MacQuarrie to address her concerns. Ms. Miller told Ms. Reidinger that she was already discharged based on attendance.

Ms. Reidinger established a claim for unemployment insurance benefits that was effective April 10, 2016. Ms. Reidinger has received \$2,840.00 in benefits for the eight weeks between April 10, 2016 and June 4, 2016. The employer is a base period employer.

On April 27, 2016, a Workforce Development Claims Deputy held a fact-finding interview to address Ms. Reidinger's separation from the employment. Ms. Miller represented the employer at the fact-finding interview.

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.

While there is some disagreement regarding which days Ms. Reidinger was scheduled to work after January 13, 2016, there is agreement that she missed all or part of at least three shifts after January 13 and prior to the discharge. Regarding of the interpersonal conflict with one or more department managers, Ms. Reidinger acted unreasonably when she decided to cease appearing for shifts until her concerns were resolved to her satisfaction. Each of the absences between January 15, 2016 and the discharge was an unexcused absence. The unexcused absences were excessive and constituted misconduct in connection with the employment. Accordingly, Ms. Reidinger 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 \$2,840.00 in benefits for the eight weeks between April 10, 2016 and June 4, 2016. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment. The employer's account will be relieved of charges for benefits including liability for benefits already paid to the claimant.

DECISION:

The April 28, 2016, reference 01, decision is reversed. The claimant was discharged 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 paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant was overpaid \$2,840.00 in benefits for the eight weeks between April 10, 2016 and June 4, 2016. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment. The employer's account will be relieved of charges for benefits including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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