IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

ABBIGAIL L GOVIG Claimant **SEQUEL YOUTH SERVICES OF WOODWARD** Employer	**APPEAL NO: 20A-UI-10628-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/03/20** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Abbigail Govig filed an appeal from the August 27, 2020, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Ms. Govig was discharged on April 30, 2020 for excessive unexcused absenteeism. After due notice was issued, a hearing was held on October 19, 2020. Ms. Govig participated. Marcia Dodds, Human Resources Director, represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 20A-UI-10629-JTT. Exhibit 1 was received into evidence. The administrative law judge took official notice of the claimant's weekly claims (KCCO).

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer operates a residential facility on the grounds of Woodward Academy. Abbigail Govig was employed by Sequel Youth Services of Woodward as a full-time Youth Counselor. She began the employment in October 2019 and last performed work for the employer on March 17, 2020. Ms. Govig supervised behaviorally disordered boys and girls in residence to ensure their safety and security. Ms. Govig would have to physically intervene as necessary.

On March 17, 2020, Ms. Govig went off work due to a suspected COVID-19 illness. Ms. Govig underwent COVID-19 testing. On March 25, 2020, Ms. Govig received her COVID-19 test results which revealed she did not have COVID-19. Ms. Govig was released to return to work at that time.

On March 25, 2020, Ms. Govig was involved in a non-work-related automobile collision in which she suffered injury to her ankle. The injury was later diagnosed as torn ligaments that required surgical intervention. On the date of the collision, Ms. Govig was transported by ambulance to

an emergency room. The emergency room physician kept Ms. Govig off work until she could follow up with her primary care physician. Ms. Govig promptly notified the employer of her need to remain off work due to her injury.

On March 28 2020, Ms. Govig first saw her primary care physician, who referred Ms. Govig to a foot specialist.

Ms. Govig first saw the foot specialist on April 1 or 2, 2020. Before Ms. Govig or the specialist knew the full extent of her injury, the specialist released Ms. Govig to return to work so long as she wore an orthopedic boot and limited the weight she placed on her foot. Given the work environment and the nature of Ms. Govig's assigned duties, Ms. Govig was unable to perform the essential functions of her Youth Counselor job. The employer declined to allow Mr. Govig to return to the work due to her injured ankle.

Effective April 2, 2020, Ms. Govig commenced a period of approved administrative leave without pay. Ms. Govig had not worked for the employer long enough to quality for job-protected leave under the Family and Medical Leave Act (FMLA). Ms. Govig provided the employer with appropriate medical documentation to support her need to be away from work.

On April 21, 2020, Ms. Govig provided the employer with updated medical documentation that supported her continued need to be off work due to her injury. The documentation indicated that Ms. Govig was scheduled to undergo an MRI during the week of April 27, 2020, which would lead to further assessment of her health status and ability to work.

On April 27, 2020, the employer sent Ms. Govig a memorandum approved leave without pay to April 30, 2020, but that terminated the employment at that time. The employer referenced Ms. Govig's ineligibility for job protection under the Family and Medical Leave Act. The employer invited Ms. Govig to reapply once she was released to work without restrictions. Ms. Govig called the employer in response to receiving the letter. The employer referenced the FMLA ineligibility and requested that Ms. Govig return her keys.

REASONING AND CONCLUSIONS OF LAW:

Iowa Administrative Code rule 871-24.1(113) characterizes the different types of employment separations as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
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> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
>
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
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> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

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.

In *Prairie Ridge Addiction Treatment Servs. v. Jackson and Emp't Appeal Bd.,* 810 N.W.2d 532 (Iowa Ct. App. 2012), the claimant, who had been injured in a non-work related automobile accident had requested a leave of absence so that she could recover from her injury. The employer approved the initial request. The employer also approved an extension of the leave of absence. The employment ended when the employer decided to terminate the employment, rather than grant an additional extension of the leave of absence. The claimant had not yet been released to return to work at the time the employer deemed the employment terminated. The Iowa Court of Appeals held that Ms. Jackson had not voluntarily quit the employment. The Iowa Court of Appeals further held that since Ms. Jackson had not voluntarily quit, she was not obligated to return to the employer upon her recovery to offer her services in order to be eligible for unemployment insurance benefits. The effect of the court's decision was to treat the separation as a discharge from the employment.

The employer did indeed discharge Ms. Govig from the employment. At no time did Ms. Govig express an intent to voluntarily sever the employment relationship or take any overt step to sever the employment relationship. Indeed, Ms. Govig attempted to return to work with the orthopedic boot restriction, but the employer did not allow her to return, based on her inability to perform the essential duties. Ms. Govig continued on an approved leave until April 30, 2020 at which time the employer discharged Ms. Govig from the employment. The *Prairie Ridge* case in on point with the facts of this case and supports the conclusion that Ms. Govig was discharged from the employment.

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:
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> 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 a discharge 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 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.

The evidence in the record establishes an April 30, 2020 discharge for no disqualifying reason. All of Ms. Govig's absences leading up to the April 30 2020 discharge were based on illness and injury and were approved by the employer. All of the absences were excused absences

under the applicable law and cannot serve as a basis for disqualifying Ms. Govig for unemployment insurance benefits. Ms. Govig is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The August 27, 2020, reference 01, decision is reversed. The claimant was discharged on April 30, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

December 3, 2020
Decision Dated and Mailed

jet/scn