IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

NICOLE M PRICKETT
Claimant

HUMACH LLC
Employer

APPEAL NO. 18A-UI-07088-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/03/18
Claimant: Appellant (5)

Iowa Code Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Nicole Prickett filed a timely appeal from the June 29, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Prickett voluntarily quit on June 8, 2018 without good cause attributable to the employer. After due notice was issued, a hearing was held on July 19, 2018. Ms. Prickett participated. Jenni Bauer represented the employer and presented additional testimony through Suzi Whitman. Exhibits 1, 2 and A were received into evidence.

ISSUE:

Whether Ms. Prickett separated from the employment for a reason that disqualifies her for benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nicole Prickett was employed by Humach, L.L.C. as a full-time trainer. Ms. Prickett began her employment in 2011 and last performed work for the employer on June 1, 2018. Ms. Prickett's work hours were 8:00 a.m. to 4:30 p.m., Monday through Friday. The employer operates multiple call centers. Ms. Prickett was headquartered at the employer's Oelwein location, but primarily worked at the Mason City location toward the end of the employment. Suzi Whitman, Call Center Manager, was Ms. Prickett's immediate supervisor.

Ms. Prickett worked on several different client projects throughout the employment. Toward the end of the employment, Ms. Prickett assisted with an inbound customer service project for client ICD. Ms. Prickett did not like working on the ICD project.

After Ms. Prickett worked on June 1, 2018, she was next scheduled to work on Monday, June 4, 2018. Ms. Prickett did not appear for work that day. At 6:10 a.m., Ms. Prickett sent an email message to Ms. Whitman advising that she had been throwing up all night and was going to use a "personal day." If Ms. Prickett needed to be absent from work, the employer's absence reporting policy required that she call or email Ms. Whitman prior to the scheduled start of her shift. Ms. Prickett was at all relevant times aware of the absence reporting policy.

Ms. Prickett was next scheduled to work on Tuesday, June 5, 2018, but did not report for work that day. At 6:51 a.m., Ms. Prickett emailed Ms. Whitman to let her know that she was still sick and would not be at work that day. Ms. Whitman was concerned for Ms. Prickett's health and was also concerned that Ms. Prickett was scheduled to conduct a training session at 10:30 a.m. that day. Ms. Whitman was concerned that the trainer's absence from the training session might not look good to the client. About 20 people were scheduled to participate in the training. At 8:30 a.m., Ms. Whitman called Ms. Prickett. Ms. Prickett did not answer the call, but immediately returned the call. Ms. Whitman asked Ms. Prickett whether, if she was feeling better, she could come perform the training. Ms. Prickett said she did not think she would be feeling better, but that she would try. At 9:38 a.m., Ms. Prickett sent Ms. Whitman a text message indicating that she was not going to make it. A call center supervisor ended up conducting the training session.

Later in the morning on June 5, Ms. Whitman sent an email message to Ms. Prickett regarding previous arrangements for a supervisor to ride with Ms. Prickett from Oelwein to Mason City the following day. In her text message, Ms. Whitman stated that the supervisor, Diane, was expecting to ride with Ms. Prickett the following day. On the afternoon of June 5, Ms. Whitman sent Ms. Prickett a text message advising Ms. Prickett that Diane wanted to call Ms. Prickett at 6:30 a.m. the next morning. Ms. Prickett replied, "Okay."

At 4:13 a.m. on Wednesday, June 6, Ms. Prickett sent Ms. Whitman the following message: "I will not be in today." Ms. Prickett made no reference to being ill and was not in fact ill at that point. On the afternoon of June 6, Ms. Whitman sent Ms. Prickett the following email message: "Is this time supposed to be considered FMLA? If not, we will need a Dr's note to cover the 3 days. Hope you are feeling better." Ms. Prickett did not respond that day.

At 6:46 a.m. on June 7, Ms. Prickett sent the following message: "I won't be in today. Not FMLA and I don't have a doctor's note. I understand where that puts me for [attendance] occurrences given the final [warning] I signed." Ms. Prickett made no reference to being ill. On May 9, 2018, the employer had issued a final warning to Ms. Prickett for attendance. The warning indicated that if Ms. Prickett's attendance occurrences reached 11 during a rolling six month period her employment would be terminated. Most of Ms. Prickett's 2018 absences up to that point had been due to illness and had been properly reported to the employer. On one occasion, Ms. Prickett had been absent due to the need to care for a sick child and had properly notified the employer. On another occasion, Ms. Prickett had been absent due to inclement weather and had properly notified the employer.

At 9:22 a.m. on June 7, Ms. Whitman sent the sent the following email message to Ms. Prickett:

> I'm concerned about you. I don't want you to go out on occurrences. You can apply for FMLA for another reason. I don't need to know what it is, but I can have Jenny Bauer [Human Resource Generalist] reach out to you. Please let me know how to proceed.

At 11:27 a.m., Ms. Prickett responded as follows: "There's nothing else to apply for on FMLA in this situation." At 11:29 a.m., Ms. Whitman responded: "Can we talk about it? I could possibly approve a leave?" Ms. Prickett did not respond to Ms. Whitman's email. That afternoon, Ms. Whitman sent Ms. Prickett a text message asking whether Ms. Whitman could stop by Ms. Prickett's house on her way home from the Oelwein workplace to pick up Ms. Whitman's company credit card. Ms. Whitman had provided the credit card to Ms. Prickett for Ms. Prickett to use that week. Ms. Prickett responded that Ms. Whitman could come to her home to get the credit card.

Ms. Whitman stopped at Ms. Prickett's home on the evening of Thursday, June 7. While she was there, Ms. Whitman asked Ms. Prickett whether she really wanted "to go out" on attendance occurrences. Ms. Prickett responded that she hated the ICD project and that every night she went home from work mentally and physically exhausted. Ms. Whitman told Ms. Prickett that what she was hearing was not the person she knew and had worked with for seven years. Ms. Whitman told Ms. Prickett that she was very concerned about Ms. Prickett and concerned about how she was going to support herself and her children. It was clear to Ms. Whitman that Ms. Prickett was essentially quitting the employment by declining to return. Ms. Whitman told Ms. Prickett, "You don't quit a job until you have another." Ms. Whitman told Ms. Prickett that she had until 9 a.m. the next day to change her mind about not returning to the employment.

Ms. Prickett knowingly and intentionally did not return to work on Friday, June 8. Ms. Prickett knowingly and intentionally elected not to make further contact with Ms. Whitman. When Ms. Whitman had not heard from Ms. Prickett by 11:28 a.m. on June 8, she sent an email message to other members of the management team regarding what had transpired the previous evening and indicated that she would be completing Ms. Prickett's "offboarding." Ms. Whitman then documented a discharge for attendance that referenced Ms. Prickett's absences during the preceding six months along with the prior warnings for attendance.

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.

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.

Iowa Admin. Code r. 871-24.25(21) provides:

> Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(21) The claimant left because of dissatisfaction with the work environment.

Iowa Admin. Code r. 871-24.25(27) provides:

> Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (27) The claimant left rather than perform the assigned work as instructed.

The weight of the evidence in the record establishes a voluntary quit. The weight of the evidence establishes that Ms. Prickett's absences from the workplace on and after June 6, 2018 were not due to illness. They were instead due to dissatisfaction with the particular project Ms. Prickett was working on at the time and due to unspecified personal issues. Ms. Prickett elected not to return to work rather than to work to continue performing her assigned duties. Ms. Prickett elected not to return to the employment rather than accept the employer's offer to request a leave. The weight of the evidence fails to establish any good cause reason attributable to the employer for Ms. Prickett's decision not to return to the employment. Accordingly, Ms. Prickett is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Prickett must meet all other eligibility requirements. The employer's account shall not be charged.

Even if the evidence had established a discharge, the evidence would also have established misconduct in connection with the employment based on excessive unexcused absences.

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 would have 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 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.

The weight of the evidence in the record establishes three consecutive unexcused absences on June 6, 7 and 8, 2018. The weight of the evidence establishes that none of the three absences was due to illness. The first two were properly reported. The final absence was not properly reported. Three consecutive unexcused absences would constitute excessive unexcused absences and misconduct in connection with the employment. However, the evidence would also have established that each of the 2018 absences through June 5, 2018 were excused absences under the applicable law.

DECISION:

The June 29, 2018, reference 01, decision is modified as follows. The claimant voluntarily quit the employment effective June 8, 2018 without good cause attributable to the employer. In the alternative, the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences. The claimant is disqualified for 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

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