IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

THOMAS D CLEMONS
Claimant

SDH SERVICES WEST LLC
Employer

APPEAL NO. 16A-UI-08849-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/17/16
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 August 3, 2016, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant had been discharged on July 13, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on August 31, 2016. Claimant Thomas Clemons participated personally and was represented by attorney Laura Jontz. Jon Broughton represented the employer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One through Five and Seven through 15 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: SDH Services West, L.L.C., d/b/a Sedexo, operates a restaurant and cafeteria located inside a Principal facility in Des Moines. Jon Broughton is the Sedexo General Manager for the Principal location. Thomas Clemons was employed by Sedexo as a full-time cashier/barista from February 2016 until July 13, 2016. Mr. Broughton was Mr. Clemons' immediate supervisor.

Mr. Clemons' work hours were 6:00 a.m. to 2:00 p.m., Monday through Friday. The employer utilizes a time clock and Mr. Clemons was required to use the time clock to clock in and out. The employer had provided Mr. Clemons with a credit card shaped badge that Mr. Clemons was to swipe through a slot in the time clock to clock in or out. The employer considered employees on time for work is they clocked in anytime between seven minutes before the scheduled start of the shift and seven minutes after the scheduled start of the shift. At eight minutes after the shift, the time clock would lock the employee out and the employee would have to document the arrival time on a manual exception log next to the time clock.

If Mr. Clemons needed to be absent or late, the employer expected that he notify the employer as soon as possible. While the employer preferred that the notice be provided at least two hours prior to the scheduled start of the shift, the employer did not enforce a two-hour notice requirement.

On July 13, 2016 Debra Benfield, Employee Relations Manager, discharged Mr. Clemons for attendance and for alleged time keeping fraud. Ms. Benfield acted upon the recommendation of Mr. Broughton. Mr. Broughton notified Mr. Clemons of the discharge.

The final incident that triggered the discharge occurred on July 13, 2016. On that morning, Mr. Broughton was waiting near the time clock at 6:00 a.m. Mr. Broughton was waiting for Mr. Clemons so that he could speak with Mr. Clemons regarding paperwork the employer needed in regard to Mr. Clemons' request for accommodations in the employment. Mr. Clemons had requested accommodations in the employment due to a chronic, sometimes debilitating, medical condition. Mr. Broughton remained near the time clock until about 6:10 a.m. and then briefly stepped away to see whether Mr. Clemons was somewhere else in the workplace. At 6:10 a.m., Mr. Broughton encountered Mr. Clemons who was at his work station just beginning his morning set up process. Mr. Broughton asked Mr. Clemons whether Mr. Clemons was just then arriving for work. Mr. Clemons said he had just arrived and apologized for being late. Immediately after Mr. Broughton spoke with Mr. Clemons, Mr. Broughton reviewed the manual exception log and saw that Mr. Clemons had documented his arrival time as 6:03 a.m. Mr. Broughton knew that Mr. Clemons had not been in the vicinity of the time clock or the manual exception log at 6:03 a.m. to make the entry in the manual exception log at that time. Mr. Broughton concluded that Mr. Clemons had intentionally misrepresented his arrival time that morning so as not to be counted as late.

When Mr. Clemons had applied for employment with Sedexo, he had not referenced any restrictions on his work availability and had indicated that he would be available to work his scheduled shifts. In March 2016, Mr. Clemons began to be absent from portions of some of his shifts and began to accrue attendance points under the employer's attendance policy. After accruing some attendance points, Mr. Clemons asked Mr. Broughton whether he would qualify for leave under the Family and Medical Leave Act (FMLA). Mr. Broughton told Mr. Clemons that he likely would not qualify for FMLA because he had just started with the company. After some additional absences, Mr. Broughton spoke to the employer's human resources staff about Mr. Clemons' situation. The human resources staff advised that Mr. Clemons might qualify for a workplace accommodation under the Americans with Disabilities Act (ADA). Mr. Clemons' doctor provided a medical note indicating that Mr. Clemons might not be able to attend work at times due to his medical condition.

On March 2, Mr. Clemons left work early due to illness and provided proper notice to the employer. Mr. Clemons was too ill to drive himself home and had to call his partner to come pick him up. Mr. Clemons sought medical treatment that day. Mr. Clemons updated

Mr. Broughton that afternoon and gave notice that he would be absent the next day due to illness. Mr. Clemons was then absent on March 3, 2016 with proper notice to the employer.

On March 18, Mr. Clemons arrived at 6:15 a.m. without providing notice to the employer that he would be late.

On April 19, Mr. Clemons arrived at 6:10 a.m. without providing notice to the employer that he would be late.

On April 29, Mr. Clemons left work early due to illness and properly notified the employer.

On May 19, Mr. Clemons arrived at 6:48 a.m. without providing notice to the employer that he would be late.

On May 24, Mr. Clemons arrived at 6:30 a.m. without providing notice to the employer that he would be late.

On June 9, Mr. Clemons left work early due to illness and properly notified the employer.

On June 22, Mr. Clemons arrived at 6:09 a.m. without giving notice to the employer that he would be late.

On June 27, Mr. Clemons left work early due to illness and provided proper notice to the employer.

On June 30, Mr. Clemons was late for work because he overslept.

On July 6, Mr. Clemons left work early due to illness and provided proper notice to the employer.

The final incident that triggered the discharge followed a week later.

The employer's decision to discharge Mr. Clemons from the employment followed multiple written reprimands for attendance. The employer issued a written coaching on April 6, 2016, when Mr. Clemons had accrued three attendance points. In that reprimand, Mr. Broughton included the following:

> Thomas, I must make it clear to you that your job requires regular attendance and punctuality. Per Attendance and Lateness Policy that you signed at your orientation, you are expected to be here on time for every shift. If you are unable to do so for some reason, it is my expectation that you will call in at least 1 hour prior to the start of your shift so that we can arrange for coverage. If you must leave a voicemail, you are expected to call back until you speak with a manager live.
>
> I want to clarify that calling prior to the start of your shift does not alleviate the expectation that you attend work regularly; it simply allows us to make a decision pertaining to staffing the unit for the shift.
>
> I have provided you with another copy of the Attendance and Lateness Policy today, and expect that you will let me know right away if you have any questions or concerns about it.

In the reprimand Mr. Broughton warned Mr. Clemons that he would face termination of the employment if he accrued seven attendance points in a 12-month period. Mr. Broughton issued additional reprimands prior to discharging Mr. Clemons from the employment.

Mr. Clemons established a claim for unemployment insurance benefits that was effective July 17, 2016. Mr. Clemons received $656.00 in benefits for the four-week period of July 17, 2016 through August 13, 2016.

On August 2, 2016, a Workforce Development claims deputy held a fact-finding interview to address Mr. Clemons' separation from the employment. A representative of Equifax/Talx represented SDH Services West at the fact-finding interview and provided and summary oral statement to the claims deputy. The representative stated that Mr. Clemons had been discharged for attendance, that Mr. Clemons had arrived late on July 13, 2016, that Mr. Clemons' had already exceeded the allowable number of attendance points, and that Mr. Clemons misrepresented his arrival time when it documented it on July 13, 2016. In addition, Equifax submitted documentation of Mr. Clemons' absences and reprimands for attendance.

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.

The weight of the evidence establishes excessive unexcused absences. The weight of the evidence in the record supports the employer's assertion that Mr. Clemons arrived late for work on July 13, 2016 and intentionally misrepresented his time of arrival in the manual exception log. Mr. Broughton was standing at the time clock until about 6:10 a.m. and would have seen Mr. Clemons if Mr. Clemons had approached the time clock at his purported 6:03 arrival time. Mr. Clemons had been unable to use his badge to clock in, which suggests and arrival at 6:08 a.m. or later at a time when the time keeping system would have locked out his badge. When Mr. Broughton encountered Mr. Clemons at 6:10 a.m., Mr. Clemons conceded he had just arrived. In addition, Mr. Clemons was just getting started with his morning set-up. Mr. Clemons had given no notice to the employer that he would be late for work. The late

arrival on July13 was an unexcused absence under the applicable law. Mr. Clemons' dishonest documentation of his time of arrival is an aggravating factor. The evidence establishes additional instances of unexcused tardiness on March 18, April 19, May 19, May 24, June 22, and June 30, 2016. In each instance, Mr. Clemons failed to give the employer any notice that he would be late. Mr. Clemons had the ability to provide notice to the employer that he would be late for work. Mr. Clemons' repeated instances of unexcused tardiness occurred on the contact of multiple reprimands for attendance. The ongoing discussion regarding workplace accommodations did not excuse Mr. Clemons from his obligation to give notice to the employer when he needed to be late.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Clemons was discharged for misconduct. Accordingly, Mr. Clemons is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Clemons must meet all other eligibility requirements.

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.

Iowa Administrative Code rule 817 IAC24.10(1) defines employer participation in fact-finding interviews as follows:

> Employer and employer representative participation in fact-finding interviews.
> 24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

Mr. Clemons received benefits but has been denied benefits as a result of this decision. Accordingly, the $656.00 in benefits disbursed to Mr. Clemons for the four-week period of July 17, 2016 through August 13, 2016 constitutes an overpayment of benefits The employer's participation in the fact-finding interview through the Equifax representative and through presentation of exhibits documenting Mr. Clemons' attendance and reprimands satisfied the participation requirement. Because the employer participated in the fact-finding interview within the meaning of the law, Mr. Clemons is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid to Mr. Clemons.

DECISION:

The August 3, 2016, reference 01, decision is reversed. The claimant was discharged for misconduct in connection with the employment based on excessive unexcused tardiness. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance. The claimant must meet all other eligibility requirements. The claimant was overpaid $656.00 in benefits for the four-week period of July 17, 2016 through August 13, 2016. The claimant must repay the benefits. The employer's account is relieved of liability 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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