IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JAMES A SIMON
Claimant

ADVANCE STORES COMPANY INC
Employer

APPEAL NO. 13A-UI-04061-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/10/13
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 28, 2013, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 8, 2013. Valerie Hefel, Staffing Consultant, represented the employer. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Exhibit One was received into evidence.

ISSUE:

Whether the claimant separated from the employer for a reason that disqualifies him for unemployment insurance benefits. The administrative law judge concludes that the claimant was discharged on February 22, 2013 for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Advance Stores Company, Inc., is a temporary employment agency. James Simon commenced getting work through the employer in January 2012 and last performed work in a full-time, temp-to-hire work assignment at AY McDonald, a foundry. The work hours were 5:00 a.m. to 3:30 p.m., Monday through Friday, with mandatory overtime as needed. On February 19, 2013, Mr. Simon notified the client business that he would be late. Mr. Simon then did not appear for any part of the shift. Mr. Simon then was absent on February 20 and 21 without notifying the employer or the client business. On February 22, AY McDonald notified Advance Stores Company that they were ending the assignment due to attendance. On February 22, an Advance Stores Company representative notified Mr. Simon of his discharge from the assignment. At that time Mr. Simon said he did not know he had to appear for work every day. There was no basis for that assertion.

If Mr. Simon needed to be absent or late from work, Advance Stores Company's attendance policy required that Mr. Simon contact the client business and Advance Stores Company prior to the scheduled start of the shift. These requirements were set forth in the handbook the employer provided to Mr. Simon at the start of the employment relationship.

During 2013, Mr. Simon had additional absences from the assignment at AY McDonald. Mr. Simon was absent due to illness on January 17 and 26. Mr. Simon reported those absences to the client business, but did not make contact with Advance Stores Company. On February 4, 8 and 9, Mr. Simon was absent for personal reasons. Mr. Simon reported those absences to the client business, but did not make contact with Advance Stores Company.

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. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 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 871 IAC 24.25.

The evidence in the record establishes that Mr. Simon was discharged for attendance on February 22, 2013.

Iowa Code section 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.

871 IAC 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.

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).

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 evidence in the record establishes eight unexcused absences in 2013 alone. For each absence, Mr. Simon failed to notify his employer, Advance Stores Company, of the absence. Only two of the absences were due to illness and neither of those was properly reported to Advance Stores Company. The rest of the absences were for personal reasons. The final two absences were no-call/no-show absences. Mr. Simon was discharged for misconduct on February 22, 2013. Mr. Simon is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Simon for the period on or after February 22, 2013.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's March 28, 2013, reference 02, decision is reversed. The claimant was discharged on February 22, 2013 for misconduct. 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, provided he meets all other eligibility requirements. The employer's account will not be charged for benefits paid to the claimant for the period on or after February 22, 2013.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css