IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

TAMATHA S HOOKER
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL NO. 18A-UI-02915-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/21/18
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 February 23, 2018, reference 04, 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 the Benefits Bureau deputy's conclusion that the claimant was discharged on January 17, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on March 29, 2018. Claimant Tamatha Hooker did not respond to the hearing notice instructions to register a telephone number for the appeal hearing and did not participate. Amber Inghram represented the employer and presented additional testimony through Shannon Housman and Stephanie Rawles. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 5 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: Tamatha Hooker was employed by the Casey's Marketing Company as a full-time pizza maker at the Casey's store in Mediapolis from October 2017 until January 19, 2018, when Amber Inghram, Store Manager, discharged her from the employment for attendance. Ms. Hooker's regular

work hours were 9:00 a.m. to 4:00 p.m., Monday through Thursday, and 8:00 a.m. to 4:00 p.m. on Friday. Shannon Housman, Food Service Leader, was Ms. Hooker's immediate supervisor. Ms. Housman reports to Ms. Inghram.

The employer has a written attendance policy that is set forth in an employee handbook. At the start of the employment, the employer had Ms. Hooker sign to acknowledge the handbook. The employer makes the employee handbook available to employees through an online ADP software application and also maintains a hardcopy of the handbook at the store. The written attendance policy required that Ms. Hooker notify her "Immediate Manager/Supervisor as far in advance as possible" if she needed to be absent or late for a shift. At the start of the employment, Ms. Inghram told Ms. Hooker that she expected notice at least two hours prior to the scheduled start of the shift so that she would have time to find a replacement worker. Ms. Hooker was familiar with the absence reporting policy.

The final absence that triggered the discharge occurred on January 17, 2018, when Ms. Hooker was absence from a mandatory food safety meeting that was set for 8:00 a.m. to noon in Morning Sun. Morning Sun is 10 miles from Mediapolis. Ms. Inghram had posted notice of the mandatory meeting one and half months in advance. Ms. Hooker was aware from the time of the posting that she was expected to appear for the meeting. At 7:00 a.m., Ms. Hooker called the Mediapolis store and spoke with Ms. Housman. Ms. Hooker told Ms. Housman that she would be late for the meeting because she and her children were sick. Though Ms. Hooker did not sound ill at the time of the call, Ms. Housman believed Ms. Hooker's assertion that she and her minor children were ill. Ms. Hooker did not appear for the meeting and did not give notice that she would be absent from the entire meeting, rather than just arriving late. After the meeting concluded, Ms. Inghram attempted to call Ms. Hooker at Ms. Hooker's cell phone number. When Ms. Hooker did not answer, Ms. Inghram left a message indicating that Ms. Hooker needed to contact her as soon as possible. Ms. Inghram had decided to discharge Ms. Hooker from the employment based on the January 17 absence and prior attendance issues. Ms. Hooker was next scheduled to work on January 19, 2018. Prior to the shift, Ms. Hooker sent Ms. Inghram a text message in which she asked whether she needed to turn in her uniforms. Though it is Ms. Inghram's practice not to respond to employee text messages, she sent Ms. Hooker a one-word response, "Yes." A few days later, Ms. Hooker returned her uniforms to the workplace at a time when she knew Ms. Inghram would not be present.

Ms. Inghram considered several prior absences in making the decision to end Ms. Hooker's employment. On October 21, 2017, Ms. Hooker was scheduled to open the store at 4:45 a.m. and to work until 2:00 p.m. Ms. Hooker overslept and did not appear until 10:00 a.m. On December 4 and 11, Ms. Hooker was absent due to the need to care for her sick minor child and provided proper notice of the absence. On December 22, Ms. Hooker called Ms. Housman right before her 9:00 a.m. scheduled start time and stated that she would be absent due to a flat tire. Ms. Hooker lived three blocks from the Mediapolis Casey's store. On December 24, Ms. Hooker's mother notified Ms. Housman that Ms. Hooker could not come to work because she had the flu. The employer's policy required that Ms. Hooker personally notify the employer of her need to be absent. On December 26, Ms. Hooker was 45 minutes late for her 9:00 a.m. shift without notice to the employer. When she arrived, Ms. Hooker told Ms. Inghram that she was late because she needed to get her children to daycare. On December 28, Ms. Inghram was late for work without notice to the employer and asserted upon her arrival that she was late due to a flat tire.

Ms. Hooker's absences occurred in the context of repeated reprimands for attendance. On October 23, 2017, Ms. Inghram issued a written reprimand to Ms. Hooker following the October 21 absence. Following the December 11 absence, Ms. Inghram planned to issue a

written reprimand to Ms. Hooker at the start of her next shift, but elected, in light of Ms. Hooker's emotional state, to issue a verbal warning instead. On December 27, Ms. Inghram issued a written reprimand to Ms. Hooker following absences on December 22 and 24. On January 4, 2018, Ms. Inghram issued a final written warning to Ms. Hooker and warned Ms. Hooker that her employment would be terminated if the absences continued.

Ms. Hooker established a claim for unemployment insurance benefits that was effective January 21, 2018. Ms. Hooker has received $1,698.00 in benefits for the six-week period of January 21, 2018 through March 3, 2018. According to Workforce Development records, Casey's is not a base period employer for purposes of the claim year that began for Ms. Hooker on January 21, 2018. Accordingly, Casey's has not been charged for the benefits paid to Ms. Hooker.

On February 22, 2018, a Workforce Development Benefits Bureau deputy held a fact-finding interview to address Ms. Hooker's separation from Casey's. Stephanie Rawles of Equifax represented Casey's at the fact-finding interview. Ms. Rawles provided an oral statement to the deputy and submitted substantial documentation concerning the absences, reprimands and discharge.

REASONING AND CONCLUSIONS OF LAW:

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.
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> 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 evidence in the record establishes a discharge for excessive unexcused absences. The final absence was an unexcused absence because Ms. Hooker never notified the employer that she would be absent from the entire four-hour training session. Instead, Ms. Hooker only advised that she would be late due to illness in her family. The evidence establishes additional unexcused absences on October 21, December 22, 24, 26 and 28. Oversleeping would not provide a reasonable basis for being late for work. Given how close Ms. Hooker lived to the Casey's store a reasonable person would not expect a flat tire to have any impact on her ability to appear for work on time. Ms. Hooker was well aware that the employer's policy required that she personally notify the employer of her need to be absent. On December 24, Christmas Eve,

Ms. Hooker elected to have her mother give notice of Ms. Hooker's need to be absent. The evidence fails to establish that Ms. Hooker was incapable of personally providing proper notice of her need to be absent. Ms. Hooker's need to get her children to daycare would not provide a reasonable basis for being late for a 9:00 a.m. shift. The excessive unexcused absences occurred in the context of repeated reprimands, including a final reprimand wherein Ms. Inghram told Ms. Hooker point-blank that she would be discharged if she was again absent.

Because Ms. Hooker's excessive unexcused absences constituted misconduct in connection with the employment, Ms. Hooker 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. Hooker 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 a base period 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) and (b).

Ms. Hooker received benefits, but has been denied benefits as a result of this decision. Accordingly, the $1,698.00 in benefits that Ms. Hooker received for the six-week period of January 21, 2018 through March 3, 2018 constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Hooker is required to repay the overpaid benefits. Because Casey's is not a base period employer, Casey's account has not been assessed for benefits in connection with the claim. Based on the disqualifying discharge, Casey's account will not be charged.

DECISION:

The February 23, 2018, reference 04, decision is reversed. The claimant was discharged for misconduct in connection with the employment. The discharge occurred on January 19, 2018 rather than on January 17, 2018. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance. The claimant must meet all other eligibility requirements. The claimant is overpaid $1,698.00 in benefits for the six-week period of January 21, 2018 through March 3, 2018. The claimant must repay the overpaid benefits. 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

jet/rvs