IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

TIMOTHY D SLETTEN
Claimant

IA VETERANS HOME – MARSHALLTOWN
Employer

APPEAL NO. 19A-UI-00045-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/02/18
Claimant: Appellant (4)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Timothy Sletten filed a timely appeal from the December 31, 2018, reference 01, decision that held he was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Mr. Sletten voluntarily quit on November 16, 2018 without good cause attributable to the employer and due to a non-work related illness or injury. After due notice was issued, a hearing was held on January 17, 2019. Mr. Sletten participated. Trenton Kilkpatrick of Corporate Cost Control represented the employer and presented testimony through Melissa Sienknecht. Exhibits 1 through 4 were received into evidence. The administrative law judge took official notice of the Agency's administrative record of the claimant's weekly claims (KCCO).

ISSUES:

Whether Mr. Sletten voluntarily quit the employment without good cause attributable to the employer.

Whether Mr. Sletten was discharged for misconduct in connection with the employment.

Whether Mr. Sletten has been able to work and available for work within the meaning of the law since he established the original claim for benefits that was effective December 2, 2018.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Timothy Sletten was employed by the Iowa Veterans' Home as a Resident Treatment Worker (nursing assistant). Mr. Sletten began the employment in 2015 and last performed work for the employer on July 27, 2018. In early 2018, Mr. Sletten became a full-time student and requested to transition from full-time to part-time employment. The employer acquiesced in the change to part-time status. Mr. Sletten thereafter worked five 2:00 p.m. to 10:30 p.m. shifts during each two-week period until he went off work at the end of July 2018. After Mr. Sletten worked on July 27, 2018, he was next scheduled to work on July 30, 2018. On July 30 and 31, 2018, Mr. Sletten was absent due to illness and properly reported his absences pursuant to the

employer's requirement that he give notice two hours prior to the scheduled start of his shift. Mr. Sletten was next scheduled to work at 2:00 p.m. on August 4, 2018. On the morning of August 4, 2018, Mr. Sletten was working on a roof, fell off the roof, and injured his tailbone. Mr. Sletten was treated at an emergency room for the coccyx injury. The treating physician took Mr. Sletten off work for that day and released Mr. Sletten to return to work the next day. Mr. Sletten properly reported his need to be absent on August 4 to the employer and provided the employer with a medical excuse. Mr. Sletten was next scheduled to work at 2:00 p.m. on August 5, 2018.

On August 5, 2018, Mr. Sletten was working on a ladder, fell off the ladder, suffered serious injury to his neck. Mr. Sletten was life-flighted to a hospital, where he was diagnosed with a fractured spine at the C1 and C2 vertebrae. In other words, Mr. Sletten had suffered a broken neck. Mr. Sletten's mother or another family member notified the employer of Mr. Sletten's injury and hospitalization. Mr. Sletten remained in the hospital until August 7, 2018. Prior to Mr. Sletten's discharge from the hospital, the treating physician advised Mr. Sletten that it would likely take eight to 12 weeks for his vertebrae to heal and that the initial recovery would be followed by six weeks of physical therapy.

The employer utilizes a third-party leave administrator, Reed Group. Upon Mr. Sletten's discharge from the hospital, Mr. Sletten contacted the employer and was directed to contact the Reed group regarding his need to continue off work. Mr. Sletten submitted an appropriate application to Reed Group for medical leave under the Family and Medical Leave Act (FMLA). Reed Group approved Mr. Sletten for 12 weeks of FMLA leave. The FMLA leave period would expire on October 28, 2018. During the FMLA leave period, Mr. Sletten maintained appropriate contact with the employer. On August 15, 2018, Mr. Sletten notified the employer that he would need to be off work at least through October 6, 2018, that new x-rays would be taken at that time, and he would be in contact regarding whether he could return to work on October 7, 2018. Mr. Sletten was not released to return to work on October 7, 2018.

On October 23, 2018, Melissa Sienknecht, Human Resources Director, met with Mr. Sletten to discuss the impending exhaustion of the 12-week FMLA leave period. Mr. Sletten brought to that meeting a medical note from his treating physician. That note indicated that the leave period should be extended through November 15, 2018, the date of Mr. Sletten's next follow-up medical appointment. Mr. Sletten prepared a written requested to extend the leave period through November 15, 2018. On that same day, Timon Oujiri, Iowa Veterans Home Commandant, approved extension of the unpaid leave of absence through November 15, 2018.

Mr. Sletten's doctor did not release Mr. Sletten to return to work at the time of the November 15, 2018 medical appointment. Instead, the doctor indicated that Mr. Sletten could now start the physical therapy and would need to remain off work until his next follow-up appointment on November 29, 2018. On November 16, 2018, Ms. Sienknecht met with Mr. Sletten regarding his doctor's decision to extend his time off through November 29, 2018. Mr. Sletten brought to the appointment a medical document supporting extension of the leave period. Mr. Sletten drafted a request to extend the leave period through November 29, 2018. Mr. Sletten set forth in the leave request that he hoped to be released to return to his full duties on November 29, 2018 and hoped to transition from part-time to full-time employment at the Veterans' Home. At the meeting, Ms. Sienknecht told Mr. Sletten that the employer needed to fill his position. On November `16, Commandant Oujiri denied extension of the unpaid leave of absence. On that same day, Ms. Sienknecht notified Mr. Sletten that the request for a second extension of the leave was denied and that the employer was ending the employment. On November 19, 2018, Ms. Sienknecht sent Mr. Sletten a letter that included the following: "Per our conversation on

November 16, 2018, you are being removed from payroll effective immediately." At no point had Mr. Sletten expressed an intention to sever the employment relationship.

Mr. Sletten's doctor released him to return to work effective December 3, 2018. On December 10, 2018, Mr. Sletten submitted an application for employment at the Veterans' Home. When Mr. Sletten received no response to his application, he contacted the employer on December 21, 2018. At that time, Mr. Sletten learned that the employer had documented his separation as a discharge and that he would be ineligible for re-employment until six months following his separation from the employment.

Mr. Sletten established an original claim for unemployment insurance benefits that was effective December 2, 2018. The Iowa Veterans' Home is the sole base period employer in connection with the claim. At the time of the January 17, 2019 appeal hearing, Mr. Sletten had made weekly claims for four benefit weeks. Those benefit weeks are the weeks that ended December 8, December 15 and December 29, 2018 and the benefit week that ended January 5, 2019. For each of these weeks, Mr. Sletten reported making two employer job contacts. Mr. Sletten did not make a weekly claim for the benefit week that ended December 22, 2018. During each of weeks for which Mr. Sletten filed a claim for benefits, Mr. Sletten applied for work with two prospective employers.

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.
> 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.
> 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 facts in evidence in this matter are remarkably similar to the facts in the *Prairie Ridge* case. Like Ms. Jackson, Mr. Sletten was injured in a non-work related accident. As in the *Prairie Ridge* case, the Veterans' Home, through Reed Group, approved an initial period of leave. As in *Prairie Ridge*, the Veterans' Home approved a single extension of the leave, but then declined to approve another extension despite the fact that Mr. Sletten had not yet been released to return to work and despite his genuine desire to return to the employment. The ruling in *Prairie Ridge* governs the outcome if this case. As referenced above, the question for the administrative law judge is not whether the employer was within its right to end the employment. Instead, the question is whether Mr. Sletten separated from the employment for reason that disqualifies him for unemployment insurance benefits. Based on the ruling in the *Prairie Ridge* case, the administrative law judge concludes that Mr. Sletten did not voluntarily quit but was instead 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:
>
> 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 weight of the evidence in the record establishes that all of the absences that factored in the separation were due to injury and were appropriately reported to the employer. Accordingly, the discharge was not based on unexcused absences or other misconduct in connection with the employment and cannot serve as a basis for disqualifying Mr. Sletten for unemployment insurance benefits. Based on the discharge, Mr. Sletten is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

Iowa Code section 96.4(3) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> (1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.22(2) provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> (2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Administrative Code rule 871-24.2.(1)(g) provides as follows:

> (g). No continued claim for benefits shall be allowed until the individual claiming benefits has completed a continued claim or claimed benefits as otherwise directed by the department.
>
> (1) The weekly continued claim shall be transmitted not earlier than 8 a.m . on the Sunday following the Saturday of the weekly reporting period and, unless reasonable cause can be shown for the delay, not later than close of business on Friday following the weekly reporting period.

The weight of the evidence establishes that Mr. Sletten had been physically able to perform full-time work since December 3, 2018. Because the involuntary separation from the employment preceded the claim for benefits, Mr. Sletten is not obligated to demonstrate the ability to perform the same type of work he performed at the Veterans Home. The evidence establishes that Mr. Sletten is able to perform many types of work one would expect to find in the Marshalltown labor market. In addition, the evidence establishes that Mr. Sletten had been engaged in an active and earnest search for new employment since he established his claim for benefits. Based on the able and available determination, Mr. Sletten is eligible for benefits effective December 2, 2018, provided he meets all other eligibility requirements, with the exception of one week. Because Mr. Sletten did not file a claim for benefits for the week that ended December 22, 2018, he did not meet the availability requirement for that week and is not eligible for benefits for that week.

DECISION:

The December 31, 2018, reference 01, decision is modified as follows. The claimant was discharged on November 16, 2018 for no disqualifying reason. Based on the discharge, the claimant is eligible for benefits, provided he meets all other eligibility requirements and the employer's account may be charged for benefits. The claimant has been able to work since he established his original claim for benefits. With the exception of the benefit week that ended December 22, 2018, the claimant has been available for work within the meaning of the law. Based on the able and available determination, the claimant is eligible for benefits effective December 2, 2018, provided he meets all other eligibility requirements, with the exception of the benefit week ended December 22, 2018. The claimant did not file a weekly claim for the week that ended December 22, 2018 and, therefore did not meet the availability requirement for that week and is not eligible for benefits for that week.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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