

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HOWARD E ZEIGLER
Claimant

APPEAL NO. 15A-UI-12722-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 10/18/15
Claimant: Respondent (2/R)

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 November 9, 2015, 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 August 7, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on December 4, 2015. Claimant Howard Zeigler did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Sabrina Bentler of Corporate Cost Control represented the employer and presented testimony through Roxanne Nowicki and Chad Mast. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Thirteen into evidence.

The materials from the November 5, 2015 fact-finding had not been scanned into the Agency's computer system by the time of the December 4, 2015 appeal hearing.

ISSUES:

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

Whether the claimant has been overpaid benefits.

Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Howard Zeigler was employed by Hy-Vee as a part-time grill cook from April 2015 until August 11, 2015; when Roxanne Nowicki, Human Resources Manager, discharged him for attendance. The employer has a written absence reporting policy that the employer provided to Mr. Zeigler at the start of his employment. If Mr. Zeigler needed to be absent from work, the policy required that he telephone and speak with a department manager or human resource

manager at least three hours prior to the scheduled start of his shift. Mr. Zeigler's usual work hours were 9:00 a.m. to 2:00 p.m., Monday through Friday. Aaron Beck, Kitchen Manager, was Mr. Zeigler's immediate supervisor.

The final absence that triggered the discharge occurred on August 10, 2015, when Mr. Zeigler was absent without notifying the employer. Mr. Zeigler was absent that day because he had been arrested and incarcerated on criminal charges. On the morning of August 11, 2015, Mr. Zeigler appeared at the workplace at 9:30 a.m. and provided Ms. Nowicki with a doctor's note that referenced his need to be absent for a medical appointment that same day. Mr. Zeigler indicated that the note was to cover his absence on August 10 as well. When Ms. Nowicki told Mr. Zeigler that the note would not cover his absence on August 10, and when Ms. Nowicki questioned Mr. Zeigler further regarding the basis for the August 10 absence, only then did Mr. Zeigler share that he had been absent on August 10 due to the incarceration.

In making the decision to discharge Mr. Zeigler from the employment, the employer considered several prior absences. Mr. Zeigler had been absent due to illness on May 29, June 29, June 30, July 1, July 13, and July 14. Mr. Zeigler had properly reported those absences to the employer. On May 10, Mr. Zeigler notified the employer ten minutes before the scheduled start of his shift that he would be absent. Mr. Zeigler had been tardy for personal reasons on April 21, April 23, May 1, May 8, and May 11. On May 11, 2015, Ms. Nowicki had met with Mr. Zeigler to discuss his attendance and told him that his employment was in jeopardy due to the attendance issues up to that point. Mr. Zeigler was then absent on June 22 and July 11 for personal reasons. On July 14, Ms. Nowicki met with Mr. Zeigler and told him that his next unexcused absence would result in discharge from the employment.

Mr. Zeigler established a claim for benefits that was effective October 18, 2015 and has received \$672 in benefits for the eight-week period of October 18, 2015 through December 12, 2015.

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 evidence in the record establishes excessive unexcused absences. These absences include the tardiness on April 21, April 23, May 1, May 8, and May 11. The evidence establishes an unexcused absence on May 10; when Mr. Zeigler failed to provide timely notice of his need to be absent. The evidence establishes unexcused absences on June 22 and July 11; when Mr. Zeigler was absent for personal reasons. The final absence, based on Mr. Zeigler's incarceration, was also an unexcused absence. The remaining absences were

due to illness, were properly reported, and therefore were excused absences under the applicable law. Mr. Zeigler's pattern of unexcused absences occurred in the context of progressive discipline regarding his attendance and included a specific warning that his employment was in jeopardy and that the next absence would result in discharge from the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Zeigler was discharged for misconduct. Accordingly, Mr. Zeigler 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 will not be charged for benefits paid to the claimant on or after the entry date of this decision.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied 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 will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

Because this decision disqualifies Mr. Zeigler for benefits, the \$672 in benefits that he received for the eight-week period of October 18, 2015 through December 12, 2015 constitutes an overpayment of benefits. Because the fact-finding materials were not available for the appeal hearing, the matter of deciding whether the overpaid benefits should be recovered from the claimant or charged to the employer under Iowa Code § 96.3-7-b is remanded to the Benefits Bureau.

DECISION:

The November 9, 2015, reference 01, decision is reversed. The claimant was discharged on October 11, 2015 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and 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 going forward. The claimant is overpaid \$672 in benefits for the eight-week period of October 18, 2015 through December 12, 2015.

This matter is remanded to the Benefits Bureau for determination of whether the overpaid benefits should be recovered from the claimant or charged to the employer under Iowa Code § 96.3-7-b.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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