IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

FELICITY K BRIGGS Claimant **INSIGHT PARTNERSHIP GROUP LLC** Employer	**APPEAL NO. 19A-UI-07838-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/15/19** **Claimant: Respondent (2)**

Iowa Code Section 96.5(1) – Voluntary Quit
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 October 3, 2019, reference 02, 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 deputy's conclusion that the claimant was discharged on August 28, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on October 28, 2019. Claimant Felicity Briggs did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Amanda Cosgrove represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of documenting the employer's participation in the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment.

Whether the claimant voluntary quit the employment without good cause attributable to the employer.

Whether the claimant has been overpaid benefits.

Whether the claimant must repay 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: Felicity Briggs was employed by Insight Partnership Group, L.L.C. as a full-time Life Skills Specialist. The work involved assisting adults with disabilities in activities of daily living and maximizing

independence. Ms. Briggs primarily performed the work in clients' homes. Ms. Briggs began the employment on June 10, 2019 and last performed work for the employer on August 28, 2019. Nina Williamson, Service Coordinator, was Ms. Briggs' immediate supervisor. Ms. Williamson reported to Gabby Malendez, Program Director for Wapello County. The employer prepared the work schedule a week or two in advance and would either hand a copy to Ms. Briggs or place a copy in her employee mailbox.

After Ms. Briggs completed her shift on August 28, 2019, she began an approved unpaid absence for the period of August 29, 2019 through September 2, 2019. On June 29, 2019, Ms. Briggs had submitted a written request for the time off. On July 8, 2019, the employer had approved in writing the written request.

Ms. Briggs did not appear for any additional shifts following her approved period of time off. Ms. Briggs was scheduled to return to work on September 3, 2019 for a 7:00 a.m. to 3:00 p.m. shift, but did not report for the shift. If Ms. Briggs needed to be absent for a scheduled shift, the employer's written attendance policy required that she give notice as soon as she knew she needed to be absent and to find her own replacement. The policy was set forth in the employee handbook the employer provided to Ms. Briggs at the start of her employment. When Ms. Briggs did not report for the start of the shift on September 3, Ms. Williamson called and spoke with Ms. Briggs. Ms. Briggs stated that she was out of the state. Ms. Briggs erroneously asserted that her time off was approved through September 3, 2019. The written request and approval clearly stated that absence was approved only through September 2. A few hours after Ms. Williamson spoke to Ms. Briggs, Ms. Malendez called and spoke with Ms. Briggs. Ms. Malendez asked Ms. Briggs whether she planned to report for her September 3 shift. Ms. Briggs asserted that she would not make it to work for her shift because she was caught in a storm. Ms. Malendez then asked Ms. Briggs whether she would be reporting for her 7:00 a.m. to 7:00 p.m. shift on September 4 and Ms. Briggs stated she would appear for the shift. Ms. Briggs was then a no-call/no-show for her shift on September 4, 2019. The employer's staff made multiple attempts to reach Ms. Briggs by telephone, but Ms. Briggs did not answer.

On September 4, 2019, Ms. Malendez documented the events of September 3 and 4. Ms. Malendez's documentation included the following: "Based on Felicity's inability to show up to two consecutive shifts she has abandonded [sic] her position with Insight Partnership and I would not reocmmend [sic] rehiring her based on this. In other words, Ms. Malendez determined on September 4, 2019 that the employment was done. The employer did not immediately communicate that determination to Ms. Briggs. The documentation concluded with a note indicating that the documentation would be forwarded to the employer's human resources personnel in Mount Pleasant.

On September 5, 2019, Ms. Briggs called the employer at 6:07 a.m. regarding her need to be absent from a 7:00a.m. to 3:00 p.m. shift. Ms. Briggs asserted that she was sick and had been throwing up all night. Ms. Briggs asked for a coworker's number. At 6:19 a.m. the coworker called the employer to advise she could not work Ms. Briggs' September 5 shift. Ms. Briggs did not appear for the shift. The employer found another employee to cover the shift.

Though Ms. Briggs was still on the schedule to work September 6, 7 and 9, 2019, but was a no-call/no-show for each shift. On the afternoon of September 9, Ms. Briggs called the employer's office and spoke with Haley Rose, Office Assistant. Ms. Briggs asked Ms. Rose whether she was fired. Ms. Rose told Ms. Briggs that she was unaware of Ms. Briggs' employment status and that Ms. Briggs needed to report to the office to speak with management. Ms. Briggs did not make further contact with the employer and did not attempt to return to the employment.

Ms. Briggs established an original claim for benefits that was effective September 15, 2019 and received $236.00 in benefits for the two-weeks between September 29, 2019 and October 12, 2019. Insight Partnership Group, L.L.C., is not a base period employer for purposes of the claim year that began for Ms. Briggs on September 15, 2019 and therefore has not been charged for benefits paid to Ms. Briggs in connection with the claim.

On October 1, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Briggs' separation from the employment. Amanda Cosgrove, Human Resources Coordinator, represented the employer at the fact-finding interview.

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. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(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 Iowa Administrative Code rule 871-24.25.

Regardless of whether one concludes Ms. Briggs voluntarily quit or was discharged from the employment, the evidence in the record establishes a disqualifying separation from the employment. The administrative law judge will address each alternative.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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.

A claimant who was absent three consecutive days without notifying the employer is presumed to have voluntarily quit without good cause attributable to the employer. See Iowa Administrative Core rule 871-24.25(4).

The evidence in the record is sufficient to establish a voluntary quit without good cause attributable to the employer. The evidence in the record indicates that Ms. Briggs was a no-call/no-show on September 3, 4, 6, 7 and 9. On September 5, Ms. Briggs contacted the employer prior to the scheduled start of her shift and asserted she was ill. Based on the circumstances surrounding the September 5 absence, including the absences and contact that

preceded it and the absences and contact that came after, a reasonable person would not give much weight to Ms. Briggs' assertion that she was ill on September 5, 2019. When Ms. Briggs contacted the employer on the afternoon of September 9, she was not contacting the employer to give notice of her need to be absent from her shift for that day, but instead was inquiring whether the employer had made a decision to discharge her from the employment. Despite Ms. Malendez's September 4, 2019 documentation, the employer had never communicated to Ms. Briggs a decision to end her employment. This continued to be the case on September 9, when Ms. Rose advised Ms. Briggs that Ms. Briggs needed to speak with a member of management to get clarity on her job status. Ms. Briggs elected not to make further contact.

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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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 rule 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 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 Iowa Administrative Code Rule 871-24.32(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 Iowa Administrative Code Rule 871-24.32(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 is sufficient to establish a discharge for excessive unexcused absences. Ms. Briggs' no-call/no-show absences on September 3 and 4 were each unexcused absence under the applicable law. Give the brevity of the employment and the nature of the employment, those two absences were sufficient to establish excessive unexcused absences and misconduct in connection with the employment. Thus, if one elects to view the employment as done as of Ms. Malendez's September 4, 2019 documentation, there was disqualifying misconduct at that time. However, the evidence in the record establishes four more no-call/no-absences during a time when the employer had not communicated to Ms. Briggs that the employer deemed her to have abandoned the employment. Each of those additional no-call/no-show absences was an unexcused absence under the applicable law. Those additional absences alone were sufficient to establish excessive unexcused absences and disqualifying misconduct in connection with the employment.

Ms. Briggs is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Briggs 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 for 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 base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Briggs received $236.00 in benefits for the two-weeks between September 29, 2019 and October 12, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Briggs received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Briggs is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The October 3, 2019, reference 02, decision is reversed. The claimant voluntarily quit without good cause attributable to the employer. In the alternative, the claimant was discharged for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid $236.00 in benefits for the two weeks between September 29, 2019 and October 12, 2019. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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