IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TEDLANA J HALVERSON
Claimant

DOLLAR TREE STORES INC
Employer

APPEAL NO. 17A-UI-01869-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/22/17
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 8, 2017, reference 01, 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 claims deputy's conclusion that the claimant was discharged on October 22, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on March 13, 2017. Claimant Tedlana Halverson participated. John Carter represented the employer. The administrative law judge took official notice of the agency's administrative 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.

ISSUES:

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

Whether the claimant was overpaid unemployment benefits.

Whether the claimant is required to 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: Tedlana Halverson was employed by Dollar Tree Stores, Inc., as a part-time sales associate at a Dollar Tree store in Waterloo. John Carter was the Store Manager at all relevant times. Ms. Halverson began her employment in February 2016 and last performed work for the employer on October 18, 2016.

Ms. Halverson's separation from the employment occurred in the context of Ms. Halverson violating the terms of her probation after being convicted of a criminal offense. At the time Ms. Halverson began the employment at Dollar Tree, she was on probation and was court-

ordered to reside at Waterloo Women's Center for Change. The center is a residential facility operated by the First Judicial District Department of Correctional Services. Ms. Halverson asserts that the underlying conviction was for Public Intoxication Third Offense. At the time Ms. Halverson was convicted, the court sentenced her to a period in prison not to exceed two years, but suspended that prison sentence. In May 2016, Ms. Halverson was discharged from the residential facility and was at that point allowed to reside elsewhere while she continued under the supervision of the First Judicial District Department of Correctional Services. In July 2016, Ms. Halverson violated the terms of her probation and was required to return to the residential facility for a week. Ms. Halverson then continued on probation and was allowed to reside at her private residence. In October 2016, Ms. Halverson again violated the conditions of her probation. On October 17, 2016, Ms. Halverson was court-ordered to immediately return to the residential facility. Ms. Halverson did not comply with that directive.

After Ms. Halverson completed her shift at Dollar Tree on October 18, 2016, she was next scheduled to work on October 19 from 12:30 p.m. to 5:30 p.m. Ms. Halverson knew she was scheduled to work that shift. Ms. Halverson was absent from the shift without notifying the employer of her need to be absent. When Ms. Halverson began her employment, the employer reviewed with her the employer's written absence reporting policy. Under the policy, Ms. Halverson was required to call the manager on duty no later than two hours prior to the scheduled start of her shift.

After Ms. Halverson missed her shift on October 19, 2016, she was next scheduled to work on October 21, 2016 from 12:30 p.m. to 5:30 p.m. Ms. Halverson knew she was scheduled to work the shift. Ms. Halverson did not report for the shift and did not give notice that she would be absent from the shift. On October 21, 2016, a representative of the First Judicial District Department of Correctional Services contacted the Dollar Tree store during Ms. Halverson's scheduled working hours and asked whether Ms. Halverson was at the workplace. The representative of the First Judicial District Department of Correctional Services told Mr. Carter that Ms. Halverson was on "escape" status and asked Dollar Tree to notify the First Judicial District Department of Correctional Services if Ms. Halverson appeared at the workplace. Ms. Halverson did not appear at the workplace. Though Ms. Halverson asserts she turned herself in on the probation violation on the evening of October 20, the call to the workplace on October 21 from the First Judicial District Department of Correctional Services refutes that assertion.

When Ms. Halverson was a no-call/no-show for two consecutive shifts, Mr. Carter deemed Ms. Halverson to have voluntarily quit the employment and documented termination of the employment. Only the absences on October 19 and 21, factored in the employer's conclusion that the employment was done. The employer written attendance policy indicated that the employer would deem two consecutive no-call/no-show absences to indicate a voluntary quit.

Soon after Ms. Halverson missed her October 21 shift, she was incarcerated for violating the terms of her probation. The day after Ms. Halverson became incarcerated, she met with her probation officer and was at that time given the option of returning to the residential facility as a condition of her probation. Ms. Halverson elected not to return to the residential facility. Ms. Halverson elected instead to have her probation revoked and to serve the prison sentence that had earlier been suspended. Pursuant to the probation revocation proceedings, Ms. Halverson admitted that she had violated the terms of her probation. The court revoked Ms. Halverson's probation and sentenced her to serve the prison sentence. On January 11, 2017, Ms. Halverson was discharged from prison and discharged from the supervision of the First Judicial District Department of Correctional Services.

On January 11, 2017, Ms. Halverson contacted Dollar Tree and spoke with an assistant manager. Soon thereafter, Ms. Halverson spoke with Mr. Carter to request to return to the

employment. The employer advised Ms. Halverson that her employment had been terminated after the second no-call/no-show absence and that she had been placed on a do-not-hire list.

Ms. Halverson established a claim for unemployment insurance benefits that was effective January 22, 2017 and has received $798.00 in benefits for the six-week period of January 22, 2017 through March 4, 2017. Dollar Tree Stores, Inc. is one of Ms. Halverson's base period employers.

On February 7, 2017, a Workforce Development claims deputy held a fact-finding interview to address Ms. Halverson's separation from the Dollar Tree employment. John Carter represented the employer at the fact-finding interview. In addition, the employer presented for the fact-finding interview the same exhibits that were submitted for the appeal hearing and received into evidence at the appeal hearing as Exhibits 1 through 5.

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 employer's policy that deemed an employee to have voluntarily quit upon two consecutive no-call, no-show absences is inconsistent with Iowa Administrative Code rule 871-24.25(4), which deems *three* consecutive no-call/no-show absences to be sufficient to establish the presumption of a voluntary quit without good cause attributable to the employer. The employer terminated the employment after the second no-call/no-show absence and thereby discharged Ms. Halverson from the employment.

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.

Ms. Halverson's two consecutive no-call/no-show absences were sufficient to establish misconduct in connection with the employment. The weight of the evidence establishes that Ms. Halverson did not give any notice to the employer of her need to be absent from either shift and did not have a legitimate reason to be absent from either shift. The weight of the evidence

establishes that Ms. Halverson was not incarcerated at the time of either shift. If Ms. Halverson had been incarcerated at the time of the October 21 shift, there would have been no reason for her probation officer to contact the employer during the shift. The two consecutive no-call/no-show absences were sufficient to indicate an intentional and substantial disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Halverson was discharged for misconduct in connection with the employment. Accordingly, Ms. Halverson 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. Halverson 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 the 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).

The claimant received $798.00 in benefits for the six-week period of January 22, 2017 through March 4, 2017, but is disqualified for those benefits as a result of this decision. Accordingly, the benefits constitute an overpayment. Because the employer participated in the fact-finding interview, Ms. Halverson is required to repay the overpaid benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid to the claimant.

DECISION:

The February 8, 2017, reference 01, decision is reversed. The claimant was discharged for misconduct in connection with the employment effective October 22, 2016. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid $798.00 in benefits for the six-week period of January 22, 2017 through March 4, 2017. The claimant must repay the benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid to the claimant.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs