IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MALICK KOFFI
1876 SUNSET AVE
CINCINNATI OH 54238-3181

CARGILL MEAT SOLUTIONS CORP
C/O FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-3181

Appeal Number: 06A-UI-05234-JTT
OC: 04/16/06 R: 12
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Cargill Meat Solutions filed a timely appeal from the May 4, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 17, 2006. Claimant, Malick Koffi, participated with the assistance of French-English interpreter Antoinette Mueller. Assistant Human Resources Manager Katie Diercks represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Malick Koffi was employed by Cargill Meat Solutions as a full-time meat cutter from October 21, 2002 until April 12, 2006. While Mr. Koffi was at work on April 12, he received a call from his wife on his cell phone. Mr. Koffi's wife, who was pregnant, was ill and needed Mr. Koffi to take her to the hospital. Mr. Koffi notified his supervisor that he needed to leave to take his wife to the

hospital. The supervisor told Mr. Koffi that he first needed to find someone to cover his shift. Mr. Koffi indicated he was unable to do so. The supervisor told Mr. Koffi that if he left work, he would be discharged from the employment. Based on this comment from the supervisor, Mr. Koffi did not appear for subsequent shifts. On April 16, Mr. Koffi called and left a telephone number at which he could be reached if the employer wished to recall him to the employment. On April 26, the employer's human resources department documented a termination of Mr. Koffi's employment as a voluntary quit based on three days absence without notifying the employer in violation of the employer's "no-call/no-show" policy.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether Mr. Koffi quit the employment or was discharged.

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 has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. See 871 IAC 24.25. 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).

The greater weight of the evidence establishes that Mr. Koffi was discharged by a supervisor on April 12 and did not quit. The employer had the ability to present direct and satisfactory evidence in support of its allegation that Mr. Koffi quit the employer and failed to do so. Such direct and satisfactory evidence might have taken the form of testimony from a supervisor or some other member of management who had personal knowledge of and involvement with Mr. Koffi's employment. The employer representative who testified at the hearing had no personal knowledge of Mr. Koffi's employment. The employer presented insufficient evidence to rebut Mr. Koffi's testimony that he was discharged by a supervisor when he indicated he needed to leave on April 12. The available evidence indicates that a reasonable person in Mr. Koffi's circumstances would have concluded he had been discharged from the employment.

The next question is whether the evidence in the record establishes that Mr. Koffi was discharged for misconduct in connection with the employment. It does not.

Iowa Code section 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.

871 IAC 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 Department of Job Service, 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 Mr. Koffi's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *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).

The evidence in the record establishes that Mr. Koffi's absence on April 12 was an excused absence. The absence was based on Mr. Koffi's need to take his sick, pregnant wife to the hospital. Mr. Koffi notified the employer of the need to leave prior to leaving. Because the final absence was an excused absence, the evidence in the record fails to establish a current act of misconduct that might serve as a basis for disqualifying Mr. Koffi for unemployment insurance benefits. The administrative law judge notes that the evidence provided by the employer fell far short of meeting the employer's burden of proving either a quit or a discharge for misconduct. The employer presented no firsthand testimony whatsoever. The employer was unable to provide meaningful information regarding relevant contact Mr. Koffi had with the employer during the times at issue.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Koffi was discharged for no disqualifying reason. Accordingly, Mr. Koffi is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Koffi.

DECISION:

The Agency representative's May 4, 2006, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

jt/cs