IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TEMPLE M WRIGHT
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 11A-UI-07848-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/15/11
Claimant: Respondent (1)

Section 96.5(2)(a) - Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 6, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 11, 2011. Claimant Temple Wright participated. David Williams of TALX represented the employer and presented testimony through Rochelle Thompson, administrator, and Bonnie Provenzano, housekeeping and laundry supervisor.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Temple Wright was employed by Care Initiatives, doing business as Westridge, as a full-time housekeeper from October 2010 and last performed work for the employer on May 8, 2011. Ms. Wright's work hours were 6:00 a.m. to 2:00 p.m. Bonnie Provenzano, housekeeping supervisor, was Ms. Wright's immediate supervisor.

The employer's attendance policy required that Ms. Wright contact the employer two hours prior to start of her shift if she needed to be absent. The employer's attendance policy indicated that two no-call, no-show absences would be deemed a voluntary quit. The attendance policy was contained in the employee handbook Ms. Wright received in October 2011.

On May 9, 2011, Ms. Wright was absent because her child was ill. Ms. Wright contacted Ms. Provenzano at 4:30 a.m. and told her that her child was ill and that she would try to get a coworker to work for her. Ms. Wright made contact with the coworker she hoped would cover for her, but that coworker could not cover the shift. Shortly before 5:00 a.m., Ms. Wright called Ms. Provenzano back to let her know the coworker would not work for her. Ms. Provenzano told Ms. Wright that if she did not have anyone to cover for her shift, then she should not bother coming back, because she did not have a job. Ms. Provenzano then hung up on Ms. Wright.

Because Ms. Wright did not have anyone to cover her shift, she took Ms. Provenzano at her word and concluded she was discharged from the employment.

According to the schedule, Ms. Wright was next supposed to work May 10, 2011. Based on the May 9 conversation with Ms. Provenzano, Ms. Wright did not report for the shift and did not contact the employer. Ms. Provenzano telephoned Ms. Wright's number. Ms. Wright did not answer. Ms. Provenzano did not leave a message. According to the schedule, Ms. Wright was next supposed to work on May 13, 2011. Based on the May 9 conversation with Ms. Provenzano, Ms. Wright did not report for the shift and did not contact the employer.

On May 16, Ms. Provenzano left a voice mail message for Ms. Wright in which she said she needed Ms. Wright's work keys if she was not coming back to work or Ms. Wright would be charged for the keys. Ms. Wright telephoned the workplace and told the office manager that her keys and name tag were in her work locker.

At no point did Ms. Wright tell the employer that she wanted to quit the employment.

Ms. Wright had been absent from work several times prior to the May 9 absence. Ms. Wright had left work early with permission on April 7 due to chest pains. Ms. Wright had been absent on April 21 and 25 because her child was ill and had notified the employer at 4:30 a.m. each day. Ms. Wright had been absent on April 26, 28, 29, and 30 due to illness and had provided proper notice to the employer. Though Ms. Wright had received prior reprimands for attendance, she was close but not quite at the point where she would have been subject to discharge under the employer's progressive discipline policy.

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.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

The question of whether Ms. Wright separated from the employment by means of a discharge or a voluntary quit rests on the relative credibility of the testimony provided by Ms. Wright and Ms. Provenzano. After carefully considering the evidence, the administrative law judge concludes that Ms. Wright's testimony is more credible. Though Ms. Wright had been absent a number of times due to illness, prior to the May 9 telephone call with Ms. Provenzano she had never been absent without notifying the employer. The absences on May 10 and 13 would be a dramatic break from that pattern. Ms. Wright had given no indication prior to the telephone call on May 9 that she intended to leave the employment. The fact that her work keys and her name tag were in the locker she used at work is not an indication that she had previously decided to quit. Those items were where Ms. Wright needed them to be, at work. If Ms. Wright had

previously made some decision to leave the employment, there would be no reason to twice make contact with Ms. Provenzano in the early morning hours on May 9 to let her know she could not come to work because she had a sick child. Ms. Provenzano testified that she telephoned Ms. Wright on May 10, after Ms. Wright did not appear for her shift, but that she did not leave a message. One would expect that if Ms. Provenzano telephoned Ms. Wright for the purpose of having her appear for work that day that Ms. Provenzano would have left a message for Ms. Wright indicating as much. The fact that she did not leave a message casts doubt on whether she made phone at all. Regardless of exactly where Ms. Wright was in the progressive discipline process, the evidence makes clear that her absences were an inconvenience to and were disturbing to Ms. Provenzano, who would likely have to work the shift if a replacement could not be located.

After reviewing all of the evidence, the administrative law judge believes that Ms. Provenzano did tell Ms. Wright not to come back if she did not have a replacement for May 9. Perhaps it was a flip remark. Perhaps it was not authorized under the employer's progressive discipline policy. But, the weight of the evidence indicates that Ms. Wright reasonably concluded from the comments that she was discharged from the employment. The evidence establishes a discharge, not a voluntary quit.

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.

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).

The absence on May 9, 2011 was an excused absence under the applicable law. The employer's attendance policy required that Ms. Wright report the absence two hours prior to the shift. The purpose of that requirement was to give the employer sufficient time to find a replacement if Ms. Wright could not. Because Ms. Wright's start time was 6:00 a.m., her notice to the employer was due no later than 4:00 a.m. Despite the earliness of the hour, Ms. Provenzano was apparently available to take a call at that time. On May 9, Ms. Wright did not call the employer at least two hours prior to shift. Instead, she contacted the employer 90 minutes before the shift, at 4:30 a.m. The earliness of the hour and the reason for the absence, a sick child, were important factors. The administrative law judge concludes that the notice Ms. Wright provided to the employer was reasonable under the circumstances and that the absence should be deemed excused. The administrative law judge reaches the same conclusion for the same reasons with regard to the absences on April 21 and 25. As indicated by the employer, Ms. Wright gave the employer proper notice of her need to be absent due to illness on April 26, 28, 29, and 30. Ms. Wright had also given the employer proper notice of her need to leave work early due to illness on April 7.

The evidence fails to establish any absences that were unexcused under the law. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Wright was discharged for no disqualifying reason. Accordingly, Ms. Wright

is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Wright.

DECISION:

The Agency representative's June 6, 2011, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw