IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JORDAN R PATTERSON
Claimant

HEALTHCARE SERVICES GROUP INC
Employer

APPEAL NO. 11A-UI-06042-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/10/11
Claimant: Appellant (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Jordan Patterson filed a timely appeal from the May 2, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 17, 2011. Ms. Patterson participated. Ashley Henry, Account Manager, represented the employer.

ISSUES:

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

Whether the claimant has been able and available for work since she established her claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer contracts with long-term care facilities to provide housekeeping services. Jordan Patterson was employed as a full-time housekeeper from January 2011 until April 9, 2011, when Ashley Henry, Account Manager, discharged her from the employment. Ms. Patterson was assigned to work at Carrington Place in Muscatine.

The employer's decision to discharge Ms. Patterson was based in part on Ms. Patterson's absence on April 8. Ms. Patterson was scheduled to work at 6:00 a.m. Ms. Patterson sent a text message to Ms. Henry at 6:12 a.m. The message said that Ms. Patterson was throwing up, could not get out of bed. The employer's attendance policy required that Ms. Patterson notify the employer prior to the scheduled start of the shift if she needed to be absent. While Ms. Henry deemed a text message insufficient notice, Ms. Patterson was not aware that this was an unacceptable form of notice at the time she used it. Ms. Henry did not respond to Ms. Patterson's text message. When Ms. Patterson appeared for her shift on April 9, Ms. Henry had a discharge document waiting for her and proceeded with discharging her from the employment.

The employer decision to end the employment was also based on notice that Ms. Patterson had given to the employer regarding her change in work availability. Ms. Patterson was set to start a four-week nursing assistant certification program on Monday, April 11, 2011. The program was to end on Thursday, May 5, 2011. During the first three weeks of the program, Ms. Patterson would need to be in classes from 9:00 a.m. to 2:30 p.m. three days a week. During the fourth and final week of the program, Ms. Patterson would be in classes or clinical all week. A week before Ms. Patterson's employment ended, she notified the employer that she would not be available for day-shift work three days a week and would not be available for day-shift work at all during that fourth week of her class. Ms. Patterson did not otherwise limit her availability. Ms. Patterson told the employer that she could work her regular day shift hours on days when she was not in class and that she was willing to work evening shifts on those days when she was in class. When Ms. Patterson provided this notice to Ms. Henry, Ms. Henry said, "Okay." By this, Ms. Henry meant that she would take it under consideration, not that she was approving the change in availability. Ms. Henry never got back to Ms. Patterson prior to the discharge to say whether the proposed change in availability was acceptable or not. Ms. Patterson had given no notice that she intended to quit the employment. Ms. Patterson had told Ms. Henry that she was going to look for a nursing assistant position once she finished her program. Ms. Patterson intended to stay with the employer while she conducted that work search.

Ms. Patterson's base period consists of the four calendar quarters of 2010. The base period wage history includes both full and part-time employment. Ms. Patterson started the year in a part-time job, 20 hours per week, then moved to another part-time job, 25-30 hours per week. In August 2010, Ms. Patterson moved to full-time job, second-shift employment. Ms. Patterson continued the full-time position until after she started at Healthcare Services Group.

Once the employer discharged Ms. Patterson from the employment, Ms. Patterson immediately started looking for other employment. Ms. Patterson was interested in both full-time and part-time employment. Ms. Patterson made two job contacts per week. Ms. Patterson made her weekly claim report to Iowa Workforce Development for three weeks, but then found the system would not allow her access. Ms. Patterson completed her CNA program on May 5, 2011. On June 6, 2011, Ms. Patterson accepted a job offer for a part-time position, 25 hours per week. The new employment is to start on June 20, 2011.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

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 weight of the evidence establishes that the employer discharged Ms. Patterson based on a single absence and based on a proposed change in availability.

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). A single unexcused absence does not constitute misconduct. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

The evidence establishes a single unexcused absence on April 9, 2011. The absence was due to illness, but was not properly reported to the employer prior to the start of the shift. This single absence did not constitute misconduct in connection with the employment that would disqualify Ms. Patterson for unemployment insurance purposes.

Nor did Ms. Patterson's proposed change in her work schedule constitute misconduct. Prior to the discharge, the employer never gave Ms. Patterson an answer, yes or no, whether her proposed change in availability would be acceptable to the employer. Had the employer told Ms. Patterson the proposed change was unacceptable, then Ms. Patterson might have reconsidered her plans so that she could continue in the employment. Had the employer told Ms. Patterson that her proposed change in availability was unacceptable, Ms. Patterson might have quit in the near future. The employer never allowed things to get that far and discharged Ms. Patterson instead.

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

Iowa Code section 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(2) provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
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> (2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

It is Ms. Patterson's work availability since she established the claim for benefits that was effective April 10, 2011 that is in issue. Prior to the discharge from the employment and the filing of the claim, there had been no change in availability, just a proposed impending change. Once Ms. Patterson had been discharged from the employment, she was not required to demonstrate availability for work with Healthcare Services Group to demonstrate the work availability required for unemployment insurance purposes. The weight of the evidence establishes a base period employment history consisting primarily of part-time employment. The full-time employment did not come into the picture until August 2010. The weight of the evidence establishes that Ms. Patterson has been just as available for work since she established her claim for benefits as she was during her base period. Despite the nursing assistant program, Ms. Patterson launched her search for new employment and made the weekly job contacts necessary to continue her claim. The evidence establishes that as of Monday, June 20, 2011, Ms. Patterson will once again be employed at the level that she enjoyed for most of her base period.

From April 10, 2011 through the benefit week that ends June 18, 2011, Ms. Patterson meets the work availability requirement and is eligible for benefits, provided she is otherwise eligible. Assuming Ms. Patterson's new job does not fall through, effective June 20, 2011, Ms. Patterson will be sufficiently employed that she would no longer meet the "availability" requirements of the law and will no longer be eligible for benefits. But since that employment has not yet started, this decision will not attempt to predict Ms. Patterson's availability going forward. Instead, the matter will be remanded to the Claims Division for consideration of Ms. Patterson's work availability effective June 19, 2011.

DECISION:

The Agency representative's May 2, 2011, reference 01, decision is reversed. 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. Effective April 10, 2011 through June 18, 2011, Ms. Patterson was able and available for work to the same extent as her base period and was eligible for benefits, provided she is otherwise eligible.

This matter is remanded to the Claims Division for determination of the claimant's work availability effective June 19, 2011.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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