IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

VICTORIA BRANDENBURG
Claimant

FROG HOLLOW CHILD DEVELOPMENT INC
Employer

APPEAL NO. 15A-UI-07466-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/31/15
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 17, 2015, reference 01, decision that allowed benefits to the claimant provided the claimant was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on May 21, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on August 12, 2015. Claimant Victoria Brandenburg participated. Alan Arzu represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit One into evidence.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Victoria Brandenburg was employed by Frog Hollow Child Development, Inc., as the full-time executive director from 1999 and last performed work for the employer on June 10, 2015. Ms. Brandenburg's duties involved overseeing the employer's four preschool/childcare locations. Two of the facilities were located in North Liberty. The other two facilities were located in Dubuque and Asbury. The directors of the facilities reported to Ms. Brandenburg. Alan Arzu, President and owner, was Ms. Brandenburg's immediate supervisor.

On May 20, 2015, Ms. Brandenburg notified Mr. Arzu that she was considering an offer to lease a child care facility in Iowa City. Ms. Brandenburg told Mr. Arzu that she felt she needed to pursue the opportunity, but that nothing was finalized. Ms. Brandenburg told Mr. Arzu that she would think about the matter and get back to him.

The next morning, Mr. Arzu requested to meet with Ms. Brandenburg at the two North Liberty locations. While there, Mr. Arzu requested Ms. Brandenburg's work keys and had her provide

her password and log-in information for the employer's computer systems at both locations. Mr. Arzu asked Ms. Brandenburg to produce her employment contract. Ms. Brandenburg told Mr. Arzu that she had not had a contract for years. Mr. Arzu accused Ms. Brandenburg of being a liar and a schemer by not having signed a contract to bind herself and by not issuing annual contracts to other staff. Ms. Brandenburg countered that in prior years the contracts had been issued at the time of annual performance evaluations and only after Mr. Arzu approved any changes in wages and benefits. Mr. Arzu printed a contract for Ms. Brandenburg to sign. The contract contained a non-compete agreement. While the employer had Ms. Brandenburg sign annual contracts early in her employment, the employer had not had Ms. Brandenburg sign a contract since 2008. Each of the earlier contracts contained a non-compete clause. Each of the contracts had expired after a year. Ms. Brandenburg asked Mr. Arzu on May 21, 2015 whether his presentation of the contract was his way of letting her know that her employment was done. Ms. Brandenburg declined to sign the contract that contained the non-compete agreement and told Mr. Arzu that she intended to pursue the opportunity in Iowa City. Mr. Arzu requested Ms. Brandenburg's work phone and her keys to the company vehicle assigned to her. Mr. Arzu returned the car keys to Ms. Brandenburg so that she would have a way to get to her home in Dubuque.

On May 22, 2015, Mr. Arzu asked Ms. Brandenburg to meet him at the employer's facility in Dubuque. Mr. Arzu asked Ms. Brandenburg to reconsider her planned venture and remain with his company. Ms. Brandenburg was getting ready to leave for a planned week of vacation. Ms. Brandenburg told Mr. Arzu she would consider the matter and speak to him again after her vacation. Ms. Brandenburg had up to that point provided no date certain for her departure. Ms. Brandenburg heard from one or more facility directors that Mr. Arzu had told them that Ms. Brandenburg had quit. Ms. Brandenburg had not yet signed a lease or otherwise obligated herself in connection with the planned Iowa City venture.

Ms. Brandenburg returned to perform additional work for employer on and after June 1, 2015. Ms. Brandenburg was at that point assisting with what she believed to be her transition out of the company. During the week that started on May 31, 2015, Ms. Brandenburg applied for unemployment insurance benefits. On or about June 15, 2015, Mr. Arzu received an unemployment insurance notice of claim regarding Ms. Brandenburg. Mr. Arzu called Ms. Brandenburg and asked why she had filed for unemployment insurance benefits. Ms. Brandenburg told Mr. Arzu that she had applied for the benefits because the employer had terminated her employment. Mr. Arzu asserted that Ms. Brandenburg had quit when she refused to sign the contract presented to her on May 21, 2015. Mr. Arzu told Ms. Brandenburg that he would pay her for the work she had performed in the preceding two weeks. The implication of that comment was that the employer considered the employment relationship terminated as of receipt of the notice of claim.

On June 30, 2015, Ms. Brandenburg signed a lease for the Iowa City child care facility. The planned opening date for the center is August 24, 2015.

Ms. Brandenburg received $2,240.00 in benefits for the period of May 31, 2015 through June 20, 2015 and July 12, 2015 through August 8, 2015.

On June 16, 2015, a Workforce Development claims deputy held a fact-finding interview to address Ms. Brandenburg's separation from the employment. Mr. Arzu represented the employer at that proceeding.

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 weight of the evidence establishes that Ms. Brandenburg reasonably concluded that she had been discharged from the employment on May 21, 2015, when Mr. Arzu demanded her work phone, her work keys, her password and log-in credentials, and presented her with a contract that he knew she would not sign. The totality of the employer's conduct would have conveyed to a reasonable person that the employer was ending the employment. The fact that the employment did not end at that very moment is not an indication that Ms. Brandenburg quit. Rather, it is clear that the employer wanted her to assist with a transition period and that Ms. Brandenburg did so until the employer ended the transition period on June 15, 2015 in response to learning that Ms. Brandenburg had filed a claim for unemployment insurance benefits.

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.
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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 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).

The evidence in the record fails to establish misconduct in connection with the employment. Ms. Brandenburg's preliminary consideration of embarking on another business venture was insufficient to establish that she was in fact in competition with the employer or about to enter into competition with the employer. In any event, it was not Ms. Brandenburg's responsibility to take affirmative and unilateral steps to bind herself through a contract with the employer. Rather, that was the employer's responsibility if the employer desired such a contract. The evidence in the record is insufficient to establish that Ms. Brandenburg intentionally misled the employer or that her conduct during the employment was intended to position her to recruit employees for her potential venture from the employer. The evidence is also insufficient to establish that Ms. Brandenburg engaged in a pattern of negligence and/or carelessness.

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

This matter could be viewed in the alternative as a quit in response to a substantial in the conditions of the employment, based on the employer's demand that Ms. Brandenburg enter into a contract that contained a non-compete clause after working for several years without any such agreement.

Iowa Admin. Code r. 871-24.26(1) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

"Change in the contract of hire" means a substantial change in the terms or conditions of employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986). Generally, a substantial reduction in hours or pay will give an employee good cause for quitting. See Dehmel v. Employment Appeal Board, 433 N.W.2d 700 (Iowa 1988). In analyzing such cases, the Iowa Courts look at the impact on the claimant, rather than the employer's motivation. Id. An employee acquiesces in a change in the conditions of employment if he or she does not resign in a timely manner. See Olson v. Employment Appeal Board, 460 N.W.2d 865 (Iowa Ct. App. 1990).

DECISION:

The June 17, 2015, 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/pjs