IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

HARL L STEPHENSON Claimant	**APPEAL NO. 09A-UI-00570-JTT**
	ADMINISTRATIVE LAW JUDGE DECISION
ELECTROLUX HOME PRODUCTS INC FRIGIDAIRE Employer	
	OC: 12/21/08 R: 01 **Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 9, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 29, 2009. Claimant Harl Stephenson participated and presented additional testimony through Kevin Buckly. April Ely, Human Resources Generalist, represented the employer.

ISSUE:

Whether the claimant voluntarily quit or was discharged from the employment. The administrative law judge concludes that the claimant was discharged from the employment when the employer forced him to retire or face immediate discharge.

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Harl Stephenson commenced his full-time employment at Electrolux Home Products on January 4, 1988 and worked as a full-time Spec 1 Press Operator. Mr. Stephenson's immediate supervisors were Supervisor Mark Brown, Facilitator Vern Cross, and Facilitator Terry DeGroete. On November 10, 2008, Mr. Stephenson returned to work from a medically-based absence that lasted six days. Mr. Stephenson had been discharged from the hospital on November 7 or 8. Mr. Stephenson suffers from diabetes. The employer was aware of Mr. Stephenson's medical condition.

On November 12, Mr. Stephenson was operating his assigned machine when one of his legs gave out and he fell against a production belt. Coworkers helped Mr. Stephenson to a place where he could sit down. Someone summoned a supervisor. The supervisor wanted to transport Mr. Stephenson to Facilitator Vern Cross's office by wheelchair. Mr. Stephenson elected to walk. Mr. Stephenson waited in Mr. Cross's office for several minutes until Bill Schnell, an employee in the employer's nursing department, arrived. Mr. Schnell's professional

credentials are unclear, but the employer believes he is either a nurse or an emergency medical technician (EMT). Mr. Schnell took Mr. Stephenson's blood pressure. It's unclear whether Mr. Schnell conducted any other evaluation. Mr. Schnell decided that Mr. Stephenson should be sent home. Mr. Stephenson did not wish to go home and, instead, wished to continue working. LaVonne Russell, Labor Relations Manager, spoke with Mr. Stephenson by telephone. Ms. Russell told Mr. Stephenson that he must leave the workplace. Ms. Russell told Mr. Stephenson that he could not return to work until he presented a full medical release from his doctor. Mr. Stephenson indicated that he wished to stay and work. Mr. Stephenson questioned the employer's motive for sending him home. Mr. Stephenson believed that the employer was looking for a means to separate him from the employment. During the telephone call with Ms. Russell, both parties reasserted their positions and both parties spoke with raised voices.

Immediately following the telephone call with Ms. Russell, Mr. Stephenson uttered some remarks out of frustration. Mr. Cross and Mr. Schnell were present for the remarks. Mr. Cross and Mr. Schnell are still with the employer, but did not testify. Mr. Cross and/or Mr. Schnell reported the negative remarks to Ms. Russell. The employer asserts the remarks were as follows: "She lied to me. I hate liars. She better not cross my path." Mr. Stephenson asserts that he does not recall the remarks. The weight of the evidence indicates that Mr. Stephenson either uttered these remarks or something similar to them. Mr. Stephenson intended only to express his frustration with being placed on an involuntary leave. Mr. Stephenson did not intend the remarks as a threat. The weight of the evidence indicates that a reasonable person would not have perceived the comments as a threat.

Mr. Stephenson had previously requested the morning of November 13 off and had been approved for a half day of vacation. On the morning of November 13, Mr. Stephenson appeared at the workplace for the purpose of asking for the balance of the day off as vacation. The employer had already placed Mr. Stephenson on an involuntary leave. While Mr. Stephenson was at the workplace on November 13, Ms. Russell came to speak with Mr. Stephenson. The employer arranged for a union representative and Mr. Cross to be present. Ms. Russell referred to the remarks that had been reported to her and asked Mr. Stephenson whether he had uttered the remarks. Mr. Stephenson provided a vague, non-committal response.

Ms. Russell had prepared a written reprimand. Ms. Russell read the remarks that had been attributed to Mr. Stephenson. Ms. Russell alleged that Mr. Stephenson had threatened her in violation of the employer's violence free workplace policy. Ms. Russell told Mr. Stephenson that he was suspended from the employment. Ms. Russell directed Mr. Stephenson to prepare a statement about his collapse in the workplace and the remarks the employer deemed threatening. Mr. Stephenson completed a written statement on November 13 with the assistance of a union representative. Neither Mr. Stephenson nor the employer made a copy of the statement available for the hearing.

The following week, Mr. Stephenson contacted the union office to see if there was any word regarding his employment status. A union representative told Mr. Stephenson that Ms. Russell would be calling him. Ms. Russell did call Mr. Stephenson and made arrangements to meet with Mr. Stephenson on or about Thursday, November 20, 2008.

On November 20, Ms. Russell met with Mr. Stephenson with a union representative present. Ms. Russell notified Mr. Stephenson that he was going to be discharged for violating the employer's workplace violence policy. Ms. Russell gave Mr. Stephenson the option of retiring from the employment or being immediately discharged. Ms. Russell told Mr. Stephenson that

he must choose immediately. Mr. Stephenson took approximately 10 minutes to discuss the situation with the union representative and then told the employer he would accept the option of retiring in lieu of immediate discharge from the employment. Ms. Russell had Mr. Stephenson execute retirement-related paperwork at that time. The employer processed the separation as a retirement to be effective December 1, 2008, but did not allow Mr. Stephenson to return to work in the meantime.

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.

871 IAC 24.26(21) 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:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

The weight of the evidence establishes that Mr. Stephenson's separation from the employment was involuntary. First, the employer initiated a separation by means of an involuntary medical leave of absence on November 12, 2008. Next, the employer reaffirmed the separation by suspending Mr. Stephenson on November 13, 2008, purportedly for the comments he made on November 12 after speaking with Ms. Russell. Finally, the employer initiated a complete separation from the employment on November 20, 2008, when Ms. Russell notified Mr. Stephenson he would be immediately discharged if he did not immediately agree to retire. There was nothing voluntary about Mr. Stephenson's separation from the employment. Accordingly, the administrative law judge must consider whether the involuntary separation was based on misconduct.

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).

Threats of violence in the workplace constitute misconduct that disqualifies a claimant for benefits. The employer need not wait until the employee acts upon the threat. See Henecke v. Iowa Dept. Of Job Services, 533 N.W.2d 573 (Iowa App. 1995).

The weight of the evidence indicates that the employer's decision to placed Mr. Stephenson on an involuntary medical leave of absence on November 12 had nothing to with misconduct, but

was instead based on the employer's decision that Mr. Stephenson was not well enough to continue working.

The employer has failed to present testimony from any person with firsthand knowledge of the events leading to Mr. Stephenson's separation from the employment. The employer had the ability to present such testimony, but has elected not to. The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with Mr. Stephenson's utterance on November 12 after he got off the phone with Ms. Russell. The evidence establishes that Mr. Stephenson uttered a comment in frustration after the employer refused to allow him to continue working. The weight of the evidence fails to establish that the utterance was anything other than an expression of frustration. The utterance was the sort of bluster one would expect from a person who felt he had been wronged and who felt powerless to remedy that wrong. The evidence fails to establish that the employer interpreted the remark as a bona fide threat and a reasonable person would not have interpreted the remark as a bona fide threat. The weight of the evidence indicates instead that the employer seized upon the utterance as a ready pretext for making permanent the involuntary separation the employer had initiated on November 12 through the involuntary medical leave.

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

DECISION:

The Agency representative's January 9, 2009, reference 01, decision is affirmed. The claimant was forced to resign in lieu of being discharged. The claimant's involuntary separation was not based on misconduct in connection with the employment. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

____

James E. Timberland
Administrative Law Judge

____

Decision Dated and Mailed

jet/kjw