IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARIA E VINSON
Claimant

LITTLE ANGELS PRE-SCHOOL & CHILDCARE CENTER
Employer

APPEAL NO. 12A-UI-12135-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/16/12
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 October 4, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 2, 2012. Claimant Maria Vinson participated. Whitney Wagaman represented the employer and presented testimony through Dan Tackus. Exhibits One through Seven were received into evidence.

ISSUE:

Whether Ms. Vinson 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: The employer is a state-licensed preschool and daycare. Since July 2012, Whitney Wagaman has been the director. Owner Julie O'Conner is also involved in operating the preschool/daycare. Maria Vinson started with the employer in 2008 and last performed work for the employer on Monday, September 17, 2012. Ms. Vinson was the facility's cook, but also filled in for the teachers to cover afternoon breaks. Ms. Vinson's employment was part time. Before July 2012, Ms. Vinson worked five days a week from 8:30 a.m. to 2:30 p.m. In July 2012, Ms. Vinson reduced her hours so that she was no longer working Mondays. In August 2012, Ms. O'Connor and Ms. Wagaman had requested that Ms. Vinson work on Monday, September 17, because Ms. O'Conner planned to be out of town and would not be available to cook for the facility that day. Ms. Vinson agreed to work on the condition that she be allowed to leave at 12:30 p.m.

When Monday, September 17, 2012 came, Ms. Vinson arrived at work on time with the intention of leaving at 12:30 p.m. At about 11:00 a.m., Chantel Hawkins, On-site Supervisor, told Ms. Vinson that she would need to stay until 2:30 p.m. to assist with covering breaks. Ms. Hawkins asked Ms. Vinson whether she intended to stay and Ms. Vinson indicated that she intended to leave at 12:30 p.m. Ms. Wagaman has a similar conversation with Ms. Vinson half an hour later and Ms. Vinson provided the same response. Ms. Vinson left at 12:30 p.m. Before she left, Ms. Vinson said she would see the employer the next morning.

Ms. Vinson returned the next morning to begin work as scheduled. Ms. Vinson was summoned to a meeting with Ms. Wagaman. Ms. Wagaman asserted that Ms. Vinson had abandoned the employment the previous day by leaving at 12:30 p.m. Ms. Vinson denied that assertion and pointed out that she would not have appeared for work that morning as scheduled if she had intended to quit the employment. The employer reasserted that Ms. Vinson had quit the employment and the employer deemed the employment done.

On September 11, 2012, Ms. Vinson had told Ms. Wagaman that it was time for her to move on, and that she was going to be looking for other employment. Ms. Vinson did not provide a date certain when she would be leaving. In response to the employer's concern that Ms. Vinson might quit without notice, Ms. Vinson assured the employer that she would not quit without notice.

Ms. Vinson had signed a Staff Responsibility Policy on August 22, 2012 . The policy indicated that the employer might ask Ms. Vinson to stay late to cover someone else's shift or perform other additional duties.

Ms. Vinson's next most recent absence had been on June 4, 2012, when she took time off to go to a doctor's appointment at the University of Iowa Hospitals and Clinics. Ms. Vinson told the employer on May 29, 2012 that she would need June 4 off. On June 1, the employer issued a written reprimand to Ms. Vinson for giving insufficient notice of her need to take time off. Ms. Vinson had given the employer six days notice. Ms. Vinson ended up skipping the doctor appointment to celebrate her daughter's birthday.

Ms. Vinson had been absent from a mandatory training session in January 2009 because she would not be compensated for her time and did not feel she needed the training.

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.

The weight of the evidence fails to support the employer's assertion that Ms. Vinson voluntarily quit the employment. The weight of the evidence indicates instead that the employer discharged Ms. Vinson from the employment when she refused to stay late on September 17 to cover breaks. Despite several exhibits for the hearing being submitted, the employer has failed to produce a work schedule that reflects Ms. Vinson being scheduled to work until 2:30 p.m. on September 17. The fact that the employer had two conversations with Ms. Vinson during the shift on September 17 about whether she was willing to stay further supports the conclusion that Ms. Vinson had not been previously scheduled to work until 2:30 p.m. that day. Ms. Vinson's parting comment before she left that day, that she would see the employer the next morning, and her arrival on time for work the next morning, further support the conclusion that she did not voluntarily quit. The employer makes a leap in logic that the administrative law judge cannot duplicate when the employer argues that because Ms. Vinson had told the employer on

September 11 she would be leaving at some point, this meant she was quitting on September 17. The weight of the evidence indicates otherwise. The weight of the evidence indicates a discharge based on alleged insubordination and attendance.

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The employer's request that Ms. Vinson stay to cover breaks was reasonable. Ms. Vinson's decision to leave at the time she was previously scheduled to leave was also reasonable. There was not insubordination within the meaning of the law.

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The weight of the evidence indicates that Ms. Vinson left at 12:30 p.m. on Monday, September 17 pursuant to the understanding and agreement she had with the employer prior to that day. The evidence fails to establish an unexcused absence. Even if the evidence had established an unexcused absence on September 17, the next most recent absence had been on June 4, 2012, three and a half months earlier. The next one prior to that was in early 2009. The evidence would not have established excessive unexcused absences.

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

DECISION:

The Agency representative's October 4, 2012, 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

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