IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LOGAN W FRAZIER
Claimant

VANTEC INC
Employer

APPEAL NO. 09A-UI-01504-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/14/08 R: 01
Claimant: Respondent (1-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 30, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 18, 2009. Claimant Logan Frazier did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Larry Heimlicher, Chief Operating Officer, represented the employer. Exhibits One through Four were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Logan Frazier was employed by Vantec as a full-time production operator until November 16, 2008, when Shirley Frost, Human Resources Manager, discharged him from the employment based on attendance issues. Ms. Frost is no longer with the employer. Mr. Frazier's immediate supervisor was Blaire Wild, D Shift Supervisor. Mr. Wild is still with the employer, but did not testify.

The final absence that prompted the discharge occurred on November 26, 2008, when Mr. Frazier notified Mr. Wild within the first 30 minutes of his shift that he needed to be absent due to a family emergency. Under the employer's absence notification policy, Mr. Frazier was required to notify the supervisor within the first 30-minutes of his shift. On November 21 and 22, Mr. Frazier had also notified Mr. Wild within the first 30-minutes of his shift that he needed to be absent due to a family emergency. On November 17, Mr. Frazier notified Mr. Wild within the first 30-minutes of his shift that he needed to be absent due to "family issues." On November 19, Mr. Frazier was absent and failed to notify the employer of the absence.

On November 1, 2008, the employer implemented a new attendance policy with an attendance point system. Mr. Frazier was aware of the policy before it went into effect and received a copy

of the policy. Under the policy an employee was deemed to have "voluntarily quit" if the employee exhausted all available attendance points.

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 indicates that the employer initiated the separation from the employment based on attendance issues. The evidence indicates 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.
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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.

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 employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish that the absences on November 17, 21, 22 and 26 were unexcused absences under the applicable law. Exhibit Two documents each of these absences as an "Excused Absence." The evidence indicates that Mr. Frazier had direct contact with his supervisor, Mr. Wild, in connection with each of these absences. Though Mr. Wild continues with the employer, the employer did not present testimony from Mr. Wild. The employer had the ability to present such testimony. The employer failed to present any testimony from anyone with firsthand knowledge of Mr. Frazier's employment. The employer had the ability to present such testimony. The evidence does establish an unexcused absence on November 19, when Mr. Frazier was absent without notifying the employer. However, a single unexcused absence does not constitute misconduct. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

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

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:
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> 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.

Mr. Frazier's absence from the hearing and five absences during the final days of the employment raises the question of whether Mr. Frazier had been available for work since he established his claim for benefits. This matter will be remanded to the Claims Division at Workforce Development so that Mr. Frazier's work availability may be assessed.

DECISION:

The Agency representative's January 30, 2009, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Claims Division at Workforce Development so that the claimant's work availability since the effective date of the claim may be assessed.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs