IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CLEASTER G MALONE
Claimant

WESTAFF USA INC
Employer

APPEAL NO: 06A-UI-08916-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/23/06 R: 03
Claimant: Appellant (2)

Section 96.5(1) – Voluntary Quit of Temporary Assignment
Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Cleaster Malone filed a timely appeal from the August 29, 2006, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on September 20, 2006. Ms. Malone participated. Placement Consultant Dawn Starr represented Westaff Staffing USA.

ISSUE:

Whether the claimant voluntarily quit the temporary work assignment with good cause attributable to the employer. She did.

Whether the temporary employment agency discharged the claimant for misconduct that disqualifies the claimant for benefits. It did not.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Cleaster Malone commenced her employment relationship with Westaff USA Staffing on October 15, 2004. The last assignment was a "utility" position at Graham Packaging in Iowa City. The assignment began on Saturday, July 8, 2006 and was scheduled to end on Sunday, July 9. Ms. Malone was to work from 7:00 a.m. to 7:00 p.m. on each day. Ms. Malone had previously been placed in a similar assignment at Graham in November or December 2005, but had not performed to Graham Packaging's expectations. Ms. Malone's duties as a utility worker involved supporting the production line. During the prior assignment at Graham Packaging, Ms. Malone had worked constructing boxes. Ms. Malone accepted the new assignment at Graham Packaging with the understanding that she would be performing work similar to work she had performed during the prior assignment. When Ms. Malone appeared on July 8 for the first day of the assignment, she learned that Graham Packaging did not have production support work available for her. The supervisor at Graham Packaging informed Ms. Malone that she would be put to work sweeping a warehouse instead and would only be provided with four hours' work instead of the full 12-hour shift. In addition, Ms. Graham suffers from asthma and explained to the Graham Packaging supervisor that she was not able to sweep the warehouse

because of the impact of flying dust on her health condition. Ms. Malone then left the assignment. Ms. Malone had paid someone for a ride to the assignment and decided not to return for the second day of the assignment to face another shortened workday and similar change in duties.

On Monday, July 10, Graham Packaging reported to Westaff USA Placement Consultant Kylie Parmer that Ms. Malone had walked off the assignment on July 8. Graham Packaging made no reference of a July 9 absence. Graham Packaging indicated to Ms. Parmer that Ms. Malone could not return to Graham Packaging. On July 12, Ms. Malone contacted Ms. Parmer in search of a new assignment. At that time, Ms. Parmer told Ms. Malone that Westaff USA had no assignments available. Westaff USA had in fact made the decision to sever the employment relationship with Ms. Malone. Westaff USA has a written policy that says employees will be discharged if they walk off an assignment. Ms. Malone had signed acknowledgment of the policy at the time she commenced her relationship with Westaff USA. Ms. Malone had not previously walked off an assignment or had no other attendance issues.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether the evidence in the record establishes that Ms. Malone's voluntary quit of the assignment was for good cause attributable to the employer. It does.

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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(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).

Though a quit due to intolerable or detrimental working conditions is deemed to be for good cause attributable to the employer, such a quit, if prompted by a medical condition, requires that, before resigning, the claimant put the employer on notice of the condition, warned the employer that she may quit if the situation is not addressed and gave the employer a reasonable opportunity to address legitimate grievances. See Suluki v. EAB, 503 N.W.2d 402 (Iowa 1993), Cobb v. EAB, 506 N.W.2d 445 (Iowa 1993) and Swanson v. EAB, 554 N.W.2d 294 (Iowa App. 1996). The evidence in the present matter indicates that Ms. Malone did not give Graham Packaging or Westaff USA an opportunity to address her concerns before she departed. Accordingly, Ms. Malone's quit of the assignment would not have been for good cause attributable to the employer if it had been solely based on her asthma.

The evidence in the record indicates that Ms. Malone had been promised 12-hours shifts and reasonably expected these to involve constructing boxes in support of a production line. The evidence indicates that once Ms. Malone arrived at the assignment, the employer reduced the available work hours by two-thirds and notified Ms. Malone that she would be performing janitorial work. The substantial reduction in hours was by itself a substantial change in the conditions of employment that made Ms. Malone's quit of the assignment reasonable. See Dehmel v. Employment Appeal Board, 433 N.W.2d 700 (Iowa 1988).

The administrative law judge concludes that Ms. Malone's voluntary quit of the assignment was for good cause attributable to the employer.

The next question is whether Westaff USA discharged Ms. Malone for misconduct. It did not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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).

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 Ms. Malone's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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. EAB, 437 N.W.2d 895 (Iowa 1989).

Because the evidence in the record establishes good cause for Ms. Malone's quit of the assignment on July 8, it would be inappropriate to deem Ms. Malone's early departure that day and/or her absence the following day of the assignment as unexcused absences. Accordingly, the evidence in the record demonstrates no misconduct. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Westaff USA discharged Ms. Malone for no disqualifying reason. Accordingly, Ms. Malone is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Malone.

DECISION:

The Agency representative's August 29, 2006, reference 03, decision is reversed. The claimant voluntarily quit her final assignment for good cause attributable to the employer. The temporary employment agency discharged the claimant 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

_____
Decision Dated and Mailed

jet/pjs