IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

APRIL M VALDEZ
Claimant

TPI IOWA LLC
Employer

APPEAL NO. 16A-UI-04742-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/03/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

April Valdez filed a timely appeal from the April 19, 2016, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that she had been discharged for misconduct in connection with the employment. After due notice was issued, a hearing was held on May 9, 2016. Ms. Valdez participated. Tahler Wildman represented the employer and presented additional testimony through Reggie McDade. Exhibit One was received into evidence.

ISSUE:

Whether Ms. Valdez separated from the employment for a reason that disqualifies her for benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: April Valdez began her full-time employment with TPI Iowa, L.L.C. in 2013. Until the end of 2015, Ms. Valdez worked as a team lead in the quality department. The work hours were 2:30 p.m. to 10:30 p.m., Monday through Friday. On September 8, 2015, Ms. Valdez completed a written request to transfer to the first shift pursuant to the employer's transfer request protocol. Ms. Valdez requested a move to first shift hours so that she could be more involved with her children after school and during the evening hours. Ms. Valdez has three children, ages 16, 12 and 11 years old. Ms. Valdez agreed to demotion from the team lead position and to a substantial pay cut, from $19.00 per hour to $15.59 per hour, to secure the first shift position. Ms. Valdez's request to move to the first shift coincided with coworker Chad Ford's request to move from the first shift to the second shift. The first shift work hours were 6:30 a.m. to 2:30 p.m., Monday through Friday. Ms. Valdez began working the first shift hours on January 4, 2016.

On or about March 10, 2016, Ms. Valdez went to Tahler Wildman, Human Resources Generalist, and requested to return to the second shift. Ms. Valdez was in tears. Ms. Valdez cited marital discord as the basis for her request. As it happened, Mr. Ford desired to return to the first shift.

On March 23, 2016, Ms. Valdez left a note for Ms. Wildman indicating that she had changed her mind and no longer wished to return to the second shift. Even though Ms. Valdez had not completed a written request to transfer back to the second shift, Ms. Wildman and Reggie McDade, Employment and Staffing Manager, decided that Ms. Valdez would be required to return to the second shift and then would have to complete a written shift transfer request to get back to the first shift.

On March 25 or 28, 2016, Ms. Wildman summoned Ms. Valdez to a meeting to discuss the March 23, note. Ms. Valdez told Ms. Wildman that she had worked out her issues at home and that the first shift would work better for her. Ms. Wildman told Ms. Valdez that she had already taken action on her verbal request to return to the second shift and that she would have to return to the second shift on April 4, 2016. Ms. Valdez asserted that she had not made an actual request and had only mentioned that she was thinking of transferring to second shift. Ms. Valdez had indeed made a verbal request to move to the second shift, but had not completed a written shift transfer form pursuant to the employer's established protocol. At the time Ms. Valdez rescinded her request, she was unaware that the employer had taken any action on the request. The employer had not previously given notice to Ms. Valdez that the employer had granted her request to return to the second shift. The employer had not given Ms. Valdez notice that the employer had taken any steps to accomplish Ms. Valdez's return to the second shift. The employer had not given Ms. Valdez notice that the employer had selected a particular date on which her return to the second shift would be effective. The return to the second shift would not include restoration of Ms. Valdez's team lead status or restoration of the higher pay that went with the team lead position. Ms. Valdez told Ms. Wildman that she could not return to the second shift and needed to remain on the first shift. Ms. Valdez told Ms. Wildman that she had no one to watch her children during the evening hours if she returned to the second shift. Ms. Wildman told Ms. Valdez that she would have to return to the second shift unless Reggie McDade, Employment and Staffing Manager, directed otherwise. Ms. Valdez demanded to speak with Mr. McDade. Ms. Valdez was upset by the meeting with Ms. Wildman and left the meeting to return to her work duties.

During Ms. Valdez's shift on March 28, 2016, Ms. Wildman summoned Ms. Valdez to a meeting with Mr. McDade. A day shift supervisor and a day shift manager were also present. Ms. Valdez outlined for Mr. McDade the basis for contacting Ms. Wildman about returning to the second shift and the basis for her decision to withdraw that request. Ms. Valdez said she could not return to second shift because she lacked a babysitter for the evening hours. At that point, Ms. Valdez had not taken any steps to secure a babysitter. When Ms. Valdez worked the first shift hours, her eldest child assisted the younger children with their morning routine. When Mr. McDade told Ms. Wildman that she had to return to the second shift, Ms. Valdez refused. Ms. Valdez told Mr. McDade that he was acting like a child. Mr. McDade asked Ms. Valdez whether she was drawing a line in the sand by her refusal to return to the second shift and whether that meant she was quitting. Ms. Valdez told Mr. McDade that she was not quitting the employment. Mr. McDade told Ms. Valdez that he was suspending her from the employment due to her refusal to return to the second shift and while he figured out what to do with her. Mr. McDade told Ms. Valdez that she should think about going to the second shift or resigning.

On March 29, Mr. McDade called Ms. Valdez, but only to notify her that he was busy with other matters that day and would contact her the next day. On March 30, Mr. McDade notified Ms. Valdez that he wanted her to appear for a meeting at 9:00 a.m. the next day.

On the morning of March 31, Ms. Valdez appeared for the meeting as directed. The same parties who had participated in the March 28 meeting were present. Prior to the meeting, Ms. Valdez assumed the purpose of the meeting was to reach a mutually agreeable solution. At the meeting, Ms. Valdez had to re-explain her position to the first shift manager. After that, the employer dismissed Ms. Valdez from the meeting and indicated that the employer would call her. In other words, Ms. Valdez continued on suspension.

Later in the day on March 31, Mr. McDade telephoned Ms. Valdez. Mr. McDade told Ms. Valdez that he expected her to return to the second shift on April 4. Mr. McDade told Ms. Valdez that she could complete an application to request a return to the first shift. Ms. Valdez asked Mr. McDade whether he would provide a written memorandum indicating that she would able to return to the first shift within three months. Mr. McDade said he would not sign such a document. Mr. McDade ended the call after telling Ms. Valdez that he would call her the next day.

When Mr. McDade did not call on April 1, Ms. Valdez called Mr. McDade. Mr. McDade again stated that Ms. Valdez would have to return to the second shift. Ms. Valdez again stated that she could not return to the second shift because she needed to care for her children. Mr. McDade told Ms. Valdez that she had to return to the second shift and that there was nothing she could do to change that. Mr. McDade again asked whether Ms. Valdez was drawing a line in the sand and whether she was quitting.

Later in the day on April 1, Mr. McDade telephoned Ms. Valdez. Mr. McDade told Ms. Valdez the he was sending her a letter indicating that Ms. Valdez was voluntarily quitting the employment. Ms. Valdez told Mr. McDade not to put words in her mouth and that she would appear for the second shift on April 4, 2016.

The employer did not have Mr. Ford start back on the first shift until April 4, 2016.

On April 4, Ms. Valdez clocked in at 2:15 p.m. to appear for the second shift. After Ms. Valdez clocked in, she went to Mr. McDade's office and said she was there to work. Ms. Valdez restated her request that Mr. McDade commit to returning her to the first shift as soon as possible. Mr. McDade said he would try to make that happen, but could make no guarantees. During that meeting, Mr. McDade left for several minutes and then returned. When he returned, Mr. McDade told Ms. Valdez that she would have to write a letter to the employer indicating that she would not be so demanding. Ms. Valdez restated that she was there to work and declined to write the letter. Ms. Valdez told Mr. McDade to grow up. Ms. Valdez told Mr. McDade that she wanted to return to the production floor and continue working. Mr. McDade told Ms. Valdez that if she did not write the letter, the employer was sending her home. Mr. McDade then escorted Ms. Valdez from the facility.

There was no further contact between the parties. On or about April 5, 2016, the employer received a notice of claim that alerted the employer to Ms. Valdez's application for unemployment insurance benefits. Though the employer asserts that the notice indicated that Ms. Valdez had quit, the notice did not indicate that Ms. Valdez had quit. Nor had Ms. Valdez notified Workforce Development that she had quit. Even though the employer had escorted Ms. Valdez from the premises on April 4, the employer asserts that Ms. Valdez voluntarily quit by failing to show for subsequent shifts. Ms. Valdez did not voluntarily quit.

REASONING AND CONCLUSIONS OF LAW:

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:
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> 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).

An employer has the right to expect decency and civility from its employees. Use of profanity or offensive language in a confrontational, disrespectful, or name-calling context, may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made. The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See Myers v Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

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).

The evidence in the record establishes that both Ms. Valdez and the employer took equally unreasonable positions and acted unreasonably following Ms. Valdez's decision to rescind her verbal request to return to the second shift. The bottom line is that the employer discharged Ms. Valdez from the employment after Ms. Valdez balked at the employer's directive that she return to the second shift and after she refused to provide a letter indicating that she would be less demanding of the employer in the future. By March 10, 2016, Ms. Valdez's first shift hours had become part of the established conditions of her employment. On March 10, 2016, Ms. Valdez went to the employer in a clearly visible state of upset and made a verbal request to return to the second shift. Ms. Valdez and Ms. Wildman both knew that the employer's establish protocol required that a written shift transfer request be completed. Ms. Valdez completed no such request. After Ms. Valdez's marital issues calmed, she returned to the employer within a reasonable time to indicate that she wanted to withdraw the request to return to the second shift. Rather than respond with empathy to an employee who had been going through a difficult time, the employer elected to do the opposite and took an unnecessarily heavy-handed approach in deciding that Ms. Valdez must be compelled to return to the second shift. The employer went further and decided that even though Ms. Valdez had not completed a written request to return to the second shift, she would be required to make such request if she hoped to get back to the first shift at some indefinite point in the future. Both parties then dug in their heels. Ms. Valdez was not unreasonable in asserting that she should be allowed to remain in the established conditions of the employment, the first shift. However, Ms. Valdez's reference to Mr. McDade as a child and needing to grow up were clearly inappropriate. The utterances were expressions of frustration and did not rise to the level of an attack on the authority of Mr. McDade. The utterances occurred in the context of the employer's unreasonable response to the situation. The utterances did not constitute misconduct in connection with the employment. Nor did Ms. Valdez's refusal to provide a "commitment letter" constitute misconduct. Employees are not obligated to pledge complete submission to the will of the employer as a condition of remaining employed.

This matter could perhaps be analyzed in the alternative as a voluntarily quit for good cause attributable to the employer, in response to substantial changes in the conditions of the employment. See Iowa Administrative Code rule 871-24.26(1). However, the evidence establishes that Ms. Valdez was ultimately willing to acquiesce in returning to the second shift to continue in the employment. The employer did not allow her to do that. Instead, the employer escorted her from the property on April 4 in a manner that led Ms. Valdez to reasonably conclude she had been discharged from the employment.

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

DECISION:

The April 19, 2016, reference 01, decision is reversed. 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

_____
Decision Dated and Mailed

jet/pjs