IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JENNIFER M BUBAN
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 07A-UI-09845-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/16/07 R: 03
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Care Initiatives filed a timely appeal from the October 15, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 6, 2007. Claimant Jennifer Buban participated. Attorney Lynn Corbeil of Johnson & Associates/Talx UC eXpress represented the employer and presented testimony through Patty Kromray, Director of Nursing, and Tim Bouseman, Administrator. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jennifer Buban was employed by Care Initiatives as a Certified Nursing Assistant (C.N.A.) from November 21, 2005 until September 4, 2007. For the final six months of the employment, Ms. Buban worked part-time. Ms. Buban generally worked 6:00 a.m. to 2:00 p.m. The employer is a long-term nursing facility. The employer's handbook contained a policy that allowed the charge nurse to keep an employee after the scheduled end of a shift if the employer was short staffed. Ms. Buban had received a copy of the handbook at the start of her employment. In August 2007, the employer enacted a new system for the charge nurses to use to determine which C.N.A. would be required to stay late if the need existed. The policy was developed with input from the C.N.A.s. Under the new system, the names of the C.N.A.s appeared on a list in alphabetical order and the charge nurse would select the next name up on the list. This new system was presented at an in-service meeting on August 6, 2007. Ms. Buban was not present for the meeting. However, information regarding the new system was posted in the communication notebook C.N.A.s were required to review at the start of the shift. One week before September 4, Ms. Buban was selected to stay late until another C.N.A. appeared. Ms. Buban ended up working an additional hour and 15 minutes beyond the scheduled end of her shift.

On September 4, 2007, Ms. Buban worked her 6:00 a.m. .to 2:00 p.m. scheduled shift. During the shift, Ms. Buban had primary responsibility for providing cares to 19 residents. At 1:30 p.m. another C.N.A. called in an absence for a 2:00 p.m. shift. Ms. Buban learned from a coworker that she was going to be selected to stay late. Ms. Buban went to the charge nurse to see if this was true and learned that it was. If Ms. Buban stayed, she would have to stay until 6:00 p.m. to assist with dinner. Ms. Buban protested that she had just stayed late the week before and asked why it was her turn again. Ms. Buban said that she had problems at home and could not stay late. The charge nurse escorted Ms. Buban to the office of Administrator Tim Bouseman.

Mr. Bouseman told Ms. Buban that he wanted Ms. Buban to stay late. Ms. Buban indicated that she could not stay because she had problems at home. Ms. Buban did not elaborate. Ms. Buban is mother to a 13-year-old son whose drug abuse issues necessitate close monitoring of the child by Ms. Buban. Ms. Buban needed to pick her son up from school at 3:40 p.m. and transport him home. Ms. Buban then needed to supervisor her son at home. Ms. Buban did not want to go into the details of her son's issues during the discussion with the employer. When Director of Nursing Patty Kromray entered the meeting, Ms. Buban asked why she had been chosen to stay late after having done so the week before. Ms. Kromray told Ms. Buban that the prior incident did not count because Ms. Buban stayed just an hour and 15 minutes after the end of her shift. Ms. Buban reiterated that she could not stay. Mr. Bouseman told Ms. Buban that if she did not stay for the additional shift, the employer would treat her absence from the additional shift as an unexcused absence and that she would incur an attendance "occurrence." Ms. Buban understood that if she incurred one more attendance occurrence, she would be discharged from the employment. The employer confirms Ms. Buban would in fact have been discharged at the time she appeared for work on September 5 if she accrued another "occurrence." Mr. Bouseman told Ms. Buban that she would have to choose between staying late or accruing the attendance "occurrence." Ms. Buban indicated that she could not stay. Mr. Bouseman produced a resignation form and told Ms. Buban what to put on the form. Ms. Buban wrote in the employee comments section that she did not want to resign, could not stay, and knew she would be discharged if she incurred another attendance point. Ms. Buban then departed from the workplace.

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.

The greater weight of the evidence indicates that Ms. Buban had formed no intent to resign from the employment prior to entering the meeting with Mr. Bouseman and Ms. Kromray on September 4, 2007. The evidence indicates that the employer compelled Ms. Bouseman to choose between three options. The first option was to work late, which Ms. Buban could not due because of her parental responsibilities. The two remaining options were to resign on the spot or face discharge when she appeared for work the following day. Regardless of how Mr. Bouseman phrased the choices, Mr. Bouseman and Ms. Kromray both confirm that Ms. Buban would in fact have been discharged the following day if she had not stayed and worked the shift or resigned. The administrative law judge concludes Ms. Buban quit in lieu of being discharged. Ms. Buban's separation from the employment was not voluntary.

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.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 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 a discharge 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).

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 indicates that the employer's decision to have a C.N.A. stay late on September 4 was reasonable. The employer needed someone to cover for the C.N.A. who had called in an absence. The employer's directive that Ms. Buban be the C.N.A. that stayed late was not reasonable. The directive came within the last 30 minutes of the scheduled end of Ms. Buban's shift. Ms. Buban was selected to stay late after Ms. Kromray made the seemingly arbitrary decision to disregard Ms. Buban's turn at staying late the week before. It appears as if the employer did not comply with the very system it had enacted to bring more fairness to the process of selecting a C.N.A. to stay late. Ms. Buban's decision not to expose herself or her 13-year-old son to potential judgment, gossip or ridicule by elaborating on her son's substance issues during the meeting on September 4 demonstrated sound parental judgment and was reasonable. Ms. Buban's decision to choose the well-being of her child over a last-minute request that she stay late was also reasonable. The evidence in the record demonstrates no insubordination and establishes no misconduct.

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

DECISION:

The Agency representative's October 15, 2007, 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

jet/pjs