IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAKE L CALLAWAY
Claimant

SWIFT & COMPANY
Employer

APPEAL NO. 10A-UI-04745-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/07/10
Claimant: Appellant (2)

Iowa Code Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Jake Callaway filed a timely appeal from the March 15, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 14, 2010. Mr. Callaway participated. Tony Luse, Employment Manager, represented the employer. Exhibits One, Two and Three were received into evidence.

ISSUE:

Whether Mr. Callaway separated from the employer for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jake Callaway was employed by Swift & Company, doing business as JBS as a full-time production worker on the second shift. Mr. Callaway's immediate supervisor was Brian Adams. Mr. Callaway started the employment in July 2009 and last performed work for the employer on January 21, 2010. After work that day, Mr. Callaway hurt his knee in a non-work-related accident.

On January 22, 2010, Mr. Callaway used the employer's absence reporting telephone number to properly notify the employer he would be absent so that he could see a doctor about his knee. Mr. Callaway also saw a doctor.

The employer's absence reporting policy required that Mr. Callaway notify the employer at least 30 minutes before the scheduled start of his shift. The employer's policy required that Mr. Callaway call in each day unless he had provided the employer with a doctor's excuse that took him off work for multiple days.

On January 25, Mr. Callaway contacted the workplace and left a message for his immediate supervisor. The weight of the evidence indicates that Mr. Callaway did not follow the employer's absence notification procedure by calling the designated absence reporting line. The employer documented a no-call/no-show absence.

On January 26, Mr. Callaway was absent from work, but did not notify the employer by calling the absence reporting line. Mr. Callaway obtained a doctor's note from a medical clinic in Conrad. The doctor's note excused Mr. Callaway from work on January 25 and 26. That afternoon, Mr. Callaway took his doctor's note to the JBS human resources department and left the note with a human resources employee.

The clinic in Conrad had referred Mr. Callaway for an M.R.I. at the Marshalltown Medical and Surgical Center. The appointment was set for January 27. On January 27, Mr. Callaway properly notified the employer he would be absent from work due to illness. Mr. Callaway went to the M.R.I. appointment January 27. Mr. Callaway obtained a doctor's note to document his need to be absent for the appointment that day.

Mr. Callaway has a friend, Jeremy Miller, who is a supervisor at JBS/Swift. On January 27, Mr. Miller telephoned Mr. Callaway and told him that his name was included on a list of terminated employees. Mr. Callaway went to the employer's human resources department. Mr. Callaway provided his doctor's note for January 27. Mr. Callaway spoke to a representative who indicated that Mr. Callaway had in fact been terminated from the employment. The human resources employee told Mr. Callaway that he would have to turn in all equipment.

On January 28 or 29, Mr. Callaway returned to the workplace to return equipment and collect his final paycheck. The employer continued to record no-call/no-show absences. The employer recorded such absences on January 28, 29, February 1 and 2. The employer then documented a separation on February 3.

The employer's attendance policy includes a provision that indicates three days of no-call/no-show absences will be deemed a voluntary quit. Mr. Callaway had received a copy of the handbook.

The employer has 2,400 employees.

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.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

The administrative law judge considers the employer's point about the number of employees it has to keep track of, 2,400, an important point. While the employer had that number of employees to track, Mr. Callaway was concerned only with his own affairs. The weight of the evidence indicates that Mr. Callaway reasonably concluded on January 27, after his

conversation with Mr. Miller and the conversation with the human resources employee, that he had been discharged from the employment for attendance. Having reasonably reached that conclusion, there would be no reason for Mr. Callaway to continue to call in absences to the employer. The weight of the evidence in the record establishes that Mr. Callaway was discharged for attendance and did not voluntarily 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.
>
> 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).

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 weight of the evidence indicates that Mr. Callaway failed to properly notify the employer of his absences on January 25 and 26, 2010. The administrative law judge notes Mr. Callaway's attempted contact with his supervisor on January 25 and his contact with the human resources department on the afternoon of January 26. The evidence indicates that the final absence that factored into the discharge was Mr. Callaway's absence on January 27, on which day Mr. Callaway properly notified the employer of his need to be absent due to illness. Because the final absence was for illness properly reported, the administrative law judge concludes that the discharge was not based on a current act and was for no disqualifying reason. Mr. Callaway is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Callaway.

DECISION:

The Agency representative's March 15, 2010, reference 01, decision is reversed. 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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