IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GARY L SEVERSON
Claimant

ABCM CORPORATION
Employer

APPEAL NO. 15A-UI-13198-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/25/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Gary Severson filed a timely appeal from the November 17, 2015, reference 02, decision that that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Mr. Severson had voluntarily quit without good cause on August 31, 2015 by failing to report for work for three days in a row and not notifying the employer of the reason for the absences. The claimant had been discharged for excessive unexcused absences. After due notice was issued, a hearing was held on December 18, 2015. Mr. Severson participated. Deanna Armstrong represented the employer and presented additional testimony through Peggy Chensbold and Hope Pile.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him 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: Gary Severson, R.N., was employed by ABCM Corporation, doing business as Hallmark Care Center, as a full-time registered nurse from March 2014 and last performed work for the employer on August 25, 2015. Mr. Severson's work hours were 6:00 a.m. to 6:00 p.m. Mr. Severson generally worked three shifts per week. In June 2015, Hope Pile became Director of Nursing and Mr. Severson's immediate supervisor. On August 25, 2015, Mr. Severson started his shift on time, but left at 10:30 a.m. due to illness. The timing of Mr. Severson's departure that day occurred close in time to his discovery that Peggy Chensbold, Administrator, was going through his trash as part of an investigation into missing medications. Though Ms. Pile was at the workplace, Mr. Severson directed his request to leave work to Deanna Armstrong, Human Resources Director. Ms. Armstrong believed that Mr. Severson was indeed ill. Ms. Armstrong directed Mr. Severson to notify a fellow nurse, Desmond Simon, L.P.N., that he was leaving. Mr. Severson complied and delivered keys to Mr. Simon before leaving. Ms. Armstrong did not direct Mr. Severson to notify Ms. Pile that he was leaving and Mr. Severson did not notify Ms. Pile of his departure.

Mr. Severson was next scheduled to work on at 6:00 a.m. on August 26, 2015. At about 5:00 p.m. on August 25, Nurse Simon telephoned Mr. Severson and Mr. Severson indicated at that time that he would not be at work the next day due to illness. The employer's written absence reporting policy required that Mr. Severson notify a nursing team leader or another nursing supervisor at least six hours prior to the scheduled start of his shift if he needed to be absent. The employer had provided Mr. Severson with a copy of the handbook. Mr. Simon was nursing team leader on August 25, but was not the nursing team leader who would be on duty during August 26 shift. Mr. Severson did not make further contact with the employer regarding a need to be absent on August 26, 2015. The employer deemed Mr. Severson a no-call/no-show for the August 26 shift.

After August 26, Mr. Severson was next scheduled to work on August 29, 2015. On August 27, a couple of nursing assistants contacted Mr. Severson by text message to let him know that he had been taken off the schedule for shifts on August 29 and 30. On August 27, Mr. Severson telephoned Ms. Armstrong. Mr. Severson told Ms. Armstrong that he had planned to work his shifts on August 29 and 30, 2015. Ms. Armstrong told Mr. Severson that the employer had covered this shifts on August 29 and 30 because the employer had not heard from him in connection with his absence on August 26. Mr. Severson told Ms. Armstrong that would telephone Ms. Pile on August 28 to learn his work status. At that point, Mr. Severson was next scheduled to work on September 2.

On August 31, Mr. Severson telephoned the workplace and Ms. Armstrong answered. Mr. Severson told Ms. Armstrong that he had learned from the nursing assistants that he was now completely off the schedule. Ms. Armstrong told Mr. Severson that was correct and that the decision to remove him completely from the schedule had been based on the August 26 no-call, no-show absence. Mr. Severson told Ms. Armstrong that he had spoken to Mr. Simon on August 25 and had given notice to Mr. Simon that he would be gone the next day. Mr. Severson asked whether he should start looking for a new job and Ms. Armstrong told him yes. Mr. Severson expressed an interest in collecting documentation of his training.

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 evidence in the record fails to establish a voluntary quit. The employer asserts but one no-call/no-show absence, not three. There is no indication that Mr. Severson formed an intention to sever the employment relationship or that he communicated any such intention by word or deed to the employer.

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.

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 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).

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The weight of the evidence in the record indicates that Mr. Severson left work early on August 25, 2015 due to illness. Though Mr. Severson did not notify Ms. Pile of his need to leave work early, he properly reported the employer of the absence by notifying the human resources manager and a fellow nurse. The weight of the evidence establishes that Mr. Severson properly notified the employer of his August 26, 2015 through the telephone call with Mr. Simon on August 25. The employer's written policy required at least six hours' notice of the absence. That meant that Mr. Severson's notice regarding the missed 6:00 a.m. August 26 shift had to be given on August 25, 2015. The employer presented insufficient evidence to rebut Mr. Severson's assertion that he provided such notice to Mr. Simon on August 25, 2015. Mr. Severson specifically referenced the August 25 contact when he spoke with Ms. Armstrong on August 31. The weight of the evidence establishes that the August 26 absence was an excused absence under the applicable law. The employer removed Mr. Severson from the scheduled temporarily and then permanently in response to the absence on August 26, 2015.

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

DECISION:

The November 17, 2015, reference 02, 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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