IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

HARETH M ALZUBAIDI
Claimant

LOFFREDO FRESH PRODUCE CO INC
LOFFREDO GARDENS INC
Employer

APPEAL NO. 15A-UI-04509-JT-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/15/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 7, 2015, reference 01, decision that that disqualified the claimant for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that the claimant had voluntarily quit on March 10, 2015 without good cause attributable to the employer. After due notice was issued, a hearing was held on May 21, 2015. Claimant participated personally and was represented by attorney Jennifer Donovan. Mike Vilez represented the employer and presented additional testimony through Brian Loffredo. Exhibits One through Four and A were received into evidence.

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: Hareth Alzubaidi was employed by Loffredo Fresh Produce Company as a full-time picker and forklift operator. The claimant began the employment in October 2014 and last performed work for the employer on February 27, 2015. The claimant's usual work hours were 5:30 p.m. to 2:00 a.m., Sunday through Friday. The claimant's immediate supervisor was Jim Maxwell, Warehouse Manager. Prior to beginning the employment, the claimant was diagnosed with asthma. In December 2014, the claimant applied for employer-sponsored health insurance. The Wellmark insurance policy was supposed to be available to the claimant effective January 1, 2015 and the claimant was supposed to receive an insurance card that he would need to present to health care providers. The employer commenced deducting the claimant's share of the premium from the claimant's paycheck in January 2015. The claimant did not receive an insurance card. The claimant contacted the employer on multiple occasions about his lack of insurance. The employer misunderstood the nature of the claimant's inquiry and assumed, without checking, that the claimant's inquiry was about applying for insurance. The employer notified the claimant that he would have to wait until the open enrollment period to apply for insurance.

The claimant was absent on March 1, 2015 due to breathing-related illness and properly notified his supervisor. Under the employer's written attendance policy, the claimant was required to personally notify his immediate supervisor each day he was absent and to do so prior to the start of his shift. The supervisor told the claimant that he would have to provide a doctor's note to cover the absence. The claimant told the supervisor he would not have a doctor's note because he did not have insurance.

The claimant continued to be unable to work due to breathing difficulty on March 2. The claimant went to the human resources office and spoke with two human resources representatives about his inability to perform work due to breathing-related illness and his lack of an insurance. The human resources representatives said they would see what they could do and directed the claimant continue to notify his supervisor of his need to be absent. The claimant properly notified his supervisor of his need to be absent.

The claimant continued to be unable to work due to breathing difficulty on March 3. The claimant properly notified his supervisor and told the supervisor about his contact with the human resources personnel.

The claimant continued to be unable to work due to breathing difficulty on March 4. On that day, the claimant returned to the human resources office and spoke with human resources personnel. The claimant told the employer that his breathing condition was getting worse and that he needed to see a doctor. The claimant told the employer that he was unable to report for work due to illness. The human resources personnel again said they would see what they could do. The claimant notified his supervisor of his need to be absent.

The claimant continued to be unable to work due to breathing difficulty on March 5. On that day, the claimant notified his supervisor of his need to be absent. The claimant also went to the workplace. While the claimant was at the workplace, the human resources personnel contacted him and at that point clarified that what the claimant needed and lacked was a Wellmark insurance card. The human resources personnel directed the claimant to appear for a meeting the next day.

The claimant continued to be unable to work due breathing difficulty on March 6. On that day, the claimant was too sick to drive to the workplace so he enlisted someone else to drive him there so he could meet with the human resources personnel regarding his need for an insurance card. At that time, the employer provided the claimant with a list of free medical clinics and the Wellmark policy number but not a Wellmark insurance card. The employer assumed that claimant would go to a free medical clinic the following day.

The claimant continued to be unable to work due to breathing difficulty on March 8, 2015. The claimant properly notified his supervisor and told the supervisor about his contact with the human resources personnel.

On March 9, 2015, the claimant went to a medical clinic and paid out of pocket for evaluation and treatment. The doctor prescribed an inhaler and released the claimant to return to work effective March 12, 2015. That same day the claimant took the medical release to his supervisor. Under the employer's attendance policy, the claimant was not required to call in each day if he provided the employer with a doctor's note that would cover multiple days going forward.

The claimant was not scheduled to work on March 10.

The claimant continued to be absence due to breathing difficulty on March 11. The claimant did not contact the supervisor that day because he had provided the supervisor with the medical excuse.

The claimant continued to be absent due to breathing difficulty on March 12. The claimant properly notified the supervisor of his need to be absent.

The claimant continued to be absent due to breathing difficult on March 13 and properly notified the supervisor. The claimant told the supervisor that he would be able to return to work the following day. The supervisor told the claimant that the employment was no longer available.

The employer had drafted a termination form, dated March 1, 2015, that indicated the claimant had voluntarily quit without notice after last working on February 27, 2015. The document contained signatures of two employer representatives, both dated March 1, 2015. The employer asserts that all three references to March 1 are erroneous and that the document was actually completed on March 18, 2015. The document indicates that the employer mailed COBRA information to the claimant on March 18, 2015. The employer's internal correspondence documented a separation alleged to have occurred on or about March 18 that was based on alleged no-call, no-show absences on March 13, 15, 16, and 17.

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.

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).

The weight of the evidence establishes that the claimant was discharged and did not voluntarily quit. Testimony from the claimant's supervisor was conspicuously absent from the employer's presentation of evidence. The employer failed to present sufficient evidence to rebut the claimant's testimony that he had maintained appropriate contact with the supervisor regarding his need to be absent from work until March 13, 2015; when the supervisor told him the employment was ended.

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:

> 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).

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 evidence in the record fails to establish unexcused absences during the period of March 1 through 13, 2015, leading up to the discharge on March 13, 2015. The weight of the evidence indicates that the claimant properly notified the employer of his need to be absent and that the claimant provided the supervisor with a doctor's notice that covered the absences on March 9 and 11, 2015. The evidence is noteworthy for the manner in which the employer's human resources personnel contributed to the claimant's absences by failing to respond in a reasonable and timely manner to the claimant's multiple attempts to obtain a health insurance card for the insurance he had been paying for since the beginning of the year. The employer's documentation of the separation is unreliable.

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

DECISION:

The April 7, 2015, reference 01, decision is reversed. The claimant was discharged on March 13, 2015 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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