IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SAMUEL HOFSTETTER
Claimant

THE AMERICAN BOTTLING COMPANY
Employer

APPEAL NO. 14A-UI-01142-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/05/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Samuel Hofstetter filed a timely appeal from the January 30, 2014, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 20, 2014. Mr. Hofstetter participated. The employer did not respond to the hearing notice instruction to provide a telephone number for the hearing and did not participate. The administrative law judge took official notice of the agency's administrative record (Clear2There Hearing Control Screen and APLT) that documents the employer failure to provide a telephone number for the hearing.

ISSUE:

Whether Mr. Hofstetter separated from the employment 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: Samuel Hofstetter was employed by The American Bottling Company as a full-time merchandiser from mid-November 2013 until December 14, 2013, when his supervisor discharged him from the employment for attendance. The employer's attendance policy required that Mr. Hofstetter notify the employer prior to the scheduled start of the shift if he needed to be absent. The final absence that triggered the discharge occurred on December 14, 2013. Mr. Hofstetter had traveled to Iowa City on December 13, 2013 for a medical appointment and got caught in a snow storm on his way back home. Mr. Hofstetter ended up sleeping in his car that night. At 3:00 to 4:00 a.m. on December 14, Mr. Hofstetter sent a text message to his supervisor indicating that he would not be able to report for his 7:00 a.m. shift. The supervisor did not respond to that message. Shortly after 7:00 a.m., Mr. Hofstetter telephoned the supervisor and left a voicemail message. The supervisor responded by text message. The supervisor wrote that Mr. Hofstetter's absence "wasn't cool," that the supervisor had planned to work on his day off to train Mr. Hofstetter, and "if this is how it is going to be," that Mr. Hofstetter should not return. Mr. Hofstetter interpreted the message as a discharge from the employment. On December 16, 2013, Mr. Hofstetter delivered his employer-issued equipment to the employer.

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 employer did not participate in the hearing and did not present any evidence to establish a voluntary quit or a discharge for misconduct. The evidence in the record establishes that the employer discharged Mr. Hofstetter from the employment. Mr. Hofstetter reasonably interpreted the supervisor's text message as a discharge.

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 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 establishes that Mr. Hofstetter was discharged based on a single absence. That absence was due to inclement weather, something that was beyond Mr. Hofstetter's control. Accordingly, the absence was an excused absence under the law. The employer has failed to present any evidence to indicate otherwise.

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

DECISION:

The Agency representative's January 30, 2014, 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

jet/pjs