IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MILLISA J THURMOND
Claimant

MASTERBRAND CABINETS INC
Employer

APPEAL NO. 14A-UI-05122-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/29/13
Claimant: Respondent (1/R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 9 2014, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits based on an agency conclusion that the claimant had been discharged for no disqualifying reason . After due notice was issued, a hearing was held on June 5, 2014. Claimant Millisa Thurmond participated. Kyle Roed represented the employer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview. Exhibits One, Two, Three and A were received into evidence.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies her 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: Melissa Thurmond began her full-time wood worker employment with Master Cabinets, Inc., d/b/a Omega Cabinetry, in May 2012 and last performed work for the employer on January 10, 2014. At that time, Ms. Thurmond commenced a leave of absence that was approved by the employer's third-party leave administrator, Matrix. The employer directed Ms. Thurmond to communicate with Matrix concerning matters related to the leave. On one occasion, the employer directed Ms. Thurmond to provide documentation directly to the employer and Ms. Thurmond complied. The leave was based on Ms. Thurmond's recurrent migraine headaches. Ms. Thurmond's health care provider completed information on a leave form provided by Matrix to support Ms. Thurmond's need for leave. The health care provider returned the form to Matrix. At the time the leave began, Matrix assigned February 10 as the anticipated return to work date. Ms. Thurmond later contacted Matrix to request that the leave

be extended through March 10, 2014. Matrix provided Ms. Thurmond's health care provider with a form to use to document the continued leave. The health care provider completed the form and returned the form to Matrix.

Ms. Thurmond did not return to work on March 11, 2014. On or about March 10, Kyle Roed, Human Resources Manager for Omega Cabinetry, spoke with Ms. Thurmond about her need to further extend the leave and directed Ms. Thurmond to contact Matrix directly to discuss that issue. Mr. Roed also directed Ms. Thurmond to provide Matrix with appropriate documentation to extend the leave. Matrix later reported to the employer that it was having difficulty contacting Ms. Thurmond. In light of the lack of communication reported by Matrix, the employer assigned Sean Stowe, Human Resources Generalist, to communicate with Ms. Thurmond about her leave coming to an end and about her return to work. Mr. Stowe documented that he had attempted to contact Ms. Thurmond. Mr. Stowe did not document when he attempted contact or how many times he attempted contact. Mr. Stowe is no longer with the employer. Mr. Stowe reported to Mr. Roed that he was unable to make contact with Ms. Thurmond.

The employer's written attendance policy required that employees call in daily absences unless and until a leave absence had been approved. The policy was contained in the employee handbook that the employer had provided to Ms. Thurmond at the start of her employment.

On April 8, 2014, Mr. Stowe sent a letter to Ms. Thurmond by certified mail. Ms. Thurmond received the letter on April 10, 2014. The letter indicated as follows:

> Millisa,
>
> This letter is being sent to confirm your separation of employment from Omega Cabinetry effective 04/09/2014 due to attendance violations. You have not provided updated medical documentation to either Omega Cabinetry or our third party leave of absence administrator Matrix to extend your leave beyond 3/10/2014. Multiple attempts have been made to contact you and we have not been able to do so. If there is any additional relevant information regarding your leave or ability to return to work that has not already been provided please contact us immediately.
>
> You will receive information concerning continued benefit coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) and information concerning other benefits you are receiving in a separate letter. Any outstanding paychecks, once issued, will be mailed.
>
> In the event that you must return to campus, please notify a member of the Human Resources team to set up an appointment.
>
> If you have any questions, you can contact me at (319) 235-5717.
>
> Sincerely,
>
> Sean Stowe
> Human Resources Representative
> Omega Cabinetry

In response to receiving the letter, Ms. Thurmond contacted Matrix and Mr. Stowe and left messages for both in which she asked for a return call. When neither party returned the call, Ms. Stowe concluded she had been discharged and made no further attempt at contact.

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 is insufficient to establish a voluntary quit from the employment. The employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish a voluntary quit. The employer provided no testimony from Mr. Stowe or from any representative of Matrix. Though Mr. Stowe has separated from the employer, that did not preclude the employer of requesting his participation in the hearing or from requesting a subpoena to compel his participation. The employer has presented insufficient evidence concerning Mr. Stowe's alleged attempt to contact Ms. Thurmond and the allegation that Matrix had been unable to make contact with Ms. Thurmond. The employer presented insufficient evidence to rebut Ms. Stowe's assertion that she attempted contact with Matrix before and after she received the employer's April 8 letter or her assertion that she attempted contact with Mr. Stowe after she received the April 8 letter. Because the weight of the evidence fails to establish a voluntary quit from the employment, the administrative law judge concludes that Ms. Thurmond was discharged from the employment.

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.
>
> 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).

The evidence in the record establishes a discharge from employment that occurred in the contract of leave of absence that had previously been approved by the employer. The weight of the evidence indicates that the employer's written attendance policy was not sufficient to put Ms. Thurmond on notice that she would need to make daily calls to the employer in connection with an extension of the previously approved leave of absence. The weight of the evidence indicates a discharge for no disqualifying reason that occurred in the context of Ms. Thurmond attempting in good faith to comply with the employer's leave requirements. Accordingly, Ms. Thurmond is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claims deputy's May 9 2014, 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.

This matter is remanded to the Benefits Bureau for determination of whether the claimant has met the able and available requirements since she established her claim for benefits. Such determination should include consideration of medical documentation concerning the claimant's ability to perform full-time work.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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