IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANGELA M MERRILL
Claimant

STREAM INTERNATIONAL INC
Employer

APPEAL NO. 10O-UI-17381-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/13/10
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

This matter was before the administrative law judge for rehearing upon a remand from the Employment Appeal Board in Hearing Number 10B-UI-11258. An appeal hearing had occurred in appeal number 10A-UI-11258-DT on October 18, 2010, and the Employment Appeal Board concluded that the employer had been denied the opportunity to participate in the hearing. The claimant had filed a timely appeal from the August 3, 2010, reference 01, decision that denied benefits. After due notice was issued, the new hearing was held on January 31, 2011. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Staci Albert represented the employer and presented additional testimony through Laura Karmann.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Angela Merrill was employed by Stream International, Inc., as a full-time customer support professional from 2006 until June 15, 2010, when the employer discharged her from the employment for attendance. On June 10, 2010, Ms. Merrill left work early due to illness. Ms. Merrill properly reported her needed to leave work early to the supervisor on duty. Ms. Merrill was then absent without notifying the employer for two days. If Ms. Merrill needed to be absent, the employer's policy required that she contact the employer's designated number an hour before her shift. The employer's policy also required that Ms. Merrill speak with her immediate supervisor. Ms. Merrill was aware of the policy. Ms. Merrill suffers from migraine headaches and depression. Ms. Merrill had been approved for intermittent medical leave under the Family and Medical Leave Act. At the time Ms. Merrill was absent, she had recently received a minor adjustment to a psychotropic medication she had been on for upwards of two years. At the time Ms. Merrill was absent without notifying the employer, she was in the process of adjusting to a new work schedule with different days off and different workstation. There was some confusion regarding the days off and this factored into the no-call, no-show absences. Ms. Merrill reported

for work on June 15, went to her new workstation, and then was advised the employer considered her a voluntary quit. The employer was unwilling to allow Ms. Merrill to continue in the employment. Ms. Merrill had not formed an intent to leave the employment she had been in for three and a half years. Ms. Merrill had not removed personal items from the workplace, but had instead prepared to move them from her old work cubicle to her new work cubicle.

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 weight of the evidence indicates that the employer discharged Ms. Merrill and that Ms. Merrill 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 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). 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).

Ms. Albert and Ms. Merrill each provided testimony that was internally consistent regarding the change in the scheduled days off at the end of the employment at the time Ms. Merrill was transitioning to different duties. The confusion in the testimony highlights and gives weight to the idea that there was indeed confusion about the assigned days off at the end of the employment. Under the circumstances, the evidence is insufficient to establish that Ms. Merrill was knowingly absent without notifying the employer on the two days the employer references as the no-call, no-show absences that triggered the separation from the employment.

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

DECISION:

The Agency representative's August 3, 2010, reference 01, decision is reversed. 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw