IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RANDY J PAULSEN
Claimant

NPC INTERNATIONAL INC
Employer

APPEAL NO. 15A-UI-01598-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/10/16
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 29, 2016, reference 01, decision that allowed benefits to the claimant provided he 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 on January 6, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on March 2, 2016. The hearing in this case was consolidated with the hearing in Appeal Number 16A-UI-01430-JTT. Claimant Randy Paulsen participated and presented additional testimony through Ron Hanson. Lyle McElfresh represented the employer and presented additional testimony through Melissa Quesada. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant in connection with the claim. Exhibits One, Two, A, B and C and Department Exhibits D-1, D-2 and D-3 were received into evidence.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies the claimant 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: the employer does business as Pizza Hut. Claimant Randy Paulsen was employed as a full-time shift leader at the employer's east location in Davenport. Mr. Paulsen's immediate supervisor was Lyle McElfresh, General Manager. Mr. Paulsen's employment began in February 2015. Mr. Paulsen last performed work for the employer on January 4, 2016.

Mr. Paulsen is 51 years old and has had chronic back issues for a decade. Those issues include a bulging vertebral disk. Mr. Paulsen receives ongoing treatment at a pain clinic and is prescribed Vicodin and a muscle relaxer. Mr. Paulsen's back pain issues prompted him to miss work. Mr. McElfresh was aggravated by the absences and was non-sympathetic to Mr. Paulsen's need to be away from work to recover from flare ups in his back pain.

After Mr. Paulsen worked his shift on January 4, 2016, he was next scheduled to work at 2:00 p.m. on January 6. The restaurant's weekly manager's meeting was also scheduled for 9:30 a.m. on January 6. On February 5, Mr. Paulsen notified Mr. McElfresh by text message that he would be absent from his shift and from the manager's meeting on January 6, 2016 due to a flare up of his back pain. Mr. Paulsen told Mr. McElfresh that he had a doctor's note to support his need to be absent. Mr. Paulsen had indeed sought medical treatment that day and had indeed been taken off work by a physician. The physician had released Mr. Paulsen to return to work effective January 8, 2016. Mr. McElfresh told Mr. Paulsen by text message:

> If you are not at the meeting you are fired. Because that was scheduled. You don't dictate to me. I'm your boss not the other way around. And I was to talk with you tomorrow about 4 issues that the outcome of your answers would decide if you still work here!!! Not your health or med issues!!!! And until I have that dr's note you are still scheduled. So don't dictate to me.

The employer's policy required that Mr. Paulsen provide at least two-hours' notice of his need to be absent from a shift. The employer accepts text messages as a form of notice. The employer's practice also included a collaborative effort to locate a replacement for missed shifts.

Mr. Paulsen took Mr. McElfresh at his word when Mr. McElfresh said he would be fired if he did not appear for the managers' meeting. On the morning on January 7, Mr. McElfresh announced to one or more employees that he had fired Mr. Paulsen. Mr. McElfresh had also crossed Mr. Paulsen off the posted work schedule. On that day, Mr. Paulsen delivered a copy of his doctor's note to the employer. He did so out of an abundance of caution, so as not to be accused later of presenting a bogus reason for being absent on January 6.

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.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

The weight of the evidence establishes that Mr. McElfresh did indeed notify Mr. Paulsen that he was discharged from the employment if he was absent from the manager's meeting. Mr. McElfresh meant it when he wrote it. Mr. Paulsen reasonably concluded that Mr. McElfesh meant what he said and that he was discharged from the employment for failing to attend the manager's meeting. The event that triggered the discharge was indeed the absence on January 6. Mr. Paulsen had a bonafide medical reason to be absent that day and had provided proper notice to the employer.

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 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). 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.

Because the final absence that triggered the discharge was due to illness and was properly reported to the employer, the absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Mr. Paulsen for benefits. Because Mr. Paulsen was discharged for no disqualifying reason, he is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The January 29, 2016, reference 01, decision is affirmed. 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.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs