IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

VICKY J BARGOIYET
Claimant

TPI IOWA LLC
Employer

APPEAL NO. 14A-UI-11252-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/12/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Vicky Bargoiyet filed a timely appeal from the October 29, 2014, reference 01, decision that disqualified her for benefits based on an Agency conclusion that she voluntarily quit by being absent for three days without notifying the employer. After due notice was issued, a hearing was held on November 18, 2014. Ms. Bargoiyet participated and presented additional testimony through Thomas Balltzley. Danielle Williams represented the employer.

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: Vicky Bargoiyet was employed by TPI Iowa, L.L.C., as a full-time warehouse worker from 2013 and last performed work for the employer on October 3, 2014. Ms. Bargoiyet's usual work hours were 3:00 p.m. to 11:00 p.m., Monday through Friday. After October 3, 2014, Ms. Bargoiyet was next scheduled to work until Monday, October 6, 2014. On that day, Ms. Bargoiyet was absent because her three-year-old son was hospitalized with injuries sustained in a motor vehicle accident. Ms. Bargoiyet properly notified her supervisor of her need to be absent by telephoning him and sending a text message to him on the morning of October 6. Ms. Bargoiyet was then absent the next two days for the same reason and properly notified her supervisor of her need to be absent those days. Ms. Bargoiyet attempted to return to work on October 9, 2014. At that time, the employer asserted that she had voluntarily quit the employment by being absent without notifying the employer. When Ms. Bargoiyet asserted that she had indeed notified the supervisor of the absences, the employer directed Ms. Bargoiyet to bring her phone to the workplace to show the calls to the workplace made on phone. Ms. Bargoiyet presented the employer with a doctor's note that covered the Monday-Wednesday absences. The employer rejected the note because the note did not set forth the calendar date of the absences. Ms. Bargoiyet brought her phone to the workplace and showed it to her supervisor's supervisor. The employer refused to allow Ms. Bargoiyet to return to the employment and asserted that she had voluntarily quit by being a no-call, no-show for multiple shifts.

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 establishes a discharge from the employment, not a voluntary quit. The weight of the evidence indicate that Ms. Bargoiyet at no point expressed an intention of separating from the employment. The weight of the evidence indicates that Ms. Bargoiyet did indeed contact the supervisor on the three consecutive days she was absent. In addition, Ms. Bargoiyet provided the employer with a doctor's note and shared the record contained on her cell phone. The employer has failed to present sufficient evidence to rebut Ms. Bargoiyet's testimony concerning the steps she took to notify the employer of the absences and provide proof of such contact. The employer had the ability to present testimony through the supervisor, but elected not to present such proof. 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).

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).

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 weight of the evidence in the record establishes absences on October 6-8, 2014 that were due to the hospitalization of a minor, dependent child and that were properly reported to the employer. Those absences were excused absences under the applicable law. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Bargoiyet was discharged for no disqualifying reason. Accordingly, Ms. Bargoiyet is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 29, 2014, 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/pjs