IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

Appeal Number: 06A-UI-05481-JTT
OC: 04/30/06 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

TRACY L MURRAY
11325 – 140TH ST TRLR 47
DAVENPORT IA 52804-9559

DAVENPORT COMMUNITY SCHOOL DIST
ATTN SUSAN K HERZMANN
1606 BRADY ST
DAVENPORT IA 52803

____
(Administrative Law Judge)

____
(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Davenport Community School District filed a timely appeal from the May 18, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 13, 2006. Claimant participated. Associate Director of Human Resources Jill Cirivello represented the employer. The administrative law judge took official notice of the Agency administrative file, which includes the documents the employer submitted to the fact-finder. The hearing in this matter was consolidated with the hearing in Appeal Number 06A-UI-06064-JTT, concerning whether the claimant refused a suitable offer of work.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tracy Murray was employed by the Davenport Community School District as a full-time para-educator

from August 21, 2000 until March 22, 2006, when she quit in response to changes in the conditions of her employment. Until March 22, 2006, Ms. Murray had been assigned to work at Wilson Elementary School. Ms. Murray had missed a significant amount of work due to illness and a pending divorce. Ms. Murray's evaluation, conducted in May 2005, indicates positive reviews for everything except attendance.

In February or March 2006, Wilson Elementary School principal Sheri Schultz told Ms. Murray that if she missed any more work, she would be required to provide a doctor's note or proof that she had needed to attend court. One week prior to her separation from the employer, Ms. Murray notified the employer that her children were ill and that she would need to be absent from work. Ms. Murray provided a doctor's note to the employer. On or about March 20, Principal Schultz notified Ms. Murray that she was discharged from her position/assignment at Wilson Elementary School.

On March 22, 2006, Associate Director of Human Resources Jill Cirivello notified Ms. Murray that due to Ms. Murray's attendance at Wilson Elementary, the employer had decided to "transfer" Ms. Murray to a "floater" position and the district would thereafter assign Ms. Murray to substitute at schools that needed coverage or additional assistance. Ms. Cirivello further notified Ms. Murray that if Ms. Murray accepted "an assignment," that the district would continue to pay Ms. Murray at her current hourly rate "for all hours worked for the rest of the school year" and allow her to seek other para-educator assignments in the district. On March 21, the employer instructed Ms. Murray to report to Lincoln Elementary School to cover for a para-educator who was on leave. There was no guarantee that the assignment would last to the end of the school year and no plans for a further assignment to complete the school year. On March 22, Ms. Murray declined to report to Lincoln Elementary School. Ms. Cirivello notified Ms. Murray that the employer deemed her refusal to accept the temporary assignment to the Lincoln School a voluntary resignation from the "floater" position.

Ms. Murray established a claim for benefits that was effective on April 30, 2006, and has received benefits.

REASONING AND CONCLUSIONS OF LAW:

The first question for the administrative law judge is whether Ms. Murray quit or was discharged from the employment. 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 administrative law judge notes that the employer failed to present testimony from Principal Sheri Schultz, a key player in the events that led to the separation from the employment. 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 greater weight of the evidence indicates that Principal Schultz discharged Ms. Murray for attendance on March 20, 2006.

The next question is whether the evidence in the record establishes that Ms. Murray was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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).

Allegations of misconduct 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). See also Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for Ms. Murray's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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).

The evidence in the record establishes that the final absence that prompted the discharge was for illness properly reported to the employer, in other words, an excused absence under applicable law. Since the final absence was an excused absence, the evidence in the record fails to establish a current act of misconduct that might serve as a basis for disqualifying Ms. Murray for benefits. Ms. Murray was discharged for no disqualifying reason and would be eligible for benefits, provided she was otherwise eligible.

DECISION:

The Agency representative's decision dated May 18, 2006, reference 01, 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.

jt/kkf