IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARYLN G COOPER
Claimant

QWEST CORPORATION
Employer

APPEAL NO. 14A-UI-08575-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/06/14
Claimant: Respondent (5)

Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 11, 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. After due notice was issued, a hearing was held on September 8, 2014. Claimant Marlyn Cooper participated. Maxine Piper of Barnett Associates represented the employer and presented testimony through Robert Moser. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One and Two into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purposes of determining whether the employer participated in the fact-finding interview and whether the claimant engaged in fraud or dishonesty in connection with the fact-finding interview.

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: Marlyn Cooper was employed by CenturyLink as a full-time sales and care representative from December 2013 and last performed work for the employer on June 16, 2014. Ms. Cooper's work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday. Ms. Cooper's immediate supervisor during the last few months of the employment was Robert Moser, Inbound Sales and Care Supervisor.

While Ms. Cooper was on her lunch break at work on June 16, 2014, she received a very disturbing call from a law enforcement officer. The officer notified Ms. Cooper that her mother had attempted suicide. Ms. Cooper had left her young children in the care of her mother while Ms. Cooper worked. The officer told Ms. Cooper that she needed to immediately come retrieve her children from her mother's home or the law enforcement officers would temporarily place Ms. Cooper's children and Ms. Cooper would have to go through the steps of locating her children. Ms. Cooper returned to the workplace and explained her family emergency to

Mr. Moser. Mr. Moser told Ms. Cooper that she could not leave and that she should find another family member to collect her children. Ms. Cooper advised that she had attempted to find another family member to assist her, but had been unable to locate anyone. Ms. Cooper asked what would happen if she left. Mr. Moser told Ms. Cooper that the employer would go through the steps that would likely lead to termination of her employment. Ms. Cooper asked to use accrued vacation time to cover the absence. Mr. Moser denied that request. Ms. Cooper explained that she had to leave and left to address the situation concerning her children and her mother.

Ms. Cooper was next scheduled to work at 8:00 a.m. on June 17, 2014. At 6:55 a.m., Ms. Cooper contacted the employer's Workforce Department (human resources) to let the employer know she would need to be absent due to her mother's condition. The employer's absence notification policy required that Ms. Cooper contact the employer at the start of the business day if she needed to be absent. Ms. Cooper explained that her mother was in the intensive care unit of the hospital and that the hospital staff had requested that Ms. Cooper remain at her mother's side in the event she had to make end of life choices on behalf of her mother. Ms. Cooper believed her mother was about to die.

Ms. Cooper was next scheduled to work at 8:00 a.m. on June 18, 2014. At 6:55 a.m., Ms. Cooper again contacted the employer's Workforce department. Ms. Cooper explained that her mother was still in critical condition and that Ms. Cooper would need to be absent that day. The employer representative directed Ms. Cooper to contact Mr. Moser about the status of her employment. Ms. Cooper advised that she did not have time at the present to do that. Between 11:00 a.m. and noon that day, Ms. Cooper called Mr. Moser's cell phone. Mr. Moser did not answer. Ms. Cooper did not leave a message.

Ms. Cooper was next scheduled to work at 8:00 a.m. on June 19, 2014. Ms. Cooper did not contact the employer that morning to report that she would be absent. A coworker contacted Ms. Cooper that morning and told her she should contact Mr. Moser. Ms. Cooper was upset about her mother's situation and Mr. Moser's handling of her need for time off to deal with the family emergency. At about noon, Ms. Cooper telephoned Mr. Moser. Mr. Moser asked what was going on. Ms. Cooper explained that her mother was still in the hospital and that Ms. Cooper needed to remain with her mother. Ms. Cooper explained that that she had a lot of things going on in her personal life and that she had been trying to contact her mother's family so that they could see her mother before her mother passed away. Ms. Cooper reminded Mr. Moser that she had tried to use vacation so that she could address her family emergency and that Mr. Moser had denied that request. Mr. Moser requested that Ms. Cooper submit a text message indicating that she resigned. Ms. Cooper did not respond to that request.

On June 20, 2014, Ms. Cooper received a letter from Mr. Moser indicated that she needed to return to work by June 24, 2014 or the employer would assume that she was choosing not to return to the employment and the employment would be terminated due to a failure to report. Ms. Cooper did not respond to the letter and did not make further contact with the employer.

REASONING AND CONCLUSIONS OF LAW:

The employer asserts that Ms. Cooper voluntarily quit the employment because the employer had not followed all of its usual steps to formally discharge Ms. Cooper from the employment. Ms. Cooper asserts that she did not voluntarily quit. The weight of the evidence indicates a quit, but a quit under extenuating circumstances. Those included the threat that Ms. Cooper would likely be discharged from the employment upon her attempt to return to the employment. Those circumstances also included the employer's questionable handling of Ms. Cooper's need for

time off to address a bona fide family emergency. The administrative law judge concludes that the evidence indicates either a quit in lieu of imminent discharge or a voluntary quit due to intolerable and detrimental working condition and will analyze the matter under both scenarios.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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.

Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 24.26(4). The test is whether a reasonable person would have quit 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). Aside from quits based on medical reasons, prior notification of the employer before a resignation for intolerable or detrimental working conditions is not required. See Hy-Vee v. EAB, 710 N.W.2d (Iowa 2005).

Ms. Cooper left the employment due to intolerable and detrimental working conditions created by Mr. Moser in the context of Ms. Cooper's bona fide family emergency. Ms. Cooper fully explained her circumstances to the employer on June 16, 2014. Despite being fully apprised of the tragedy unfolding in Ms. Cooper's family life at that moment, the employer elected to adopt a heavy-handed, unreasonable, patently callous response to Ms. Cooper's need for time to address the family emergency. The employer did not change course thereafter. The employer chose to add to the pressure Ms. Cooper was already under by threatening her with imminent discharge form the employment. In the face of such conduct on the part of the employer, a reasonable person would likely have chosen not to return to the employment. The administrative law judge notes that the separation was premised as much on the intolerable conditions created by the employer as the need to care for a family member.

871 IAC 24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

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.

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.

The evidence establishes that the absences on June 16, 17 and 18 were excused absences under the applicable law. Ms. Cooper properly notified the employer of her need to be absent each day and the basis for the absence was a bona fide family emergency involving Ms. Cooper's mother. The June 19 absence is more problematic. Ms. Cooper did not give proper notice to the employer of her need to be absent that day. She did contact the employer during the shift to discuss the absence. Given the failure to provide proper notice, the absence was an unexcused absence under the applicable law. However, the employer's handling of Ms. Cooper's need for time was a mitigating factor. The administrative law judge concludes that evidence in the record is insufficient to establish excessive unexcused absences or other misconduct.

Based on the evidence in the record and the applicable law, the administrative law judge concludes that Ms. Cooper quit the employment for good cause attributable to the employer and in the absence of misconduct on the part of Ms. Cooper. Ms. Cooper is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claims deputy's August 11, 2014, reference 01, decision is modified as follows. The claimant quit the employment for good cause attributable to the employer and in the absence of misconduct on the part of the claimant. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/css