IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHAEL E STORY
Claimant

MOSSMAN ROOFING INC
MOSSMAN ROOFING
Employer

APPEAL NO. 11A-UI-10825-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/20/11
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 15, 2011, reference 04, decision that allowed benefits. After due notice was issued, a hearing was held on September 9, 2011. Claimant Michael Story participated and presented additional testimony through Ken Bishop. David Mossman represented the employer.

ISSUE:

Whether Mr. Story separated from the employment for a reason the disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michael Story was employed by Mossman Roofing as a full-time roofer from March 2011 until July 18, 2011, when David Mossman, president, discharged him for attendance. Ron Frye was Mr. Story's immediate supervisor. Mr. Story's usual work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday.

At about noon on Thursday, July 14, Mr. Story received a telephone call at work. The call was from his wife. Mr. Story's six-year-old son had fallen down the basement stairs and needed to go to the hospital. Mr. Story requested to leave. Mr. Frye approved the request to leave the job site, but told Mr. Story to contact Mr. Mossman. Mr. Story contacted Mr. Mossman and Mr. Mossman approved the absence. Mr. Story's son was hospitalized.

On the morning of July 15, Mr. Story contacted Mr. Mossman to say he would not be at work because he needed to stay at the hospital with his son. Mr. Mossman approved the absence.

On the morning of Monday, July 18, Mr. Story appeared for work. Mr. Frye directed him to telephone Mr. Mossman. Mr. Mossman told Mr. Story that he was discharged from the employment. In making the decision to discharge Mr. Story from the employment, Mr. Mossman considered other absences that had occurred during the brief employment.

The only further contact between the parties was about whether the parties were square financially in connection with a drill purchase and about Mr. Story's request to receive pay stubs.

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.

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 weight of the evidence establishes that the employer discharged Mr. Story and that Mr. Story did not voluntarily quit. The employer was already unhappy with Mr. Story's attendance. The employer knew that Mr. Story was called away from work on the final day because an emergency involving Mr. Story's son. Mr. Story appeared for work on July 18, indicating a desire to continue in the employment. The administrative law judge notes that the employer was, by and large, unprepared for the hearing and was generally unable to provide specific information about the employment, in contrast to the detailed and specific information provided by Mr. Story. The administrative law judge concludes that Mr. Story's version of events is more credible.

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 a discharge 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).

The evidence in the record establishes that the employer discharged Mr. Story for attendance. The final two absences that factored in the discharge were due to illness of Mr. Story's young son and were properly reported to the employer. Each of these absences was an excused absence under the applicable law. Because the final two absences that triggered the discharge were excused absences under the law, the administrative law judge concludes that Mr. Story was discharged for no disqualifying reason. Accordingly, Mr. Story is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Story.

DECISION:

The Agency representative's August 15, 2011, reference 04, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw