IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

THERESA L PETTIT
Claimant

AMERICAN BUILDING MAINTENANCE COMPANY OF KENTUCKY INC
Employer

APPEAL NO. 09A-UI-03536-JTT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 01/25/09
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 February 23, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 31, 2009. The claimant participated. Cheryl Roethemeier of TALX UC eXpress represented the employer and presented testimony through Shawn Conrad, Human Resources Manager. Exhibits One through Six were received into evidence.

ISSUE:

Whether the claimant voluntarily quit or was discharged from the employment.

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Theresa Pettit commenced her employment with American Building Maintenance of Kentucky (ABM) on January 14, 2008 and last performed work for the employer on January 2, 2009. Ms. Pettit worked as a part-time janitor and was assigned to an Aegon facility in Cedar Rapids. Ms. Pettit's immediate supervisor was Kathy Howell, Project Manager. Ms. Howell is still with the employer.

On Friday, January 2, 2009, Ms. Pettit reported for work as scheduled. During her shift, Ms. Howell requested that Ms. Pettit provide a doctor's excuse to cover her absence on December 31, 2008. On that date, Ms. Pettit had been absent because her mother had suffered a fall and had to be transported to a hospital. Hospital staff had contacted Ms. Pettit to summon her to the hospital to assist her mother. The employer's absence notification policy required that Ms. Pettit contact Ms. Howell at least four hours prior to the shift if she needed to be absent. Ms. Pettit was scheduled to work at 5:30 p.m. and contacted Ms. Howell between noon and 1:00 p.m. Ms. Pettit had told Ms. Howell only that she needed to be absent for personal reasons.

On January 2, when Ms. Pettit was unable to produce a doctor's excuse, Ms. Howell approached Ms. Pettit for the purpose of issuing a written reprimand in connection with the December 31 absence. Ms. Howell would not allow Ms. Pettit to read the reprimand. Ms. Pettit declined to sign the reprimand without an opportunity to read it and asserted that it was inappropriate for Ms. Howell to issue the reprimand or to probe further into Ms. Pettit's personal business. Ms. Howell returned later in the shift with another employee, Tim Gilbertson. Ms. Howell again requested that Ms. Pettit sign the reprimand. Ms. Pettit refused to sign the reprimand. Ms. Howell directed Ms. Pettit to leave. Ms. Howell and Mr. Gilbertson escorted Ms. Pettit from the Aegon facility.

On January 5, Ms. Pettit contacted Human Resources Manager Shawn Conrad to request her request reassignment to another facility. Ms. Pettit told Ms. Conrad about her forced early departure from work on January 2. Ms. Conrad told Ms. Pettit that they could discuss a transfer to another facility, but that Ms. Pettit should report to the Aegon facility for work on January 5.

On January 5, Ms. Pettit reported to the Aegon facility for her scheduled shift. Aegon security, upon Ms. Howell's directive, did not allow Ms. Pettit past the lobby. Ms. Howell and Mr. Gilbertson came to the lobby to meet with Ms. Pettit. Ms. Howell told Ms. Pettit that she was issuing a reprimand to Ms. Pettit in connection with the early departure on January 2. Ms. Howell would not allow Ms. Pettit to review the reprimand. Ms. Pettit refused to sign the reprimand in the absence of an opportunity to review it. Ms. Howell told Ms. Pettit that she could not return to work and would not be allowed into the Aegon building. Ms. Pettit left the Aegon facility under the belief that Ms. Howell had just discharged her from the employment.

On January 6, Ms. Howell discussed the January 5 incident with Ms. Conrad. Ms. Conrad waited until January 9 to attempt to follow up with Ms. Pettit. On January 9, Ms. Conrad left a message for Ms. Pettit asking her to call Ms. Conrad. Ms. Pettit called Ms. Conrad on January 13. Ms. Pettit indicated at that time that she believed she had been discharged from the employment.

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).

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 employer failed to provide any testimony from Ms. Howell or Mr. Gilbertson. The employer had the ability to present such testimony. The employer instead provided a written statement from Mr. Gilbertson that addressed only the events of January 2 and did not address the events of January 5. The weight of the evidence indicates that Ms. Pettit reasonably concluded on January 5 that she had been discharged from the employment by Ms. Howell. The administrative law judge concludes that Ms. Pettit was discharged from the employment by her immediate supervisor and did not voluntarily quit.

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.
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> 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 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).

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 weight of the evidence indicates that the final absence that factored in the discharge was the absence on December 31, 2008, when Ms. Pettit was absence due to the illness of her mother and properly notified the employer. The absence was an excused absence under the applicable law. Insofar as the discharge was based on attendance, the discharge was for no disqualifying reason and Ms. Pettit would be eligible for benefits, provided she was otherwise eligible.

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence in the record indicates that Ms. Howell unreasonably directed Ms. Pettit to sign written reprimands on January 2 and 5 without providing Ms. Pettit an opportunity to review the document she was being asked to sign prior to signing the document. The weight of the evidence indicates that Ms. Pettit acted reasonably in refusing to sign a document she was not allowed to review. Accordingly, Ms. Pettit's conduct did not amount to insubordination under the applicable law.

Ultimately, the employer's case fails because the employer failed to present sufficient evidence and sufficiently direct and satisfactory evidence to establish misconduct. 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). As stated above, 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 employer failed to produce testimony from anyone with firsthand knowledge of the events of January 2 and 5 despite the ability to present such testimony.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Pettit was discharged for no disqualifying reason. Accordingly,

Ms. Pettit is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Pettit.

DECISION:

The Agency representative's February 23, 2009, reference 01, decision 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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