IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DESIREE A HAMILTON
Claimant

IA DEPT OF HUMAN SVCS/GLENWOOD
Employer

APPEAL NO. 15A-UI-05328-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/15/15
Claimant: Appellant (4)

871 IAC 24.23(10) – Leave of Absence
Iowa Code section 96.5(2)(a) – Discharge
Iowa Code section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Desiree Hamilton filed a late appeal from the March 3, 2015, reference 01, decision that denied benefits effective February 15, 2015, based on an Agency conclusion that Ms. Hamilton had requested and been granted a leave of absence, was voluntarily unemployed, and was not available for work within the meaning of the law. After due notice was issued, a hearing was held on July 20, 2015. Ms. Hamilton participated and was represented by attorney, Todd Bennett. Sandra Linsin of Employers Edge represented the employer and presented testimony through Kathryn King and Pam Stipe. Exhibits 1 through 23 and A and Department Exhibits D-1 and D-2 were received into evidence.

ISSUES:

Whether there is good cause to treat Ms. Hamilton's late appeal of the March 1, 2015, reference 01, decision as a timely appeal. There is not.

Whether Ms. Hamilton 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: Desiree Hamilton established a claim for unemployment insurance benefits that was effective February 15, 2015. Ms. Hamilton did not participate in the March 2, 2015 fact-finding interview that was scheduled to address her employment relationship with the Glenwood Resource Center. On March 3, 2015, Iowa Workforce Development mailed a copy of the March 3, 2015, reference 01, decision to Desiree Hamilton at her last-known address of record. That address was 15211 Rock Bluff Avenue in Plattsmouth, Nebraska. Ms. Hamilton had moved to the address toward the end of February 2015. The March 3, 2015 decision denied benefits effective February 15, 2015, based on an Agency conclusion that Ms. Hamilton had requested and been granted a leave of absence, was voluntarily unemployed, and was not available for work within the meaning of the law. Ms. Hamilton received the March 3, 2015, reference 01,

decision on March 10, 2015. See Department Exhibit D-2, appeal email. The March 3, 2015, reference 01, decision contained a warning that an appeal from the decision must be postmarked by March 13, 2015 or be received by the Appeals Section by that date. When Ms. Hamilton received the decision, she consulted with her attorney about filing an appeal from the decision. Ms. Hamilton then waited until May 5, 2015 to file an appeal by email. The Appeals Section received the emailed appeal on May 5, 2015. In the emailed appeal, Ms. Hamilton said the appeal had been filed late because, "I have been sick, and have been without a phone or computer also was in a bad domestic violence situation!" The assertion that Ms. Hamilton had been without access to a computer was untrue. Ms. Hamilton had repeatedly corresponded with the employer by email from March 4, 2015 through April 21, 2015. See Exhibits One-22.

Ms. Hamilton was employed by the Iowa Department of Human Resources, Glenwood Resources Center, as a full-time residential treatment worker from June 2013 and last performed work for the employer on February 12, 2015. Ms. Hamilton provided services to developmentally disabled adults. Ms. Hamilton's regular duties required that she be able to lift 50 to 75 pounds on a regular basis.

On February 23, 2014, Ms. Hamilton suffered injury to her neck and shoulder in the course of performing her duties when a client assaulted her from behind. The client grabbed and pulled Ms. Hamilton by her neck. The incident prompted a worker's compensation claim. Ms. Hamilton was diagnosed with cervical strain. The treating physician prescribed pain medication, referred Ms. Hamilton to physical therapy and imposed light-duty work restrictions. In March 2014, Ms. Hamilton underwent an MRI. The treating physician referred Ms. Hamilton to a neck specialist and continued the medication, the physical therapy, and the work restrictions.

On March 28, 2014, Ms. Hamilton had her first appointment with spine specialist, Bradley Bowdino, M.D. Dr. Bowdino affirmed the diagnosis of cervical strain. Dr. Bowdino continued the physical therapy, the light-duty work restrictions, and indicated that a new MRI should be performed in six months to assess for change in Ms. Hamilton's neck. As of September 29, 2014, Dr. Bowdino indicated that he planned to release Ms. Hamilton to return to full duty.

On October 2014, Ms. Hamilton underwent a functional capacity evaluation. The physical therapist who conducted the FCE concluded, in essence, that Ms. Hamilton had attempted to manipulate the evaluation and that the evaluation was invalid. The physical therapist noted that, "Accurate functional restrictions cannot be outlined for Ms. Hamilton based on an invalid examination."

Ms. Hamilton thereafter performed a combination of her regular duties and light-duty work until February 12, 2015.

Ms. Hamilton and her attorney requested an independent medical evaluation. Ms. Hamilton underwent the independent medical evaluation on January 12, 2015. Dr. Sunil Bansal, M.D., R.P.H., of Premier Injury Institute conducted the evaluation. Dr. Bansal reviewed Ms. Hamilton's medical history since the February 2014 injury. Ms. Hamilton reported, and Dr. Bansal noted, Ms. Hamilton's then current condition to be as follows:

> Ms. Hamilton continues to have constant aching pain in her neck, accompanied by sharp shooting pains. She also describes painful muscle spasms and tightness of her neck muscles. This begins with a severe pulling sensation and tightness of her neck, and she has difficulty turning her head. She now has headaches at least two to three times per

> week since her neck injury. She takes Excedrine [sic] Migraine for her headaches, which helps ease her pain better than Tylenol.
>
> She also reports constant left shoulder pain, which increases with repetitive overhead reaching and lifting at work. When her shoulder pain is at its worst, she also experiences occasional swelling and tingling of her left hand to the point where she is unable to wear her rings. The tingling affects all of the fingers of her left hand. This tingling and swelling usually happens in the night while she is sleeping. She reports no numbness or tingling of her right hand at this time.
>
> On a scale of 0 to 10, with 0 being no pain and 10 being the highest level of pain, she rates her average neck pain at 3/10. However, it will get as high as 8 to 9/10. She rates her average left shoulder pain at 6 to 7/10. She rates her average headache at 6/10.
>
> Using her left arm alone, she feels she can safely lift 20 pounds occasionally, and 10 pounds more frequently. She can comfortably lift only five pounds over shoulder level using her left arm.

Based on information from Ms. Hamilton, Dr. Bansal noted Ms. Hamilton's job situation as follows:

> Ms. Hamilton is employed by Glenwood Resource Center… Her job duties require that she be able to lift 25 to 50 pounds, and work 8 to 16-hour shifts. She generally works 12-hour shifts on to four times per week.
>
> She performs extensive cleaning duties such as laundry, mopping, and sweeping. She washes laundry which requires pushing and pulling heavy laundry carts around the facility. She also puts the incoming laundry away, which comes to her in very heavy laundry bags that she has to lift. Her duties include a significant amount of overhead reaching, as well as bending, pushing, pulling and stooping.
>
> In her position as a residential treatment worker she cares for the disabled clients, which requires frequent lifting, rolling, and repositioning of clients. She estimates that some of the patients she lifts and rolls weigh 75 to 100 pounds. Even if a Hoyer lift is used to assist with lifting the clients, she is still required to roll them from side to side to place them into the sling. After pushing and pulling the linen carts, lifting the linens, lifting and moving clients, and carrying cleaning supplies, she estimates she spends approximately 50% of her time at work lifting.
>
> She continues to work for Glenwood Resource Center. At this time, she typically works 50 hours per week.

After his physical exam of Ms. Hamilton, Dr. Bansal diagnosed Ms. Hamilton with "aggravation of cervical spondylosis," that is aggravation of age-related wear and tear affecting spinal disks in her neck. Dr. Bansal deemed Ms. Hamilton to have reached maximum medical improvement as of September 29, 2014, the date of her last appointment with Dr. Bowdino. Dr. Bansal concluded that the assault had likely altered Ms. Hamilton's perception of pain in her neck whereby "normally innocuous stimuli may generate an amplified response."

In determining Ms. Hamilton's whole person impairment rating, Dr. Bansal noted: She has radicular complaints, spasms, loss of range of motion, and pain. She had an MRI which shows

reversal of the normal cervical lordosis [normal curve of the cervical spine], indicative of spasms and a C5-6 bulging disc."

Dr. Bansal concluded that Ms. Hamilton should be subject to permanent work restrictions as follows: "no lifting greater than 20 pounds occasionally, or 10 pounds frequently with her left arm, along with no lifting greater than 5 pounds over shoulder level, and no frequent over shoulder lifting with the left arm." Dr. Bansal rejected the conclusion that Ms. Hamilton had caused invalid test results in connection with the October 2014 FCE and added that the FCE evaluation was invalid was "based on certain consistency measures that are not supported by the medical literature."

The employer received Dr. Bansal's report on February 12, 2015. When Ms. Hamilton appeared for work on February 13, 2015, the night supervisor instructed her to go home and to call Kathy King, Treatment Program Administrator, on the following Monday.

The employer has provided an incomplete and highly selective sampling of the employer's email correspondence with and about Ms. Hamilton since Ms. Hamilton went off work. On Monday, February 23, 2015, Ms. Hamilton telephoned the workplace and spoke with Krista Ellis, Human Resources Technical Assistant. In connection with that call, Ms. Ellis sent an email message to Ms. King, stating, "Just called to if we are going to be able to ever accommodate her restrictions. I told her she would need to call you since you are her supervisor. She said okay and hung up." On or before February 25, 2015, the employer took the position that Ms. Hamilton would have her physician complete a request for reasonable accommodation before Ms. Hamilton would be allowed to return to work. In an email dated February 25, 2015, Ms. King told Ms. Hamilton that she would need the form returned by March 11, 2015. The employer indicated a need for the additional form despite the fact that the employer already had a detailed physician's statement regarding the permanent work restrictions and the basis therefore.

On March 5, 2015, Ms. Ellis sent a message to Ms. King asking, "Is there anything you need me to do regarding her [Ms. Hamilton's] voicemail I forwarded you yesterday." Ms. King replied, "Nope."

Ms. Hamilton subsequently sent emails to the employer on March 20, 2015, wherein she indicated that her physician was not available and that she wanted the employer to involve her attorney in the conversation regarding her return to work. On March 24, 2015, Ms. Hamilton indicated that she was busy that day, but offered to meet with the employer the next day. The employer has omitted its emails to Ms. Hamilton that prompted the March 20 and March 24 responses. At 10:59 a.m. on March 26, 2015, Ms. King sent Ms. Hamilton an email message indicating that she wanted to meet with Ms. King that day at 3:00 .m. or the next day at 11:00 a.m. On March 26, Ms. Hamilton responded that she was caring for a sick child and asked whether the meeting could occur the next Monday, March 30, 2015. On March 26, Ms. King sent a reply email asking whether Ms. Hamilton could meet on the following Monday at 2:00 p.m. On March 27, Ms. Hamilton sent an email message in which she asked to have a union representative present and indicated that she would not be making any final decisions about her employment without her attorney. On March 27, Ms. King replied that she would see Ms. Hamilton the following Monday at 2:00 p.m. Ms. King did not respond to Ms. Hamilton's request for union representation. On March 27, Ms. Hamilton replied to reiterate her request for union representation and to ask what she needed to bring with her. On March 27, Ms. King replied, "You just need to come." On March 27, Ms. Hamilton replied to once again reiterate that she was requesting a union representative be present.

The available email correspondence picks up at 11:55 a.m. on Monday, March 30, 2015, when Ms. Hamilton sent a message to Ms. King indicating that she would report for a meeting at 3:00 p.m., despite the employer's earlier directive that she meet with the employer at 2:00 p.m. At 11:56 a.m., Ms. King sent a message to Ms. Hamilton reiterating that the meeting was at 2:00 p.m., not 3:00 p.m. Ms. Hamilton responded at 11:59 a.m., indicating that she could not appear at 2:00 p.m. because of the need to care for her children. Ms. Hamilton added that if 3:00 p.m. did not work, she could be available any morning after 9:00 a.m.

The available email correspondence picks up at 8:26 a.m. on Thursday, April 2, 2015. At that time, Ms. King sent a message to Ms. Hamilton asking whether Ms. Hamilton was still planning to meet with her that morning. Ms. Hamilton responded at 10:51 a.m. that she had started on her way to meet with the employer, but had been run off the road and then harassed on her way back home. Ms. Hamilton advised that she needed to meet with the sheriff regarding the incident. Ms. Hamilton was at the time estranged from husband and had obtained a protective order. Ms. Hamilton added, "So when and if we meet I will be bringing someone with me…" In that emails and others, Ms. Hamilton alludes to a statement from the employer that the employer could not accommodate Ms. Hamilton's permanent work restrictions. In the April 2 email, Ms. Hamilton asks whether she has been terminated.

On April 2, 2015, Ms. King did indeed have Ms. Hamilton removed from payroll and, thereby, terminated the employment relationship.

At some point during the back and forth emails, Ms. Hamilton surrendered her work keys to a coworker under the belief that she had been involuntarily separated from the employment.

On April 6, 2015, Ms. Hamilton left a voicemail message for Krista Ellis, Human Resources Technical Assistant. In the voicemail message, Ms. Hamilton had inquired about applying for long-term disability benefits and requested contact information for IPERS and VOYA (deferred compensation). On April 7, Ms. Ellis emailed the contact information to Ms. Hamilton and Ms. Hamilton requested that Ms. Ellis email her the long-term disability application materials. On April 8, Ms. Ellis emailed the requested long-term disability application materials with guidance in completing the application. Ms. Ellis included the following in her message, "I have provided you with information on Recall. If LTD is approved and your doctor later determines you are able to return to work, recall allows you to apply for statement employment again."

On April 15, Ms. Hamilton sent a message to Ms. Ellis in which she stated the following: "Hello so how do I know if I will be recalled and am I entitled to withdrawing [sic] anoy [sic] of my retirement funds etc and do I get a paycheck as I have been locked out of the online payroll site."

The available email picks up on April 20, 2015, with a message from Ms. Hamilton to Ms. King, wherein she asked Ms. King whether the employer received a check for her that day. The next email is from Ms. Hamilton the next day, asking if there is any news. The available email terminates with that message and inquiry.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge must first address the timeliness of Ms. Hamilton's appeal from the March 3, 2015, reference 01, decision that denied benefits effective February 15, 2015, based on the claims deputy's conclusion that Ms. Hamilton had requested and been granted a leave of absence.

Iowa Code section 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

Ms. Hamilton's appeal from the March 3, 2015, reference 01, decision was filed on May 5, 2015, when the Appeals Section received the appeal by email.

Substantially more than ten calendar days elapsed between the mailing date of the decision and the date Ms. Hamilton filed her appeal from the decision. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a

case show that the notice was invalid. Beardslee v. IDJS, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973).

The record shows that the appellant did have a reasonable opportunity to file a timely appeal. Ms. Hamilton received the March 3, 2015 decision in a timely manner, no later than March 10, 2015. Ms. Hamilton's email correspondence with the employer during March 2015 establishes that Ms. Hamilton had the means to file a timely appeal from the March 3, 2015, reference 01, decision. The evidence indicates that Ms. Hamilton elected not to file a timely appeal. Ms. Hamilton's failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Workforce Development error or misinformation or delay or other action of the United States Postal Service. See 871 IAC 24.35(2). Because the appeal was not timely filed pursuant to Iowa Code section 96.6(2), and the administrative law judge lacks jurisdiction to disturb the March 3, 2015, reference 01, decision that denied benefits effective February 15, 2015, based on an Agency conclusion that Ms. Hamilton was on a leave of absence that she requested and the employer approved. See Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

Unfortunately, the March 3, 2015, reference 01, decision that concluded Ms. Hamilton had requested a leave of absence effective February 15, 2015 was wrong. Ms. Hamilton did not request a leave of absence. The employer conceded that fact during testimony. Ms. Hamilton merely presented the employer with a bona fide statement of her work-related medical restrictions in the context of a worker's compensation dispute and the employer elected to suspend the employment effective February 13, 2015.

The fact that the administrative law judge and the parties are bound by the March 3, 2015, reference 01, decision does not end the discussion regarding the *separation* from the employment. The reference 01 decision establishes, for unemployment insurance purposes, only what Ms. Hamilton's employment status was from February 15, 2015 when she established her claim for benefits through the week that included March 3, 2015, when the decision was entered. Because the Administrative Code rule and the underlying statute upon which the decision was based call for a *week-by-week* determination of the unemployment insurance eligibility status, the March 3, 2015, reference 03, decision does not bind the administrative law judge or the parties with regard to the period beyond the week that included March 3, 2015. See Iowa Code section 96.4(3) (regarding the work ability and work availability requirement). In other words, the administrative law judge has the authority to determine Ms. Hamilton's employment status, for unemployment insurance purposes, effective the week that started March 8, 2015.

So the question becomes, what happened in the employment relationship in the weeks that followed the March 3, 2015, decision that erroneously deemed Ms. Hamilton to be on a leave of absence up to that point. The evidence establishes that there was a separation from the employment.

Workforce Development rule 871 IAC 24.1(113) provides as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

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 parties have created obstacles to analyzing the employment relationship for unemployment insurance eligibility purposes by coming to the hearing without clean hands. Neither party provided especially credible testimony. Ms. Hamilton at times misrepresented the basis for the late filing of her appeal and tossed up any and all rationalization for the late filing. The employer provided a highly selective collection of emails in an attempt to paint Ms. Hamilton as an unreasonable person who refused to meet with the employer to discuss her medical restrictions. 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 conveniently omitted the bulk of Ms. King's email messages to Ms. Hamilton. The weight of the evidence indicates that those omitted messages set the tone of the discussion and prompted Ms. Hamilton's responses.

The weight of the evidence indicates that there was little need for the meeting the employer purportedly needed to have with Ms. Hamilton to address her medical restrictions and need for reasonable accommodations. The employer had earlier accommodated Ms. Hamilton's same or similar work-related medical restrictions and, therefore, knew what reasonable accommodations were necessary. The employer could have and should have readily implemented the reasonable accommodations that would have allowed Ms. Hamilton to continue in the employment. See Sierra v. Employment Appeal Board, 508 N.W. 2d 719 (Iowa 1993). The employer unreasonably ignored Ms. Hamilton's repeated requests to have union representation present at the proposed meeting with the employer. Both parties were posturing opposite the other in the context of an ongoing worker's compensation dispute. The employer had held the upper hand in that discussion until the report from the independent medical evaluation. The weight of the evidence indicates that because the employer did not like what that independent medical evaluation report said, the employer used its power to disingenuously assert that Ms. Hamilton had commenced a leave of absence. The employer used its power to

demand a unnecessary further statement of medical restrictions despite already having a detailed statement of those medical restrictions. The employer used its power to suspend Ms. Hamilton from the employment. The suspension was tantamount to a discharge for purposes of determining Ms. Hamilton's unemployment insurance eligibility and the employer's liability for unemployment insurance benefits. See Iowa Administrative Code section 871 IAC 24.32(9) (suspensions to be treated as discharges). The employer then permanently severed the employment relationship by removing Ms. Hamilton from payroll effective April 2, 2015.

The weight of the evidence establishes that Ms. Hamilton was discharged from the employment. Though the employer had effected the separation prior to April 2, 2015, the employer formalized the separation on April 2, 2015. In light of the March 3, 2015, reference 01, decision, the administrative law judge concludes that the discharge was effective Sunday, March 8, 2015.

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 a 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).

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 evidence in the record establishes that the employer demonstrated bad faith in its dealings with Ms. Hamilton and that that demonstration of bad faith was the basis for Ms. Hamilton's reasonable request to have a union representative present during the proposed meeting with the employer. The employer unreasonably refused the repeated requests. Ms. Hamilton had other compelling issues in her personal life that at times impacted on her ability to meet with the employer. The employer and Ms. Hamilton each contributed to Ms. Hamilton not appearing for a meeting with the employer between March 26 and April 2, 2015. Ms. Hamilton's failure to appear for a meeting by April 2, 2015 did not constitute misconduct and did not disqualify her for unemployment insurance benefits. Effective March 8, 2015, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claimant's appeal from the March 3, 2015, reference 01, decision that denied benefits effective February 15, 2015, .based on an Agency conclusion that the claimant was on a leave of absence was untimely. The March 3, 2015, reference 01, decision is hereby effectively modified to limit its reach through the week in which it was entered. The claimant was discharged for no disqualifying reason. Effective March 8, 2015, the claimant is eligible for benefits based on the separation from the employment, provided she is otherwise eligible. The employer's account may be charged for benefits.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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