IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOYCE CAMPBELL
Claimant

C&W FACILITY SERVICES INC
Employer

APPEAL NO. 17A-UI-11044-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/08/17
Claimant: Appellant (2)

Iowa Code Section 96.5(2) – Discharge

STATEMENT OF THE CASE:

Joyce Campbell filed a timely appeal from the October 26, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that Ms. Campbell was discharged on September 15, 2017 "for failure to follow instructions in the performance of her job." After due notice was issued, a hearing was held on November 15, 2017. Ms. Campbell participated. Jeff Quinn represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 17A-UI-11046-JTT. Exhibits A and B were received into evidence.

ISSUE:

Whether Ms. Campbell separated from the employment for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joyce Campbell began her employment with Cushman & Wakefield Facility Services, Inc. (C&W) on September 6, 2016. Ms. Campbell performed work for the employer as a full-time custodian at a medical laboratory in Fort Dodge. Ms. Campbell's work hours were 4:00 p.m. to 12:30 a.m., Monday through Friday. Ms. Campbell performed general custodial duties that included dusting, mopping, cleaning windows, emptying trash, and cleaning restrooms. Ms. Campbell's immediate supervisor was Gina Spencer, Production Supervisor.

Ms. Campbell last performed work for the employer on August 4, 2017. On August 2, Ms. Campbell was absent from work due to severe eye pain. Ms. Campbell properly notified the employer of her need to be absent. Ms. Campbell returned to work on August 3 and worked her full shift on that day and on August 4. At that point, Ms. Campbell was next scheduled to work on Monday, August 7. Ms. Campbell was absent due to eye pain on August 7 and 8 and properly notified the employer of her need to be absent. On August 8, Ms. Campbell consulted with her optometrist, who referred Ms. Campbell to Wolfe Eye Clinic. On August 8, Ms. Campbell was evaluated at ophthalmologist at Wolfe Eye Clinic, who diagnosed her with a serious eye infection related to excessive wearing of contact lenses. The ophthalmologist took Ms. Campbell off work until further notice and scheduled a follow up appointment for October 14, 2017.

On October 9, 2017, Ms. Campbell took the medical excuse she had received from the ophthalmologist to her immediate supervisor, Gina Spencer. Ms. Spencer directed Ms. Campbell to leave without providing guidance to Ms. Campbell regarding what additional steps she could take, if any, to preserve her employment.

The employer utilizes a third-party Family and Medical Leave Act (FMLA) administrator, Unum. After Ms. Campbell presented the note to Ms. Spencer that indicated she needed to be off work until further notice, Unum sent Ms. Campbell leave application materials for Ms. Campbell to take to her doctor and return to Unum. The ophthalmologist, Dr. Johnson, completed the medical certification portion of the leave application and Wolfe Eye Clinic staff faxed the completed medical certification to Unum. The medical certification materials supported a need for Ms. Campbell to be off work due to her serious eye condition. Because Ms. Campbell had not been with C&W for 12 month's Unum deemed her ineligible for FMLA leave. Unum sent Ms. Campbell a letter indicating that she would not be eligible for FMLA leave until September 6, 2017.

Pursuant to the employer's leave protocol, once Unum determined that Ms. Campbell would not be eligible for FMLA leave until her September 6, 2017 employment anniversary, responsiblilty for further discussion with Ms. Campbell regarding the availability of non-FMLA medical leave reverted to C&W human resources department. Ms. Campbell was not aware of the particulars of the duty-sharing arrangement between Unum and C&W.

On August 18, 2017, the employer received a medical note from Wolfe Eye Clinic. The note indicated that Ms. Campbell would need to be off work through September 17, 2017, but could return to work on September 18, 2017.

On August 25, 2017, a C&W human resources representative sent Ms. Campbell a letter and attached a job description and reasonable accommodations questionnaire. The letter instructed Ms. Campbell to take the materials to her doctor so that the doctor could complete the questionnaire. The letter advised Ms. Campbell that once the employer received the completed questionnaire, the employer would continue its evaluation of Ms. Campbell's medical condition and engage in further discussion regarding whether she was capable of performing the essential duties of her employment with reasonable accommodation contemplated under the Americans with Disabilities Act (ADA). The letter provided a September 12, 2017 deadline for the employer's receipt of the completed questionnaire. Ms. Campbell received the letter on August 28, 2017. On that same day, Ms. Campbell took the materials to Dr. Johnson at Wolfe Eye Clinic. Ms. Campbell asked Dr. Johnson to complete the questionnaire and fax the completed questionnaire to the employer. Ms. Campbell confirmed with Wolfe Eye Clinic that the clinic had indeed faxed the materials to the employer on August 28, 2017. The employer does not have a record of receiving the completed reasonable accommodation questionnaire.

Ms. Campbell continued under the belief that she had complied with the employer's leave request requirements until she received a letter from Daniel Gutierrez, C&W Senior Human Resources Manager, dated September 13, 2017. Ms. Campbell received the letter on September 15, 2017. The letter referred to the medical note the employer received on August 18, 2017 that took Ms. Campbell off work through September 17, 2017. The letter also referred to the employer's letter of August 25, 2017 requesting additional information. The letter included the following:

> Since we received no response to our request for additional information we have made the determination to separate your employment as a voluntary separation for personal matters with the eligibility for rehire upon receipt of this letter.

The letter included a number Ms. Campbell could call if she had questions. At the time Ms. Campbell received the employer's letter, she was still under the care of Dr. Johnson and had not been released to return to work. Ms. Campbell did not have further contact with C&W after she received the employer's letter on September 15, 2017.

Ms. Campbell received a letter from Unum, dated October 2, 2017. The letter included the following:

> You were previously notified your leave had been approved from August 7, 2017 through September 17, 2017.
>
> On October 2, 2017, we were notified your employment was terminated as of September 15, 2017. Therefore, your FMLA from September 16, 2017 through September 17, 2017 is no longer approved.

Ms. Campbell was released to return to work with no restrictions effective October 25, 2017.

REASONING AND CONCLUSIONS OF LAW:

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 weight of the evidence establishes that Ms. Campbell did not voluntarily quit, but was discharged on September 13, 2017 for purported failure to provide medical documentation that supported her need to be off work through September 17, 2017. Ms. Campbell had not given notice to the employer that she intended to end the employment. Ms. Campbell had provided the employer with a medical excuse on August 7, 2017 that supported her need to be off work due to her serious eye condition. The employer provided no guidance to her at that time regarding what steps she would need to take to preserve the employment through a leave of absence or otherwise. Ms. Campbell subsequently responded in a timely and reasonable manner to the request from Unum, the employer's third-party FMLA leave administrator, for documentation to support her need to be away from work through September 17, 2017 and

provided the requested medical provider certification. The employer expected Ms. Campbell to learn on her own, understand and navigate the intricacies of the employer's duty-sharing arrangement with Unum regarding leave issues. However, the weight of the evidence, including the October 2, 2017 letter from Unum, indicates that the distinction, from Ms. Campbell's perspective was anything but clear. That letter explicitly states that Ms. Campbell was approved for leave through September 17, 2017. If Unum and the employer lacked a mutual understanding regarding Ms. Campbell's leave status, it is unreasonable for the employer to expect Ms. Campbell to have had a better understanding than she did of what was expected of her. The employer's correspondence acknowledges receipt of an additional August 18, 2017 medical excuse that took Ms. Campbell off work through September 17, 2017 due to her serious medical condition. Ms. Campbell responded in a timely and reasonable manner to the employer's August 25, 2017 request that she have her doctor complete and return the reasonable accommodations questionnaire. Ms. Campbell confirmed that her doctor had in fact sent the additional requested documentation to the employer. Ms. Campbell would not be responsible for the employer's loss or mishandling of documentation submitted by Wolfe Eye Clinic to the employer. The weight of the evidence establishes that Ms. Campbell had acted in good faith and in reasonable fashion to preserve the employment relationship, but that the employer elected to terminate the employment effective September 13, 2017 based on an erroneous assertion that Ms. Campbell had not provided appropriation documentation to support her need for a leave of absence through September 17, 2017.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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).

The weight of the evidence in the record fails to establish any intentional or substantial disregard of the employer's interests. Accordingly, Ms. Campbell was discharged on September 13, 2017 for no disqualifying reason. Ms. Campbell is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 26, 2017, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge date was September 13, 2017. 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

jet/rvs