IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

STEPHANIE D MOWRAY
Claimant

RENAPPLI OF BURLINGTON
Employer

APPEAL NO. 07A-UI-10590-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/14/07 R: 04
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Stephanie Mowray filed a timely appeal from the November 8, 2007, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on December 3, 2007. Ms. Mowray participated. David Gulick, owner and President, represented the employer and presented additional testimony through Becky Gulick, Vice President and Secretary.

ISSUES:

Whether the claimant voluntarily quit or was discharged from the employment. The administrative law judge concludes that Ms. Mowray was discharged.

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: Stephanie Mowray was employed by Renappli of Burlington rent-to-own store as a part-time Office Assistant/Office Manager from August 9, 2007 until October 12, 2007. On October 12, Ms. Mowray did not appear for work and did not notify the employer she would be absent. That morning, Ms. Mowray transported a person who had tried to harm himself to the hospital. The evidence indicates that despite the events of that day, Ms. Mowray had the opportunity to notify the employer at some point that she would be late or absent, but failed to notify the employer. The employer's written attendance policy required Ms. Mowray to notify the employer if she needed to be absent. On August 9, Ms. Mowray had signed her acknowledgment of receipt of the work rules that included the attendance policy. On October 12, when Ms. Mowray did not appear for work or notify the employer, David Gulick, owner and President, went to Ms. Mowray's home to retrieve her key to the employer's store. The employer had decided that Ms. Mowray was unreliable and had decided to sever the employment relationship. Ms. Mowray was in the shower at the time Mr. Gulick arrived and Ms. Mowray directed her son to give Mr. Gulick his key.

Ms. Mowray's absence on October 12 followed other absences. On August 13, Ms. Mowray was tardy because one her sons had been hurt and she needed to transport him to the emergency room. Ms. Mowray properly notified the employer. On August 21, Ms. Mowray was absent due to illness and properly notified the employer. On August 22, Ms. Mowray left work early for a doctor appointment with the approval of the employer. On August 27, Ms. Mowray was tardy getting to work because there was a fire in her apartment complex and the fire department vehicles blocked her exit from the complex. Ms. Mowray properly notified the employer. On August 29, Ms. Mowray was absent because two of her children were ill. Ms. Mowray properly notified the employer. On September 4, Ms. Mowray left work early to deal with a personal matter. On September 6, Ms. Mowray was absent because she lacked childcare for a son who had an infection and could not go to school. On September 27, Ms. Mowray was absent so that she could go on a trip with one of her sons. Ms. Mowray had requested the day off two weeks in advance and the employer had approved the request. On October 5 Ms. Mowray was absent and failed to notify the employer. On October 8, Ms. Mowray was absent due to illness and properly notified the employer. On October 9, Ms. Mowray came to work late because her son was ill. Ms. Mowray properly notified the employer she would be tardy.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether Ms. Mowray quit or was discharged from the employment. 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.

The evidence in the record indicates that Ms. Mowray at no time announced an intention to sever the employment relationship. Though Ms. Mowray had poor attendance, this did not necessarily indicate an intention to quit the employment. The evidence indicates that the employer formed the intention to sever the employment relationship on October 12 and further evidenced this by going to Ms. Mowray's home to collect the employer's key. The evidence in the record persuades the administrative law judge that Ms. Mowray did not quit, but that the employer discharged her from the employment for attendance.

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:
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> 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). 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).

The greater weight of the evidence indicates that the final absence on October 12, 2007 was an unexcused absence under the applicable law. The circumstances Ms. Mowray described would have prompted a reasonable person to summon an ambulance or other professional service to transport the person to the hospital. The evidence does not indicate it was necessary for Ms. Mowray to transport the individual. The evidence indicates that Ms. Mowray made no effort to notify the employer of her absence even after her involvement in the other matter had ended. The evidence establishes additional unexcused absences on September 4, September 6 and October 5. Though Ms. Mowray clearly had poor attendance, her unexcused absences were not excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Mowray was discharged for no disqualifying reason. Accordingly, Ms. Mowray is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Mowray.

DECISION:

The Agency representative's November 8, 2007, reference 02, decision is reversed. 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

jet/pjs