IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CATHERINE A ASMUS
Claimant

ELECTROLUX HOME PRODUCTS INC
FRIGIDAIRE
Employer

APPEAL NO. 07A-UI-00120-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/07/06 R: 02
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Electrolux Home Products filed a timely appeal from the December 20, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 22, 2007. Claimant Catherine Asmus participated. Human Resources Generalist Mallory Russell represented the employer. The administrative law judge took official notice of the Agency's administrative records regarding benefits disbursed to the claimant and received Employer's Exhibits One through Ten into evidence.

The employer had not listed Human Resources Generalist Shelly Moss as a witness, but agreed to make Ms. Moss available to testify upon the administrative law judge's request. From the beginning of Ms. Moss' testimony, the employer representative could be heard coaching Ms. Moss regarding her testimony. Despite repeated warnings not to coach the witness, the employer representative continued to coach the witness on the substance of the witness' testimony. In response to the employer's inappropriate conduct, the administrative law judge terminated Ms. Moss' testimony.

ISSUES:

Whether the claimant voluntarily quit the employment or was discharged from the employment. The administrative law judge concludes the claimant 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: Catherine Asmus commenced her full-time employment with Electrolux Home Products/Frigidaire on August 4, 1999. Ms. Asmus last performed work for the employer on October 19, 2006 and was a third-shift punch press operator at that time. Ms. Asmus' immediate supervisor was Tim Loughey. On October 22 and 23, Ms. Asmus was absent due to back pain and properly reported the absences to the employer. On October 23, Ms. Asmus spoke to Human Resources Generalist Shelly Moss. Ms. Asmus advised Ms. Moss that she had been

experiencing back problems and had seen a doctor. Ms. Asmus expected to be off work for an extended period and asked Ms. Moss whether she needed to continue to report her absences. Ms. Moss told Ms. Asmus that she had her "covered." Ms. Moss recorded that Ms. Asmus would be absent until November 2, 2006. Ms. Asmus discussed with Ms. Moss the need for Ms. Asmus to complete a "Sickness & Accident" leave form and Ms. Moss told Ms. Asmus that she would fax the form to Ms. Asmus' doctor. Ms. Asmus indicated that she would be going to see her doctor on October 23. On October 23, Ms. Asmus did in fact go to see a Physician's Assistant (P.A.). During the October 23 doctor visit, the P.A. indicated that he wanted Ms. Asmus to return on October 29 to have her back x-rayed. Ms. Asmus intended to return to work after the October 29 appointment, provided the x-ray indicated no injury.

The employer had faxed the "Sickness & Accident" leave form to the P.A., but the form that was received at the P.A.'s office was distorted and unusable. The P.A. located a blank "Sickness & Accident" leave form from 2002 in Ms. Asmus' patient file, completed information on that form, and faxed it from the P.A.'s Dows clinic to the employer on the morning of October 25. On the form, the P.A. indicated that Ms. Asmus was expected to return to full-duty on October 30. The form required the P.A. to insert a return date and stated as follows: "Please do not leave this blank. Estimate date if unknown." See the second page of Exhibit Nine. Note that the first page of Exhibit Nine actually belongs with Exhibit Eight.

On October 25, Ms. Moss contacted Ms. Asmus and told Ms. Asmus that the P.A. had used the wrong "Sickness & Accident" form. Ms. Moss indicated that she would fax a second form to the P.A.'s office. The healthcare provider maintained multiple offices. On October 25, Ms. Asmus contacted the P.A. to see whether he had completed the second "Sickness & Accident" form. The P.A. indicated that Ms. Asmus' patient file was at a different office and that he would have to wait until he returned to the other office to complete the form. On October 25, Ms. Moss instructed Ms. Asmus that the P.A. should just submit the form with the information that was available and the P.A. did so on October 25. See Exhibit Eight. On this form, the P.A. indicated that Ms. Asmus was restricted from any lifting, that Ms. Asmus was to return for a follow up appointment in a week, and that Ms. Asmus' release date was unknown.

On October 26, Ms. Asmus contacted Ms. Moss to confirm that the employer had received the second "Sickness & Accident" form. Ms. Moss asked Ms. Asmus whether her back issues were work-related and Ms. Asmus indicated they were. At that point, Ms. Moss indicated that the matter would need to be addressed as a worker's compensation matter. Ms. Moss told Ms. Asmus that she needed to go to the workplace and be seen by the employer's nurse. Ms. Asmus made an appointment with the employer's nurse and reported to the nurse the next day. The employer's nurse had Ms. Asmus complete worker's compensation paperwork. The employer's nurse told Ms. Asmus that she would arrange an appointment for Ms. Asmus with the employer's worker's compensation doctor.

Ms. Asmus waited to hear from the employer's nurse. Ms. Asmus did not receive any additional contact from the employer or its agents until November 5 or 6, when a representative from the employer's worker's compensation insurance carrier contacted Ms. Asmus. Ms. Asmus continued to attempt to contact the employer's nurse. Ms. Asmus left messages for the nurse, but did not receive a return phone call.

On November 9, Human Resources Generalist Mallory Russell drafted and mailed to Ms. Asmus a letter terminating her employment. Ms. Russell asserted in the letter that Ms. Asmus had been absent without notifying the employer on three consecutive days in violation of the employer's written attendance policy. Ms. Asmus did not receive this letter. The employer had recorded "no call/no-show" absences on November 5, 6, and 7. These were days

during which Ms. Asmus was waiting to hear back from the employer's nurse regarding an appointment with the employer's worker's compensation doctor.

On November 10, Human Resources Generalist Shelly Moss drafted a letter indicating that Ms. Asmus had still not provided the employer with a completed "Sickness & Accident" form. Ms. Moss added that Ms. Asmus had not been calling in on a daily basis and that she was required to call in on a daily basis until the employer received a completed "Sickness & Accident" form. Based on the November 10 correspondence, Ms. Russell rescinded the employer's decision to consider Ms. Asmus' prior absences a quit. There is no indication that Ms. Asmus received this letter.

On November 20, Ms. Asmus received a November 17 termination letter from the employer. The letter indicated that Ms. Asmus had been absent without notifying the employer for three consecutive shifts in violation of the employer's written attendance policy and that the employer deemed her absence a voluntary quit. The employer had recorded "no call/no-show" absences on November 12, 13, 14, 15, and 16. There were days on which Ms. Asmus was still waiting to hear from the employer's nurse regarding the pending worker's compensation matter.

The employer subsequently recorded absences on December 25, 26, and 27 and designated these as vacation days.

On December 26, Ms. Asmus underwent magnetic resonance imaging (M.R.I.). Ms. Asmus had a follow up appointment on January 4, 2007, at which time she learned she had a bulging disk in her back.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether Ms. Asmus 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 greater weight of the evidence indicates that Ms. Asmus was discharged and did not quit. The evidence further indicates that the discharge occurred in the context of a pending worker's compensation claim based on serious medical issues.

The question is whether the evidence in the record establishes that Ms. Asmus was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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 employer did not provide testimony from the employer's nurse, worker's compensation carrier, or worker's compensation healthcare provider. The employer had not listed Human

Resources Generalist Shelly Moss as a witness, but agreed to make Ms. Moss available to testify upon the administrative law judge's request. From the beginning of Ms. Moss' testimony, the employer representative could be heard coaching Ms. Moss regarding her testimony. Despite repeated warnings not to coach the witness, the employer representative disregarded those warnings and continued to coach the witness on the substance of the witness' testimony. In response to the employer's inappropriate conduct, the administrative law judge terminated Ms. Moss' testimony. The employer representative's conduct with regard to Ms. Moss' "testimony" was sufficiently egregious to generally and completely undermine the employer representative's credibility.

The greater weight evidence in the record establishes that the absences upon which the employer based its decision to discharge Ms. Asmus involved days during which Ms. Asmus was waiting to hear from the employer's nurse regarding a doctor's appointment the nurse had agreed to schedule. The greater weight of the evidence indicates that Ms. Asmus reasonably relied up on statements from the nurse and a statement from Ms. Moss and, therefore, did not report daily absences to the employer. The evidence indicates that neither the employer representative nor Ms. Moss were directly involved in recording Ms. Asmus' absences from the workplace and that the employer's attendance information may not be accurate. Based on the evidence in the record, the administrative law judge concludes that the absences upon which the employer based its decision to discharge Ms. Asmus were actually excused absences under the applicable law.

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

DECISION:

The Agency representative's December 20, 2006, 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

jet/css