IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AMY R DOLLASH
Claimant

KOLLMORGEN SCHLUE & ZAHRADNIK PC
Employer

APPEAL NO. 11A-UI-15987-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/13/11
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 December 12, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 10, 2012. Claimant Amy Dollash participated personally and was represented by Attorney Vivian Meyer Betts. Attorney Jennifer Zahradnik represented the employer. The administrative law judge took official notice of the Agency administrative documented submitted for and generated in connection with the fact-finding interview. Exhibits One and Two were received into evidence.

ISSUE:

Whether Ms. Dollash separated from Ms. Zahradnik's law firm for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Attorney Jennifer Zahradnik owns and operates a small law firm based in Belle Plaine. Amy Dollash joined the firm as a full-time associate in January 2010 and last performed work for the firm on November 11, 2011. Ms. Dollash graduated from law school in 2006 and came to the firm with four years of practice experience. While employed by Ms. Zahradnik, Ms. Dollash engaged in the general practice of law, with a fair amount of her practice being family law work. Ms. Dollash also assisted with tax returns and other duties as assigned. The third attorney at Ms. Zahradnik's firm was part time, semi retired. The firm employed three full-time support staff.

At the time Ms. Dollash started with Ms. Zahradnik's firm, the two agreed on a compensation and benefits package. Ms. Dollash was to receive a $40,000.00 annual salary until her annual production exceeded $65,000.00. The agreement was to equally split the revenue generated by Ms. Dollash above the $65,000.00 mark. Ms. Zahradnik agreed to provide $600.00 per month toward Ms. Dollash's health insurance premiums, $150.00 in monthly retirement contribution, and dental insurance. Ms. Zahradnik agreed to provide Ms. Dollash with *six* weeks of paid vacation per year. Ms. Zahradnik told Ms. Dollash that the office's hours were 8:00 a.m. to 5:00 p.m., but acquiesced in Ms. Dollash starting at 8:30 a.m. Ms. Zahradnik told Ms. Dollash that *20* billable hours per week would be a good *starting* point. Ms. Dollash understood that she

was expected to make a good faith effort to build her practice to the mutual benefit of herself and the employer.

At the beginning of 2011, Ms. Zahradnik increased Ms. Dollash's annual salary to $45,000.00. The agreement continued to be to split the revenue produced by Ms. Dollash that exceeded $65,000.00.

Ms. Dollash took the employer at her word with regard to the allotted vacation and used upwards of 23 days of vacation in 2011. Ms. Dollash's fiancé had health issues and Ms. Dollash spent additional time out of the office transporting her fiancé to and from appointments. Ms. Dollash would take work with her when she accompanied her fiancé to medical appointments.

Ms. Dollash's *2011* weekly billable hours averaged just under *18* per week during those weeks in which she performed work for the employer. Of the 45 weeks Ms. Dollash was with the employer in 2011, during only 15 of those did Ms. Dollash's billable hours meet or exceed 20 the twenty-hour threshold Ms. Zahradnik had referenced as a good *starting* point.

The relationship between Ms. Zahradnik and Ms. Dollash had thoroughly soured by October 19, 2011, when Ms. Zahradnik sent Ms. Dollash the following memo:

> Amy:
>
> I'm putting this in writing so that there can be no misunderstandings regarding your 2011 Numbers.
>
> 1) As of October 1, 2011, you have receivables of $32,083.18. You annual salary, health insurance, retirement and dental costs were $51,685.20 for 2011. There is a difference of $19,602.02 which needs to be received in 2011 in order to cover your salary. This does not have you contributing anything towards the overhead it takes to run an office.
> 2) You need to run your monthly invoices for your clients and the work you have done. I usually try and run mine the last week of the month. Once you complete your invoices you need to get them to me so that I can run statements showing the previous balances and get them to Louise for writing checks out of the trust account.
> 3) We need to get the small claims drafted for those delinquent accounts that have not paid so that we can attempt to collect on the money you are owed. Please give Laura a list of those that have been sent notices to cure and that have not paid. She also needs copies of the notices to cure. Laura can then put the small claims together for you.
> 4) You need to go through the receivables and get them back to me by the end of October 2011, so that I can add in any receivables that I may have missed when I reviewed the information. I want you numbers to be as accurate as possible.
> 5) You need to start handling some real estate matters so that you are more familiar with the process. If you have questions please ask.
> 6) You should also be taking phone calls throughout the day. I have heard a lot of complaints lately that you are not returning phone calls and that client [sic] have left multiple messages without a return call. (I understand that some clients say that and will always say that, but I've heard it from several different clients.)
>
> I'm not ready to start looking for a new associate as you are doing a good job meeting the needs of the clients in your family law matters. I want you to be aware of the current

> financial position we are in regarding you and your salary. I'd really like to try and minimize the loss as I cannot afford to continually lose money on you each year.
>
> I need someone that I can count on to handle things if I am gone, regardless of what comes up. We have great office staff and they can help you out if I'm not here. I'm going to direct Laura to begin giving you all of the title opinions and loan opinions from here on out. Get them reviewed and dictated and back to her. Turnaround on these needs to be about 48 hours, as we usually start getting calls after that time.
>
> Let me know what your thoughts are regarding this and whether any of these are unreasonable or not doable. If you have decided to seek employment elsewhere I'd also like to know that so that I can begin planning for the 2012 tax season.
>
> If there is a different way that you want to handle your compensation for the future please let me know as I am open to any suggestions that you may have.

Ms. Dollash responded with a three-page, single-spaced memo to Ms. Zahradnik on November 2, 2011. Ms. Dollash responded point-by-point to the concerns Ms. Zahradnik had raised in her memo. Ms. Dollash pointed out that *the firm* was unable to accurately account for her accounts receivable because of the employer's choice of QuickBooks account tracking software. Ms. Dollash pointed out that the employer had provided her with a stack of printouts in small font that further hindered her ability to accurately discern her accounts receivable.

Ms. Dollash asserted in her memo that it was unreasonable for the employer expect her production to cover the $52,000.00 cost of her salary and benefits during the second year of the employment and to wait until October to make that announcement. Ms. Dollash asserted that $65,000.00 in annual production was not attainable in the local market. Ms. Dollash pointed out that she received an estimate of her monthly receivables for January and March, but then had not received another until September. Ms. Dollash asserted that the expectation that her production should be sufficient to help pay the firm's overhead expenses had not previously been discussed as a term of her employment. Ms. Dollash asserted that it was premature for the employer to expect her production to reach that level. Ms. Dollash cited the difficulty in getting paid for family law work in light of the nature of the work, poor economic climate, and Ms. Zahradnik's referral of slow-pay or no-pay clients to Ms. Dollash. Ms. Dollash cited Ms. Zahradnik's lack of clear communication as the basis for Ms. Dollash not running invoices for September. Ms. Dollash cited changes in Ms. Zahradnik's directives as the source of problems with appropriately billing clients. Ms. Dollash asserted that she had been proactively dealing with small claims actions on delinquent accounts.

Ms. Dollash said she was happy to handle real estate matters, probate and to otherwise work on expanding her practice. Ms. Dollash asked to attend an upcoming Continuing Legal Education class.

Ms. Dollash asserted that she took phone calls as appropriate and apologized to clients when she could not.

Ms. Dollash indicated that she saw no need for her compensation structure to change. Ms. Dollash asserted that she had taken a substantial pay cut to work in Belle Plaine and that she was paid less than some colleagues in similar markets and firms.

Finally, Ms. Dollash faulted Ms. Zahradnik's method of communicating with her. On that point, her comments were as follows:

> Finally, this "leave-it-on-her-chair-while-she's out" mentality does not work for me. I am an educated, competent professional. I treat everyone with common courtesy and respect. I expect the same in return. Your recent refusal to address me directly and penchant for leaving items on my chair (particularly those negative in nature) is offensive and degrading. I do not feel that I deserve such disrespect or condescension.

On November 9, Ms. Zahradnik met with Ms. Dollash to discuss Ms. Dollash's future with the firm. Ms. Zahradnik asked Ms. Dollash how she would feel if she was in the employer's shoes. Ms. Zahradnik pointed out that she had three full-time office staff and a family to support on her income. Ms. Dollash said that these money issues that had not been raised before. Ms. Zahradnik told Ms. Dollash that the cost of Ms. Dollash's insurance was set to increase. Ms. Zahradnik mentioned that she was due to have a baby in 2012 and that she needed someone she could rely on. Ms. Zahradnik told Ms. Dollash that she expected her to be at the office from 8:30 a.m. to 5:00 p.m. This had indeed been the original agreement, but Ms. Dollash had over time found reasons to hold appointments outside the office. Ms. Zahradnik then asserted that Ms. Dollash had abused the vacation arrangement by taking 23 days of vacation, two sick days, and more time for other matters. Ms. Zahradnik told Ms. Dollash that she would not be able to take any more vacation in 2011. Ms. Zahradnik added that in 2012, Ms. Dollash would be limited to five days of vacation and that she would not be allowed to take vacation during tax season or while Ms. Zahradnik was on maternity leave. This was a dramatic change from original agreement. Ms. Zahradnik told Ms. Dollash that she would be limited to six days of sick leave in 2012 and that doctor appointments would count towards that six days.

During the November 9 meeting, Ms. Zahradnik told Ms. Dollash that she would be expected to bill 1,500 hours in 2012 and that if she was able to collect for that amount of services, she would generate $90,000.00 in revenue. The billable hour expectation would require an average of 29 billable hours per week. Ms. Zahradnik told Ms. Dollash that at least *75 percent* of her work hours should be billable hours. Ms. Zahradnik told Ms. Dollash that when she had been a new associate with the firm, she had generated $76,000.00 in annual revenue.

Ms. Zahradnik talked to Ms. Dollash regarding other expectations she would not have for Ms. Dollash. Ms. Zahradnik told Ms. Dollash that she needed to have invoices ready to go to clients by the 25th of each month, that title opinions needed to be done within 48 hours, that tax returns needed to be done within four days of receipt, that Ms. Dollash needed to return client telephone calls in a timely manner, and that appointments with clients needed to take place at the firm.

Ms. Zahradnik spoke to Ms. Dollash about a bill the State Public Defender's office had refused to pay up to that point because Ms. Dollash had not satisfied that agency's request for information.

Toward the end of the November 9 meeting, Ms. Dollash told Ms. Zahradnik that the proposed changes in the conditions of her employment were not acceptable to her. Ms. Zahradnik then said, "We are done." Ms. Zahradnik told Ms. Dollash that her final day with the firm would be November 11. On November 10 and 11, Ms. Dollash worked from home to avoid further encounters with Ms. Zahradnik. Ms. Zahradnik agreed to pay Ms. Dollash's salary through the end of November.

In June 2011, Ms. Dollash and Ms. Zahradnik attended a law-related function and were seated at the same table as one of Ms. Zahradnik's law school classmates. The classmate's appointed position was about to expire. Ms. Zahradnik casually mentioned to the classmate that he could

come work for her. Ms. Dollash noted the remark because she did not think the firm could support two full-time associates. The classmate did eventually join Ms. Zahradnik's firm, but it was well after Ms. Dollash was out the door.

REASONING AND CONCLUSIONS OF LAW:

The weight of the evidence indicates that Ms. Dollash and Ms. Zahradnik both contributed to the problems in the employment. Ms. Zahradnik entered into the arrangement with the reasonable assumption that Ms. Dollash would put forth a sustained good faith effort to build her practice. Instead, Ms. Dollash focused on other things and generally generated billable hours commensurate with *part*-time, not full-time employment. Ms. Zahradnik removed a significant portion of the incentive to build the practice by offering a salaried position and increasing the salary at the beginning of 2011. Ms. Zahradnik provided an unreasonably generous vacation allowance, but then faulted Ms. Dollash for using it. Ms. Dollash took full advantage of the benefit and found means to take additional time out of the office to take her fiancé to his medical appointments. The ongoing financial loss to Ms. Zahradnik was substantial as a result of the employment arrangement. Ms. Zahradnik's memo of October 19 would have come as no surprise to a reasonable person in Ms. Dollash's position.

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 weight of the evidence indicates that Ms. Zahradnik pulled the trigger on ending the employment after Ms. Dollash balked at the changes Ms. Zahradnik announced on November 9. Ms. Zahradnik discharged Ms. Dollash from the employment and made the discharge effective November 11, 2011.

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.

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).

Ms. Zahradnik only started to get serious about following up on Ms. Dollash's production and collection issues in September or October 2011. The October 19, 2011 memo was the first actual reprimand issued to Ms. Dollash. Ms. Dollash did not refuse to follow any of the directives contained in that reprimand, but did provide a sometimes testy response on November 2. Ms. Dollash's November 2 memo did not amount to misconduct. During the meeting on November 9, Ms. Zahradnik announced several changes to the conditions of Ms. Dollash's employment. Some were reasonable under the circumstances and some were not. A reasonable employer would not have been surprised by Ms. Dollash's balking response to the substantial change to her vacation benefit. It is hard to tell what all Ms. Dollash was objecting to when she told the employer that the proposed changes did not work for her.

The weight of the evidence fails to establish a *continued* refusal to follow reasonable directives and, therefore, does not establish insubordination that would disqualify Ms. Dollash for unemployment insurance purposes. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

That leaves the question of whether there was a pattern of negligence and/or carelessness indicating a willful and wanton disregard of the employer's interests. As the administrative code definition of misconduct indicates, unsatisfactory work performance must be accompanied by a willful disregard of the employer's interests before it will disqualify a claimant for unemployment insurance benefits. Under the particular facts of this case, the administrative law judge concludes there was unsatisfactory performance, but that it was not the result of a willful and wanton disregard of the employer's interests. The evidence indicates instead that both parties had been coasting in the relationship, when the employer decided on short notice to change course. Rather than continuing to work in a reasonable way to resolve prior misunderstandings or disagreements, Ms. Zahradnik elected to discharge Ms. Dollash from the employment. While it was within the employer's discretion to end the employment, the administrative law judge

concludes that Ms. Dollash was not discharged for misconduct in connection with the employment that would disqualify her for unemployment insurance benefits.

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

DECISION:

The Agency representative's December 12, 2011, 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

_____
Decision Dated and Mailed

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