IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AARON W MOORE
Claimant

FEDERAL EXPRESS CORP
Employer

APPEAL NO. 11A-UI-09676-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/25/10
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 14, 2011, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on August 16, 2011. Claimant did not respond to the hearing notice and did participate. Tom Kuiper of TALX represented the employer and presented testimony through Dave Gartin, operations manager.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Aaron Moore was hired by Federal Express Corporation to work as a full-time courier out of the employer's Waterloo facility. Mr. Moore resided in Guttenberg. Mr. Moore started the employment on January 11, 2011. The employer sent Mr. Moore to courier training in Chicago. Mr. Moore had to successfully complete the courier training and associated testing to continue in the full-time courier position he was hired to perform. Mr. Moore did not perform well enough on the tests to qualify for a courier position.

The employer notified Mr. Moore that he was disqualified for a courier position and suspended him from the employment effective February 18, 2011. The employer gave Mr. Moore a 30-day deadline to bid on, and apply for, a non-courier position. The employer's policy deemed failure to bid on a job within that timeframe a voluntary quit. The employer did not have any non-courier positions open in Waterloo. The employer had one part-time position open in Dubuque and two part-time positions open in Cedar Rapids. Mr. Moore did not bid on the part-time positions. The part-time positions would have paid substantially less per hour.

On March 28, 2011, the employer met with Mr. Moore, received uniforms that had been issued to Mr. Moore, and wished Mr. Moore well.

REASONING AND CONCLUSIONS OF LAW:

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.

Mr. Moore did not voluntarily quit the employment. Instead, the employer suspended Mr. Moore on February 18, 2011 and then formally discharged Mr. Moore from the employment effective March 28, 2011, based on Mr. Moore's failure to demonstrate sufficient proficiency during required training.

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). 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's decision to suspend Mr. Moore was based solely on his inability to perform the employer's satisfaction during training. This did not constitute misconduct in connection with the employment. The employer's subsequent decision to completely sever the employment relationship was based on Mr. Moore's decision not to pursue part-time employment with the employer in Cedar Rapids or Dubuque. The available positions all involved substantial changes in the conditions of Mr. Moore's employment. The changes would include working in a different community than the one Mr. Moore was originally assigned to, a reduction in work hours from full-time to part-time, and a substantial reduction in pay. Mr. Moore's decision not to pursue these positions did not constitute misconduct in connection with the employment.

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

DECISION:

The Agency representative's July 14, 2011, reference 03, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he 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/kjw