**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**CLIFTON L SISK**
Claimant

**SEARS MANUFACTURING CO**
Employer

**APPEAL NO. 11A-UI-09745-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 05/29/11**
**Claimant: Appellant (2)**

Section 96.5(1) – Voluntary Quit

**STATEMENT OF THE CASE:**

Clifton Sisk filed a timely appeal from the June 22, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 17, 2011. Mr. Sisk participated. Todd Richardson of Employers Unity represented the employer and presented testimony through Trisha Taylor.

**ISSUE:**

Whether Mr. Sisk 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: Clifton Sisk was employed by Sears Manufacturing Company as a full-time assembler until May 13, 2011. Mr. Sisk last performed work for the employer on May 9, 2011. On May 4, 2011, Mr. Sisk was selected for random drug and alcohol testing. On Monday, May 9, the employer received the drug test result, which indicated a positive test for marijuana. The employer's policy required that Mr. Sisk contact a substance abuse evaluator to schedule an evaluation before he could return to work. The employer required that the employee be off work until the appointment with the evaluator had been set up. The employer did not intend to discharge Mr. Sisk from the employment based on the drug test, provided he followed through the evaluation and recommended treatment.

On May 13, Mr. Sisk made contact with the employer to indicate that he had set up the appointment with the substance abuse evaluator. At that time, Trisha Taylor, Human Resources Manager, told Mr. Sisk that his time away from the employment presented another problem under the employer's no-call, no-show policy. This was despite the fact that the employer mandated that Mr. Sisk be off work until the appointment with the evaluator was set up and despite the fact that the employer's policy did not require that Mr. Sisk contact the employer during those days off. Ms. Taylor told Mr. Sisk that she would need to speak to his supervisor about whether he would be allowed to return to the employment. At that point,

Mr. Sisk said that he was thinking of quitting anyway to move to Atlanta. That statement brought the discussion to a close. There was no further contact between the parties.

**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.

The context of Mr. Sisk's conversation with the employer is important. The employer had suspended Mr. Sisk upon receiving the results of the positive drug test. When Mr. Sisk contacted the employer about returning to work within the period allowed under the employer's policy to set the evaluation appointment, the employer told Mr. Sisk that he would not be allowed to return to the employment unless and until his supervisor okayed that. The employer imposed the additional hurdle of the employer's no-call, no-show policy, even though that policy clearly did not apply to Mr. Sisk's circumstances. The employer's comments to Mr. Sisk reasonably led Mr. Sisk to believe that he had been separated from the employment and that the matter at hand was whether the employer would allow him to return to the employment after what the employer deemed a separation. Only at that point, did Mr. Sisk offer up that statement that he was going to move to Atlanta. The evidence indicates that but for the employer's comments indicating there had been a separation, Mr. Sisk would not have uttered his comments indicating that he was contemplating a separation anyway. Under the circumstances, Mr. Sisk's purported quit cannot be deemed a voluntary separation from the employment. Mr. Sisk reasonably concluded that the employer already deemed the employment relationship severed. The administrative law judge concludes that the employer discharged Mr. Sisk for attendance.

Iowa Code § 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 a discharge matter. See Iowa Code § 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).

Each of the absences the employer considered when the employer told Mr. Sisk that his attendance was a problem was an absence allowed, indeed mandated, under the employer's drug testing policy. Each was an excused absence under the applicable law. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Sisk was discharged for no disqualifying reason. Accordingly, Ms. Sisk is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Sisk.

**DECISION:**

The Agency representative's June 22, 2011, reference 01, decision is reversed. 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/pjs