IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHAEL D MENKE
Claimant

LANCE PRIVATE BRANDS LLC
Employer

APPEAL NO. 13A-UI-07720-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/09/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Michael Menke filed a timely appeal from the June 25, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 5, 2013. Mr. Menke participated and presented additional testimony through Andrea Martin. Janet Bowen, Human Resources Assistant, represented the employer. Exhibits One was received into evidence.

ISSUE:

Whether Mr. Menke 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: Michael Menke was employed by Lance Private Brands, L.L.C., as a full-time forklift operator from 2011 until June 3, 2013, when the employer discharged him from the employment. The final incident that triggered the discharge occurred on May 25, 2013. On that day, Ms. Menke was assigned to perform the painting within the production plant. Mr. Menke reported for work at 7:00 p.m. as scheduled. Around 6:00 p.m., Mr. Menke had notified a supervisor that his pregnant girlfriend was not feeling well that day and that he might have to leave work early. Mr. Menke's girlfriend was also caring for Mr. Menke's six-year-old daughter. Mr. Menke had not made alternative arrangements for childcare despite knowing before he reported for work that his girlfriend was not well. Mr. Menke's girlfriend called Mr. Menke during the shift, indicated she was not feeling well, and asked him to come home to care for his daughter. The girlfriend is not the mother of the daughter. Mr. Menke left the production plant at 9:15 p.m. and went home to care for his daughter. Mr. Menke left a note for the employer indicating that he would perform the painting duties some other time. Though Mr. Menke had just been in contact with a supervisor a short while before he left to discuss another matter, Mr. Menke did not contact the supervisor to discuss his need to leave work before the end of his shift. Mr. Menke had the ability to contact the supervisor. Mr. Menke left without contacting the supervisor even though he expected that he would likely receive a reprimand for leaving work early.

Mr. Menke was next scheduled to work on May 31. When Mr. Menke arrived for work that day, the employer suspended him from the employment. At that time, the supervisor told Mr. Menke that the employer deemed his early departure job abandonment under the employer's written policy concerning unauthorized absences. The employer subsequently notified Mr. Menke that the employer deemed the employment ended

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 evidence fails to establish a voluntary quit. Mr. Menke had put the employer on notice of his possible need to leave work early on May 25, 2013. Mr. Menke left a note indicating he would perform the assigned work another time. Mr. Menke left work without contacting the employer for approval. Mr. Menke had no intention to sever the employment relationship. Mr. Menke's actions did not indicate an intention to quit the employment. The employer's policy does not alter the fact that this was merely an unauthorized early departure, rather than a quit.

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).

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The evidence in the record establishes a discharge based on a single unexcused absence. The absence is unexcused because Mr. Menke left without notifying the employer. The absence is unexcused because the basis for the absence was the need to provide childcare to the six-year-old daughter.

While a disqualifying discharge for attendance usually requires *excessive unexcused* absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). In Sallis, the Supreme Court of Iowa set forth factors to be

considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence.

Mr. Menke's single unexcused absence did not involve any dishonesty or falsification. Mr. Menke was a forklift operator assigned on the day in question to perform ancillary painting duties. There are no aggravating circumstances that would make his single unexcused absence rise to the level of misconduct that would disqualify him for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Menke was discharged for no disqualifying reason. Accordingly, Mr. Menke is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's June 25, 2013, 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