IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSEPH BUTLER
Claimant

DAVENPORT SQUARE FAMILY RESTR INC
Employer

APPEAL NO. 13A-UI-11762-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/15/13
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 October 9, 2013, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on November 13, 2013. Claimant participated. Pete Hasakis represented the employer and presented additional testimony through Lupe Seibel.

The parties stipulated that the employer participated in the fact-finding interview that led to the October 9, 2013, reference 02, decision.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joseph Butler was employed by Davenport Square family Restaurant, Inc., as a full-time dishwasher from November 2012 and last performed work for the employer on August 3, 2013. At that time, owner Pete Hasakis was away from the workplace and Philippe Reyes was the acting supervisor when owner Kathy Hasakis was unavailable. On August 3, 2013, Mr. Butler worked for a couple hours before he hurt his back in the course of performing his work duties. Mr. Butler suffers from severe arthritis. Mr. Reyes and Hasakis were gone at the time that Mr. Butler suffered injury. Mr. Butler knew that he needed to see a doctor and notified the hostess before he left that he needed to go to the hospital. Mr. Butler did indeed see a doctor that day and the doctor took him off work until August 7, 2013. Mr. Butler contacted the workplace, spoke to the hostess, and asked the hostess to let Mr. Reyes or whoever was in charge know about his need to be absent.

On August 4, 2013, Mr. Butler contacted the workplace at 12:20 p.m. and told the waitress who answered the phone that he would be absent from his 2:00 p.m. shift. It was standard operating procedure to tell whoever answered the phone about the need to be absent. Mr. Reyes was cooking at the time and, for that reason, Mr. Butler did not speak directly to Mr. Reyes. If an

employee needed to be absent from work, the employer expected the employee to call an hour or two before the scheduled start of the shift. The employer did not have a formal, written attendance policy.

On August 7, Mr. Butler was scheduled to work at 2:00 p.m. Mr. Butler arrived at 1:30 p.m., went to the time clock, did not see his timecard, and asked Mr. Reyes where his timecard was. Mr. Reyes told Mr. Butler that Kathy Hasakis took Mr. Butler's timecard. Mr. Reyes added that Mr. Butler had been terminated from the employment. Mr. Butler told Mr. Reyes that he had a doctor's excuse. Mr. Reyes told Mr. Butler that his doctor's excuse did not matter. Mr. Reyes told Mr. Butler that Mr. Hasakis would be back the next day, if Mr. Butler wanted to speak to Mr. Hasakis then. Mr. Butler asked why he was being treated in such a manner. Mr. Reyes responded that it was because Mr. Butler had left on August 3 before Mr. Reyes had returned to the restaurant. Mr. Butler told Mr. Reyes that if he had stayed any longer on August 3 that the employer would have needed to call an ambulance for him.

On August 8, Mr. Butler telephoned the workplace at 1:00 p.m., when he expected Mr. Hasakis would be present. The person who answered the phone said that Mr. Hasakis was not there. Mr. Butler borrowed a vehicle and drove to the restaurant, where he saw Mr. Hasakis' vehicle. Mr. Butler entered the restaurant with the intention of speaking to Mr. Hasakis, but was turned away by Mr. Hasakis' son. On August 9, Mr. Butler again went to the restaurant with the intention of speaking to Mr. Hasakis, but Mr. Hasakis' son turned him away.

Mr. Hasakis deemed Mr. Butler a no-call/no-show for shifts on August 9, 10, 11. The employer hired a new dishwasher on August 12, 2013.

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 employer's credibility was not helped by the employer's assertion that Mr. Reyes had no supervisory authority. That assertion was contradicted not only by Mr. Butler, but also by the hostess, Lupe Seibel, who the employer had testify at the hearing. The weight of the evidence fails to establish a voluntary quit on the part of Mr. Butler. The evidence indicates that Mr. Butler left work early on August 3 due to illness, at a time when the employer had left the restaurant unsupervised. Mr. Butler recognized his need for medical attention and reasonably left the workplace to get such medical attention. Mr. Butler contacted the workplace on August 4 to report his need to be absent that day. Mr. Butler went to the workplace on August 7 with a medical excuse in hand, but found his timecard unavailable and was told by the acting supervisor that he was discharged from the employment. Mr. Butler made two subsequent attempts to speak to Mr. Hasakis, but was turned away each time. The weight of the evidence indicates a discharge on August 7, 2013, not a voluntary 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 that Mr. Butler acted reasonably in leaving when he did on August 3, 2013 to seek medical attention. Even though the restaurant was without supervision, Mr. Butler notified the hostess before he left of his circumstances and his need to go to the hospital. The August 3 absence is an excused absence under the law. The evidence further indicates that on August 4, 2013, Mr. Butler was absent due to illness and properly reported the absence to the employer. That absence also was an excused absence under the applicable law. The evidence indicates that Mr. Butler reported for work on August 7, 2013 and was told by the acting supervisor that he was discharged. Mr. Butler reasonably relied upon acting supervisor's statement that he was discharged from the employment. The two absences that led to the supervisor statement that Mr. Butler was discharged were excused absences under the law. There was no need for Mr. Butler to report for work after August 7, 2013, given the acting supervisor's statement to him that he was discharged from the employment and further evidence of that in the removal of his timecard.

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

DECISION:

The Agency representative's October 9, 2013, reference 02, 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/pjs