

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SAYEED AHMED

Claimant

VA CENTRAL IA HEALTHCARE

Employer

APPEAL NO. 09A-UCFE-00028-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/11/09
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act requirement

STATEMENT OF THE CASE:

Sayed Ahmed filed a timely appeal from the November 5, 2009, reference 02, decision that denied benefits based on an Agency conclusion that Mr. Sayeed had voluntarily quit the employment without good cause attributable to the employer. After due notice was issued, a hearing was held on December 18, 2009. Claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Dawn McCalley, Human Resources Specialist, represented the employer. Exhibits One and A were received into evidence.

ISSUE:

Whether Mr. Ahmed voluntarily quit or was discharged from the employment. The administrative law judge concludes that Mr. Ahmed was discharged from the employment and did not voluntarily quit.

Whether the discharge was based on a current act of misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sayeed Ahmed was employed by Veterans' Administration Central Iowa Healthcare as a full-time Pharmacy Technician. Mr. Ahmed started the employment on June 21, 2009. At the time the employer made a formal offer of employment, the employer informed Mr. Ahmed that his employment was conditioned upon favorable adjudication of an applicable background investigation or National Agency Check with Written Inquiries (NACI), per the VA Handbook. On June 22, 2009, Mr. Ahmed filled out a required Declaration for Federal Employment. On the first page of the document was a question asking whether, during the preceding five years, Mr. Ahmed had been fired from a job for any reason. Mr. Ahmed's written response to the question was no. On August 11, Mr. Ahmed notified the employer that he had decided to resign the employment because he had been commuting from Des Moines to the employment in Iowa City and did not wish to continue the commute. On August 14, 2009 the Department of

Veterans Affairs was informed via written notice from the United States Office of Personnel Managements Investigations Service that Mr. Ahmed had been discharged from Iowa Methodist Medical Center, where Mr. Ahmed had worked from September 1999 to October 2005. The United States Office of Personnel Managements Investigations Service had received the information from the former employer on August 5, 2009.

Because Mr. Ahmed had submitted his resignation, the employer elected at that time not to take further steps in response to the information concerning the discharge from the prior employment. However, on August 28, 2009, Mr. Ahmed notified the employer he had decided not to leave the employment and the employer allowed Mr. Ahmed to rescind his resignation. When Mr. Ahmed withdrew his resignation, the employer reinitiated its response to the background check information it had received from the United States Office of Personnel Managements Investigations Service. Diane McCalley, Human Resources Specialist, sent three e-mail messages to Mr. Ahmed requesting that he appear to discuss the discrepancy between the written information he had provided on June 22 and the written information the employer had received on August 14. Ms. McCalley does not know when the messages were sent and did not keep a copy of the messages. Mr. Ahmed did not respond to the e-mail messages. The nature of Mr. Ahmed's employment was that he would travel to the employer's various clinics around the state. Mr. Ahmed was accessible by pager, where Ms. McCalley could have left a telephone number for Mr. Ahmed to call. Ms. McCalley did not attempt to contact Mr. Ahmed by pager. During the week of September 14, Ms. McCalley was on vacation a couple days and was involved in training a couple days. With the assistance of the union, Ms. McCalley made contact with Mr. Ahmed on September 28 and met with Mr. Ahmed on that date.

During the September 28 meeting, Mr. Ahmed admitted that the prior employer had discharged him from the employment in 2005, but Mr. Ahmed asserted that the prior employer had advised him to tell prospective employers that he had quit. The employer notified Mr. Ahmed that falsification of the Declaration for Federal Employment provided grounds for his discharge from the employment. On September 29, Ms. McCalley presented Mr. Ahmed with a written notice that said effective October 13, 2009, Mr. Ahmed would be discharged from the employment for falsification of the Declaration for Federal Employment. In the meantime, Mr. Ahmed continued to work and searched for other employment. On October 9, Mr. Ahmed presented the employer with a written resignation.

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.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

The weight of the evidence in the record indicates that the employer notified Mr. Ahmed on September 29, 2009 that he was discharged from the employment effective October 13, 2009. Mr. Ahmed did not submit his resignation letter until October 9, 2009, 10 days after he had been notified of the impending discharge. The weight of the evidence establishes a discharge, 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 a discharge 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 weight of the evidence indicates that the information upon which the discharge was based came to the employer's attention on August 14, 2009. In light of the resignation that had been submitted at that time, the employer's decision not to take further action at that time was reasonable. However, the employer's failure to take prompt action within a reasonable time after the employer allowed Mr. Ahmed to withdraw his resignation on August 28 was not reasonable. The weight of the evidence indicates that Mr. Ahmed was accessible by pager at least five days a week between August 28 and September 28, when the employer finally notified him that the discrepancy concerning his separation from the prior employment placed his current employment in jeopardy. The employer was unable to produce or provide testimony concerning the dates of the three e-mails sent to Mr. Ahmed during that month-long period. The evidence fails to establish a reasonable basis for the employer's delay in broaching the matter with Mr. Ahmed. The administrative law judge concludes that the evidence fails to establish a current act of misconduct. In the absence of a current act, the discharge would not disqualify Mr. Ahmed for unemployment insurance benefits. Having reached the conclusion that there was no current act of misconduct, the administrative law judge need not further consider whether the conduct in question constituted misconduct. See 871 IAC 24.32(8).

The weight of the evidence indicates that Mr. Ahmed was discharged for no disqualifying reason. Mr. Ahmed is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's November 5, 2009, reference 02, decision is reversed. The discharge was not based on a current act. 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 for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs