IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RICK L RODRIGUEZ
Claimant

YELLOWBOOK INC
Employer

APPEAL NO. 16A-UI-12046-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/20/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Rick Rodriguez filed a timely appeal from the November 3, 2016, reference 03, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Rodriguez had voluntarily quit the employment without good cause attributable to the employer on October 20, 2016, by refusing to continue working. After due notice was issued, a hearing was held on November 28, 2016. Mr. Rodriguez participated personally and was represented by attorney Christopher Mercle. Maria Gaffney represented the employer and presented additional testimony through Justin Linnell. Exhibits 1 through 4 and B, C, D were received into evidence. Department Exhibit D-1 was received into evidence. The administrative law judge took official notice of the fact-finding materials.

ISSUE:

Whether Mr. Rodriguez separated from the employment for a reason that disqualifies him for 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: Rick Rodriguez was employed by Yellowbook, Inc., d/b/a Hibu, as a part-time telephone client services consultant. Mr. Rodriguez's sales position involved use of computer and telephone to make sales calls to prospective client businesses. Mr. Rodriguez's work hours were 9:00 a.m. to 3:00 p.m., Monday through Friday. Mr. Rodriquez began the employment in April 2016 and last performed work for the employer on Friday, September 30, 2016. From April 2016 until October 3, 2016, Sales Manager Cory Wood was Mr. Rodriguez's immediate supervisor.

On Saturday, October 1, 2016, Mr. Rodriguez went to the Cedar Rapids Mercy Medical Center Emergency Room, where he was diagnosed with community acquired pneumonia, a contagious form of pneumonia. The emergency room physician prescribed an antibiotic to be taken daily during the period of October 1-10.

Mr. Rodriquez was next scheduled to work on Monday, October 3. On Sunday, October 2, Mr. Rodriquez telephoned Mr. Wood and told him that he had been diagnosed with a contagious

form of pneumonia and would be off work the next day and the entire next week. Mr. Wood told Mr. Rodriguez that was fine and to get well soon. If Mr. Rodriguez needed to be absent from work, the employer's attendance policy required that he call his supervisor prior to each scheduled shift to provide notice to the supervisor. Mr. Rodriquez was aware of the absence reporting requirement. Mr. Rodriguez continued to provide the employer with proper notice of his continued need to be absent until a meeting that took place on October 20.

At the time Mr. Rodriguez began to be absent from work due to illness, the employer was in the process of reassigning Mr. Rodriguez and other members of his part-time sales group to a different supervisor. Sales Manager Cella Richards became Mr. Rodriguez's supervisor effective October 3, 2016. Mr. Rodriguez did not immediately learn of this change in supervisor and had continued to report his absences to Mr. Wood until he learned that Ms. Richards was his new supervisor. Mr. Rodriguez then commenced properly reporting his absences to Ms. Richards.

On October 10, Ms. Richards contacted Maria Gaffney, Human Resources Generalist, regarding Mr. Rodriguez's continued absence. Ms. Gaffney instructed Ms. Richards to contact Mr. Rodriguez regarding the employer's need for Mr. Rodriguez to return to the employment. Mr. Rodriguez was still ill with communicable pneumonia. On October 10, Mr. Rodriguez had an appointment with his primary care physician, who renewed the antibiotic prescription because the communicable pneumonia was unresolved. Ms. Richards ceased her role as Mr. Rodriguez's supervisor on October 12, when the employer discharged her from the employment. When Mr. Rodriquez's learned of Ms. Richards' discharge, he reverted to notifying Mr. Wood of his absences.

On October 17, Mr. Rodriguez left a voice mail message for Justin Linnell, Sales Director, stating that he was still sick with pneumonia and asking to whom he should be reporting his absences. Because Mr. Rodriguez had most recently been communicating with Sales Manager Cory Wood, Mr. Linnell directed Mr. Wood call Mr. Rodriguez to let him know that Sales Manager Kyle Ducker would now be Mr. Rodriguez's immediate supervisor. The assignment of the new supervisor went in to effect that same day. When Mr. Rodriguez received that information, he commenced reporting his absences to Mr. Ducker. Mr. Ducker was a new sales manager.

On October 19, Mr. Ducker contacted Mr. Linnell regarding Mr. Rodriguez's continued absence from the workplace and for instructions on what Mr. Ducker should do next. Mr. Linnell instructed Mr. Ducker to notify Mr. Rodriguez that he either needed to return to work or resign from the employment. Mr. Rodriguez had no intention of voluntarily resigning his employment. Mr. Ducker summoned Mr. Rodriguez to a meeting at the workplace on October 20.

Mr. Rodriguez appeared for the meeting on Thursday, October 20. At the meeting, Mr. Rodriquez explained that he was still sick with a contagious form of pneumonia and had not been released to return to work. Mr. Rodriguez told Mr. Ducker that he had medical documentation regarding his illness. Mr. Ducker told Mr. Rodriguez that he did not need the documentation. Mr. Ducker told Mr. Rodriguez that he either needed to return to the employment or sign a resignation form. Mr. Rodriguez declined to resign from the employment. At that point, Mr. Ducker summoned Mr. Linnell to the meeting. Mr. Rodriguez reiterated that he was not resigning from the employment. Mr. Linnell told Mr. Rodriguez's his options were to return to the employment or resign the employment. Mr. Linnell told Mr. Rodriguez that he could not miss any more work. Mr. Rodriguez reiterated that he had not been released to return to work. Mr. Linnell presented Mr. Rodriguez with a written reprimand regarding his absences during the preceding two weeks. The employer's policies required that Mr. Rodriguez work at

least 20 hours per week to maintain his part-time employment. The reprimand indicated that, "Rick has accrued over 20 hours of unpaid time over the last 2 weeks." The employer's policies required that Mr. Rodriguez make up any missed work time during the same week of the absence. The reprimand further indicated that, "Rick will work his scheduled shift going forward and have at least 20 hours per week going forward. Any unpaid time will lead to termination."

Mr. Rodriguez left the October 20 meeting under the belief that he had essentially been discharged from the employment. For that reason, Mr. Rodriguez did not attempt to return to work or report additional absences. On October 26, Hibu's human resources staff mailed a letter to Mr. Rodriguez that asserted Mr. Rodriguez had abandoned the employment by being absent since October 21, 2016 without notifying the employer. When Mr. Rodriguez received the letter, he contacted the employer to challenge the assertion he had quit the employment and referenced the meeting on October 20.

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.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993).

The weight of the evidence in the record establishes that Mr. Rodriguez reasonably concluded, based on the October 20, 2016, that he had been discharged from the employment. The weight of the evidence fails to support the employer's assertion that Mr. Rodriguez voluntarily quit. The employer's demand that Mr. Rodriguez return to work at a time when a doctor had temporarily taken him off work due communicable pneumonia was markedly unreasonable, not to mention unsafe. The weight of the evidence establishes that Mr. Rodriguez had taken reasonable and appropriate steps to notify the employer of his need to absent and had done so despite the difficulty presented by the employer's turnover and reassignment of supervisors. Nothing about Mr. Rodriguez's conduct leading to the October 20 meeting suggest an intention to sever the employment relationship. Rather, his conduct up to that point demonstrated an ongoing intention to retain the employment despite experiencing substantial illness. On the other hand, the employer's conduct in preparation for and during the October 20 meeting does indicate an intention to sever the employment relationship.

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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

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 fails to establish a single unexcused absence. Rather, the evidence establishes a series of absences due to illness and properly reported to the employer. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Rodriguez was discharged for no disqualifying reason. Accordingly, Mr. Rodriguez is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The November 3, 2016, reference 03, 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/rvs