IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRENT PURVIANCE
Claimant

JAEGER CORPORATION
Employer

APPEAL NO. 15A-UI-09982-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/09/15
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 August 28, 2015, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on August 4, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on September 30, 2015. Claimant Brent Purviance participated personally and was represented by attorney, Todd West. Stan Jaeger represented the employer and presented additional testimony through Brian Hill. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits A and B into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUE:

Whether the claimant separated from the employment for a reason that would disqualify him for unemployment insurance benefits or that would relieve the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jaeger Corporation contracts with cancer treatment centers to provide highly skilled medical physicists to facilitate delivery of cancer treatment radiation to cancer patients. Stan Jaeger is President of Jaeger Corporation. Brian Hill is Vice President of Jaeger Corporation. Brent Purviance was employed by Jaeger Corporation as a full-time board certified medical physicist from September 1, 2014 and last performed work for the employer on July 31, 2015. Mr. Hill was Mr. Purviance's immediate supervisor.

Mr. Purviance's duties as a medical physicist involved making quality assurance checks on machines that delivered radiation to cancer patients. The work involved interacting with patients, physicians, radiation therapists and other professionals. Mr. Purviance has a master's degree.

Mr. Purviance was assigned primarily to the June E. Nylen Cancer Center in Sioux City, but on at least a couple occasions also performed work at a treatment center in Spencer. Mr. Purviance's usual work hours were 8:00 a.m. to 4:00 p.m., Monday through Friday. Mr. Purviance was expected to be available to assist with emergencies outside of normal working hours. A second, non-board certified medical physicist, Jason Spaans, was also assigned to the Sioux City treatment center and had additional duties at a treatment center in Yankton, South Dakota.

Mr. Purviance's work for the employer was governed by an Employment Contract executed by the parties in August 2014. Under the contract, Mr. Purviance's annual salary was $180,000.00. The contract was effective September 1, 2014. The contract did contain a termination date, but contained a provision regarding the parties' right to terminate the contract. The provision provides, in relevant part, as follows: "This contract may be terminated by any party upon sixty (60) days' written notice."

On Thursday, June 4, 2015, one or more staff members from the Nylen Cancer Center complained to Mr. Hill about Mr. Purviance's conduct at the center. The essence of the complaint was that Mr. Purviance's sense of humor led to Mr. Purviance making jokes that could be construed as inappropriate. On Friday, June 5, 2015, Mr. Hill spoke to Mr. Purviance to make him aware of the complaints and to counsel him to avoid attempts at humor to focus on performing his work duties. Mr. Hill's meeting with Mr. Purviance did not involve any form of reprimand. During the meeting, Mr. Purviance spoke to Mr. Hill about feeling ganged up on and undermined by radiation therapists at the center. Mr. Purviance also raised the issue of why Mr. Spaans was being sent to a particular training and Mr. Purviance was not. The Nylen Cancer Center was about to receive a new piece of medical equipment. Mr. Hill told Mr. Purviance that the center had requested that Mr. Spaans be sent for the training. On the evening of June 5, 2015, Mr. Purviance called Mr. Hill and the pair engaged in similar discussion.

At 10:39 p.m. on Sunday, June 7, Mr. Purviance sent a text message to Jason Spaans, the other medical physicist who served the Nylen Cancer Center. Mr. Purviance wrote that it would probably be good for Mr. Spaans to go to the Sioux City center and that Mr. Purviance would not be there. At 2:37 a.m., Mr. Spaans responded with, "Oh okay" and asked whether Mr. Purviance would be out all week. Mr. Purviance did respond. Mr. Purviance was aware that Mr. Spaans had to travel to the Yankton facility two days per week to support medical staff with cancer radiation treatments. Mr. Spaans was scheduled to travel to Yankton on Monday, June 8, but changed his schedule so that he could assist at the Nylen Cancer Center in Sioux City.

On Monday, June 8, at about 9:00 a.m., Mr. Purviance called Mr. Hill. Mr. Purviance told Mr. Hill that he was not returning the Sioux City clinic. Mr. Purviance asked about a position in Lincoln or Omaha, Nebraska. Mr. Hill told Mr. Purviance it was possible something might come up Mr. Purviance then told Mr. Hill that he had to go and hung up. Mr. Hill attempted to reach Mr. Purviance at his cell phone number throughout the day to continue the discussion, but Mr. Purviance did not answer or return the call. Mr. Hill was aware that Mr. Purviance had been interested in positions other than the Sioux City position and accepted that position with the understanding that employer expected him to remain in the Sioux City for at least a year before the employer would consider a transfer to another location. On the evening of June 8, Mr. Hill sent a text message to Mr. Purviance asking if everything was okay. Mr. Purviance telephoned Mr. Hill in response to the text message. Mr. Hill reminded Mr. Purviance of the contract

provision that obligated him to provide the employer with 60 days' notice of termination of the contract. Mr. Purviance agreed to return to the Sioux City position.

Mr. Purviance returned to work on June 9. On that morning, Mr. Hill sent an email message to Mr. Purviance. The subject line indicated the message was in reference to the employment contract. The message stated as follows:

> Brent,
> Thank you for honoring our contract and giving Jaeger Corporation the time to find a better fit for June E. Nylen. Per our contract, I have set your last day at Friday, August 7. If we both agree on a solution earlier than this, we can change that date. My hope is that we can continue to provide high quality service up until that date. Please don't hesitate to come to me with any further issues. Thanks.
> Brian Hill

Though the terms of the employment contract required written notice of termination of the contract, and though Mr. Purviance had not provided written notice that he was terminating the contract, the employer treated Mr. Purviance's June 8 verbal announcement that he was not returning to the Sioux City center and his absence on June 8 as notice that Mr. Purviance was terminating the contract. Mr. Purviance did not acknowledge or respond to Mr. Hill's email message. The employer proceeded with recruiting a new medical physicist to replace Mr. Purviance at the Nylen Cancer Center.

On June 25, 2015, Mr. Purviance telephoned Mr. Hill to ask whether the employer had found someone to replace Mr. Purviance at the Sioux City center. Mr. Hill told Mr. Purviance that the employer had not. Mr. Purviance asked Mr. Hill about an opening the employer had in Lincoln, Nebraska. Mr. Hill told Mr. Purviance that he was not the right person for that position.

On June 26, Mr. Purviance sent an email message to Mr. Hill and to Mr. Jaeger. Mr. Purviance wrote that until his conversation with Mr. Hill on June 25, he was not sure how to interpret Mr. Hill's email message of June 9. Mr. Purviance asserted that he had never resigned, that he had never given written notice as required by the contract, that he valued his job, and that he was interpreting the employer's actions as terminating the employment contract.

On June 29, Mr. Purviance met with Mr. Hill and Mr. Jaeger via conference call. Mr. Purviance indicated that his relationships at the Sioux City center had improved. Mr. Purviance denied that he had quit the employment or that he had planned to quit. The employer told Mr. Purviance that he had no authority to be absent on June 8 and that in light of Mr. Purviance's assertion that he had not quit, the employer was terminating him for cause, and had provided notice of the termination via Mr. Hill's June 9 email message.

The June 8 absence was the sole absence the employer considered as the basis for asserting that Mr. Purviance was being discharged for cause. While the employer did not have a formal absence reporting policy, the employer expected Mr. Purviance to provide Mr. Hill with appropriate notice of his need to be absent. Mr. Purviance's previous conduct indicated that he understood such notice was expected in advance of that absence.

On June 30, Mr. Jaeger sent Mr. Purviance the following email message:

> Brent,

> This is confirmation and clarification of our conversation yesterday with Brian Hill. Since you indicated that you do not wish to resign, we will indicate that Brian's June 9th email to you was written notice to you of our intent to terminate the contract. With that, we will keep with the original August 7th termination date, and not August 1st date I stated yesterday, thus giving you 60 days written notification.
>
> Stan Jaeger

The employer subsequently hired a replacement medical physicist for the Sioux City center. Rather than work until August 7, Mr. Purviance requested to take a paid leave for the last week of the employment. Mr. Purviance worked on July 31, 2015 and then separated from the employment.

Mr. Purviance established a claim for benefits that was effective August 9, 2015. Mr. Purviance has thus far received $3,879.00 in benefits for the nine-week period of August 9, 2015 through October 10, 2015. Jaeger Corporation is the sole base period employer for purposes of the claim.

On August 26, 2015, a Workforce Development claims held a fact-finding interview to address Mr. Purviance's separation from the employment. The employer participated in the proceeding through a detailed statement outlining the steps leading to Mr. Purviance's separation from the employment.

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 weight of the evidence in the record establishes that the employer discharged Mr. Purviance and that Mr. Purviance did not voluntarily quit the employment. Mr. Purviance was angry and upset on June 8 when he told Mr. Hill that he would not be returning to the Sioux City center. At the same time Mr. Purviance asserted that he was not returning to the Sioux City center, he engaged Mr. Hill in what had been an ongoing discussion about a transfer to a different location. During that conversation, Mr. Hill told Mr. Purviance it was "possible something might come up." Mr. Purviance clearly indicated he was not seeking to separate from the employer, but was instead pressing the employer to transfer him to a different location. Mr. Hill clearly indicated he knew that. On the evening of June 8, Mr. Hill specifically rejected Mr. Purviance's verbal utterance on the morning of June 8 as notice of resignation from the employment. Though the contract required written notice of termination of the contract, Mr. Purviance provided no such notice. Instead, he returned to the employment and ignored, for a time, the employer's assertion on the morning of June 9 that termination of the contract had been triggered.

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.
>
> 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 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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must ordinarily 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).

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. Purviance's absence on June 8, 2015 was indeed an unexcused absence under the applicable law. Because the discharge was based on the sole absence, the evidence does not establish excessive unexcused absences. Because the discharge was based on the sole absence, the administrative law judge must consider the factors set for in Sallis. Mr. Purviance's position was a high-skill, highly specialized medical support position. Mr. Purviance's salary reflected this. Like the employer, the administrative law judge is rather shocked that a person in such a position would simply decide not to appear for work on a particular day, knowing the impact that such absence could have on cancer patients and medical personnel. On the other hand, Mr. Purviance took steps on the evening of June 7 to make certain that Mr. Spaans would be available to cover the needs of the Sioux City center on June 8. The employer has presented insufficient evidence to establish that Mr. Spaans' presence in Sioux City on June 8 caused hardship at the Yankton facility. Mr. Purviance provided notice, albeit late notice, to Mr. Hill that he would be gone on June 8. Mr. Purviance's absence on June 8 did not involve dishonesty. Given the steps Mr. Purviance took to ensure coverage on June 8, the administrative law judge concludes that his absence on June 8 did not constitute 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. Purviance was discharged for no disqualifying reason. Accordingly, Mr. Purviance is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The August 28, 2015, reference 01, 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

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