

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JAMES G RACOWSKI
Claimant

SEDONA STAFFING INC
Employer

APPEAL NO. 21A-UI-13811-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/28/21
Claimant: Respondent (5)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 4, 2021, reference 01, decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on March 5, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on July 12, 2021. Claimant, James Racowski, participated. Colleen McGuinty represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 21A-UI-11519-JTT. Exhibits 1, 2 and 3 were received into evidence. The administrative law judge took official notice of the following Agency administrative records KFFV, DBRO, DBIN, KPYX, WAGE-A, as well as the notice of claim mailed to Sedona Staffing, Inc. on which the employer wrote its protest. The administrative law judge took official notice of the available 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.

ISSUES:

Whether the claimant voluntarily quit without good cause attributable to the employer or was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sedona Staffing, Inc. is a temporary employment agency. The claimant established his employment with Sedona Staffing, Inc. in February 2021.

On February 17, 2021, the claimant began a full-time, temp-to-hire general labor work assignment at Sterilite. The claimant's work hours were 7:00 p.m. to 7:00 a.m. The claimant usually worked three to four shifts per week. Sedona Staffing, Inc. On-site Coordinators Tanner McCutcheon and Michelle Robles were the claimant's supervisors. Both supervisors continue in their same positions. Sedona Staffing did not have the claimant sign and execute a policy document that would obligate the claimant to contact Sedona Staffing upon completion of an assignment to request a new assignment.

The claimant last performed work in the assignment on the morning of February 26, 2021, when he completed the 12-hour shift that started the previous evening.

The claimant was next scheduled to work on February 27, 2021. At 3:45 p.m. that day, the claimant notified Ms. Robles that he would be absent due to being short of breath. The employer's policy required that the claimant notify the employer at least 30 minutes prior to the start of the shift if he needed to be absent and the claimant complied with the notice requirement.

The claimant was next scheduled to work on February 28, 2021. Though Ms. Robles documented a no-call/no-show absence that day, the claimant asserts he provided notice to Mr. McCutcheon of his need to be absent that day.

The claimant continued off work due to chest pain and shortness of breath. The claimant was hospitalized on or about March 1, 2021 and subsequently underwent a heart procedure on March 3, 2021. Mr. McCutcheon called the claimant an hour prior to the surgery. Mr. McCutcheon told the claimant that Sterilite needed a worker who could report for work and that Sterilite was ending the claimant's assignment.

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. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(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 Iowa Administrative Code rule 871-24.25.

The weight of the evidence in the record establishes that the employer initiated the separation on March 3, 2021 through Mr. McCutcheon's phone call to the claimant. The claimant did not voluntarily quit the employment. The employer presented insufficient evidence to rebut the claimant's testimony that Mr. McCutcheon called on March 3, 2021 and discharged the claimant from the assignment and the employment. The employer could have presented testimony from Mr. McCutcheon and/or Ms. Robles, but did not present such testimony. The claimant was the only witness with personal knowledge of the circumstances leading to his separation from the assignment and from the employment.

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 proving a disqualifying separation. 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).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 weight of the evidence in the record establishes a March 3, 2021 attendance-based discharge from the Sterilite assignment. The claimant's absences were due to illness. The employer presented insufficient evidence to rebut the claimant's testimony that the claimant properly notified the employer of each absence. The employer could have presented testimony from Mr. McCutcheon and/or Ms. Robles, but did not present such testimony. The claimant was the only witness with personal knowledge of the circumstances leading to his separation from the assignment and from the employment.

The evidence further establishes a separation from Sedona Staffing with good cause attributable to that temporary employment firm.

Iowa Code section 96.5(1)(j) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:

j. (1) The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.

(2) To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.

(3) For the purposes of this paragraph:

(a) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their workforce during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.

(b) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

Iowa Admin. Code r. 871-24.26(19) 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:

(19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. ...

The weight of the evidence establishes the employer did not have the claimant sign a policy document obligating him to contact the employer upon completing an assignment to request a new assignment. Accordingly, Iowa Code section 96.5(1)(j) does not apply and the claimant's obligation to the employer ended on March 3, 2021, when Mr. McCutcheon notified the claimant the assignment was ended.

The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The June 4, 2021, reference 01, decision is modified as follows. The claimant was discharged from his assignment on March 3, 2021 for no disqualifying. At that time, the claimant separated from the employer, a temporary employment firm, for good cause attributable to the employer. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.



James E. Timberland
Administrative Law Judge

October 25, 2021
Decision Dated and Mailed

jet/scn