

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARRY L BAKER
Claimant

APPEAL NO. 14A-UI-05117-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KIMCO FACILITIES SERVICES CORP
Employer

OC: 04/06/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Larry Baker filed a timely appeal from the May 5, 2014, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits based on an Agency conclusion that Mr. Baker had voluntarily quit without good cause attributable to the employer. After due notice was issued, a hearing was held on June 26, 2014. Mr. Baker participated. Emanuel Debeche, represented the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Larry Baker was employed by Kimco Facilities Services Corporation from May 2013 and last performed work for the employer on Sunday, January 19, 2014. Mr. Baker was assigned to perform janitorial work at the Kohl's department store in Cedar Falls. Mr. Baker had Monday, January 20, 2014 off as part of the Martin Luther King, Jr. public holiday.

On the evening of January 20 Mr. Baker's supervisor, Emanuel Debeche, telephoned Mr. Baker. Mr. Debeche told Mr. Baker that a coworker, Mark Carpenter, had alleged to the Kohl's department store manager that Mr. Carpenter had observed Mr. Baker urinating in a utility sink drain in the dock area of the Kohl's store. Mr. Baker had not urinated in the utility sink drain. Mr. Baker had just finished emptying a mop bucket when Mr. Carpenter had approached and observed Mr. Baker tucking the back of his shirt into his slacks. Based on the allegation made by Mr. Carpenter, the Kohl's store manager had sent a message to Mr. Debeche indicating that the manager did not want Mr. Baker to return to the store. Mr. Debeche told Mr. Baker not to report for work at Kohl's and to instead telephone the employer's human resources office the next day. Mr. Debeche provided Mr. Baker with the telephone number for the human resources office.

On Tuesday, January 21, Mr. Baker telephoned the employer's human resources office and spoke with a human resources representative. The human resources representative told Mr. Baker that she or Mr. Debeche would call Mr. Baker back to let him know what was going to happen next. Mr. Baker did not receive another call from the employer. Mr. Baker subsequently attempted to contact Mr. Debeche and left a voicemail message, but did not receive a return call. The employer did not offer Mr. Baker another work 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. 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 establishes a discharge, not a voluntary quit. The employer notified Mr. Baker not to report for work. The employer told Mr. Baker to wait until he heard back from the employer. The employer did not get back to Mr. Baker. Mr. Baker attempted to contact the employer, but the employer did not return his call. Mr. Baker reasonably concluded that he had been discharged from the employment.

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 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).

The weight of evidence in the record establishes an allegation of misconduct in the absence of proof of misconduct. The employer alleges that that Mr. Baker urinated in a sink drain. The employer presented no testimony, or even a written statement, from the only person alleged to have witnessed the alleged misconduct. The employer had the ability to present testimony from Mr. Carpenter, but elected not to present that testimony. The employer has presented insufficient evidence to rebut Mr. Baker's assertion that he was merely straightening his clothes after having been bent over performing his work duties.

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

DECISION:

The claims deputy's May 5, 2014, reference 01, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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