

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

COREY R MARX
Claimant

APPEAL NO. 18A-UI-02110-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BAKER ELECTRIC INC
Employer

OC: 10/01/17
Claimant: Appellant (5)

Iowa Code Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Corey Marx filed a timely appeal from the February 7, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Marx was discharged on January 12, 2018 for excessive unexcused absenteeism and tardiness after being warned. After due notice was issued, a hearing was held on March 13, 2018. Mr. Marx participated. Jennifer Robinson represented the employer.

ISSUE:

Whether Mr. Marx separated from the employment for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Corey Marx was employed by Baker Electric, Inc. as a full-time apprentice electrician from October 16, 2017 and last performed work for the employer on January 11, 2018. General Foremen Damon Berger and Kory Leiker were Mr. Marx's immediate supervisors. Mr. Marx has at all relevant times resided in Cedar Rapids. The employer hired Mr. Marx to work at the Grinnell College jobsite in Grinnell. Mr. Marx is affiliated with the International Brotherhood of Electrical Workers (IBEW) Local 405, located in Cedar Rapids. The trade union facilitated establishment of the employment relationship and deemed the jobsite in Grinnell an appropriate placement for Mr. Marx. Mr. Marx's commute from Cedar Rapids to Grinnell took 75 to 90 minutes. There was no agreement between Mr. Marx and the employer for the employer to provide transportation to and from the jobsite. Mr. Marx sometimes carpooled with a coworker who lived in Oxford. On those days, Mr. Marx would drive from Cedar Rapids to Oxford to meet the coworker. Though other Baker Electric employees assigned to the Grinnell jobsite commuted from Cedar Rapids, Mr. Marx had no carpooling arrangement with those employees and lacked contact information for those employees.

On January 11, 2018, one of the general foremen allowed Mr. Marx and other employees who had commuted from Cedar Rapids to leave work early due to inclement weather.

During his shift on Thursday, January 11, Mr. Marx notified Mr. Leiker that he had a dental appointment set for 11:00 a.m. on January 12. In light of the appointment time and the commute from Cedar Rapids to Grinnell, Mr. Leiker approved Mr. Marx's request to take the entire day off for the appointment. Mr. Marx noted on the work calendar, per the jobsite practice, that he would be gone on January 12.

After the pre-approved absence on January 12, Mr. Marx was next scheduled to work on Monday, January 15. During his commute to work that day, Mr. Marx's vehicle slid on ice and entered a ditch south of Amana. At 6:26 a.m., Mr. Marx sent a text message to Mr. Berger to notify the employer that he was stuck in the ditch, was waiting for his mother's boyfriend, and would be late for work. Mr. Marx was able to remove the vehicle from the ditch at about 8:30 a.m. However, a tie rod in the steering mechanism had been damaged when the vehicle slid into the ditch and the vehicle now shook when Mr. Marx drove it. Mr. Marx determined it was best to drive the vehicle home to Cedar Rapids, rather than attempt to drive the vehicle to Grinnell. Mr. Marx did not make further contact with the employer that day to indicate he would not be appearing for any part of the shift. The employer's attendance policy required that Mr. Marx notify a foreman as soon as possible if he needed to be absent or late. This policy was part of the written attendance policy contained in an employee handbook that the employer provided to Mr. Marx at the start of the employment. Mr. Marx was aware of the policy.

After the absence on January 15, Mr. Marx was next scheduled to work on Tuesday, January 16. At that point, Mr. Marx lacked an operable vehicle that he could use to commute to work. Mr. Marx did not take any steps to try to secure a ride with another Baker Electric employee. On the morning of January 16, Mr. Marx notified Mr. Berger that he would be absent from work that day.

After the absence on January 16, Mr. Marx was next scheduled to work on January 17. On that day, Mr. Marx sent Mr. Berger the following text message: "Hey Damon. I know I was on my last leg there. I just wanna say thanks for everything. I asked Nick if he'd grab my tools and slip for me. Have a good one sir." Through the text message, Mr. Marx indicated that he would not be returning to the employment. The employer had not discharged Mr. Marx from the employment and had not notified Mr. Marx that he was discharged from the employment. Mr. Marx did not in fact return to the employment. On the morning of January 17, the employer documented Mr. Marx's voluntary separation from the employment.

Mr. Marx's separation from the employment followed two reprimands for attendance. On December 12, 2017, Mr. Berger issued a reprimand to Mr. Marx after seven absences in November and an absence on December 12 that was due to Mr. Marx oversleeping. Some or all of the November absences had been due to illness and had been properly reported to the employer. On December 29, Mr. Leiker issued a second reprimand to Mr. Marx for attendance. Mr. Leiker did not reference specific absences, but instead stated that Mr. Marx has missed "extensive amount of time."

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 Mr. Marx voluntarily quit the employment effective January 17, 2018 through the text message he sent to Mr. Berger and by not returning to the employment.

Iowa Code section 96.5(1) 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.

Iowa Admin. Code r. 871-24.25(1) provides:

Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(1) The claimant's lack of transportation to the work site unless the employer had agreed to furnish transportation.

Iowa Admin. Code r. 871-24.25(30) provides:

Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(30) The claimant left due to the commuting distance to the job; however, the claimant was aware of the distance when hired.

The evidence in the record establishes a voluntary quit without good cause attributable to the employer. The voluntary quit was based a lack of transportation and the commuting distance to the workplace. Mr. Marx was aware of the commute, and of his need to secure a reliable means to the jobsite, from the start of the employment. Because the voluntary quit was without good cause attributable to the employer, Mr. Marx is disqualified for benefits until he has worked

in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Marx must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

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).

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.

If the evidence had established that the employer discharged Mr. Marx from the employment, the evidence would also have established a discharge based on excessive unexcused absences. The absence on December 12 was unexcused because it was due to oversleeping. The full-day absence on January 15 was unexcused because Mr. Marx had notified the employer only that he would be late, not that he would be absent the entire day. Had Mr. Marx merely been late, the late arrival due to the inclement weather and with proper notice to the employer would have been an excused absence. The absences on January 16 and 17 were both unexcused absences because they were based on Mr. Marx's failure to secure transportation to work, a matter of personal responsibility. The fact that the unexcused absences occurred in the context of repeated reprimands for attendance is an aggravating factor.

DECISION:

The February 7, 2018, reference 01, decision is modified as follows. The claimant voluntarily quit on January 17, 2018 without good cause attributable to the employer. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs