

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MARC A BYRD

Claimant

APPEAL NO. 20A-UI-13292-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COMMUNITY MOTORS COMPANY INC

Employer

OC: 04/05/20

Claimant: Appellant (1)

Iowa Code Section 96.5(1) – Voluntary Quit

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

Iowa Code Section 96.3(7) – Overpayment

Public Law 116-136, Section 2104 – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The claimant, Marc Byrd, filed a timely appeal from the September 1, 2020, reference 04, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant voluntarily quit on June 14, 2020 without good cause attributable to the employer by failing to report for work for three days in a row without notifying the employer in violation of the employer's attendance policy. After due notice was issued, a hearing was held on November 16, 2020. Claimant participated and presented additional testimony through Patsy Byrd. Clyde Luck represented the employer and presented additional testimony through Alishia Boelman. This hearing matter was consolidated with the hearing in Appeal Numbers 20A-UI-11038-JTT and 20A-UI-13291-JTT. Exhibits 1, 3, 4, A, B and D through J were received into evidence. The administrative law judge took official notice of the following Agency administrative records: KCCO, DBRO, KPYX and WAGE-A.

ISSUE:

Whether the claimant voluntary quit without good cause attributable to the employer.

Whether the claimant was discharged from the employment.

Whether the claimant was overpaid regular benefits.

Whether the claimant was eligible for Federal Pandemic Unemployment Compensation (FPUC).

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Marc Byrd's most recent period of employment with Community Motors Company, Inc. began in May 2019. Mr. Byrd was employed as a full-time auto salesperson. He worked on commission and received a guaranteed draw of \$1,500.00 per month, paid on the first day of the month and on the 15th day of the month. The employer would pay the sales commission on 10 day of the month that followed the month for which the commission was being paid. Mr. Byrd would usually sell 10 to 11 vehicles per month. Clyde Luck, Used Car Manager, was Mr. Byrd's

primary supervisor. Mr. Byrd's usual work hours prior to the COVID-19 pandemic were 8:00 a.m. to 8:00 p.m., Monday through Thursday, and 8:00 a.m. to 6:00 p.m. on Friday and Saturday. The employer's policy required that Mr. Byrd call the workplace prior to the start of his shift if he needed to be absent. Mr. Byrd was aware of the absence reporting requirement.

Mr. Byrd last performed work for the employer on June 15, 2020. Mr. Byrd had returned on Friday, June 12, 2020 from a period of approved time off, during which time he was dealing with a medical issue. By June 12, 2020, the employer had returned Mr. Byrd to his regular full-time work hours after a period during which the employer had him work every other day as part of its response to the COVID-10 pandemic. On June 12 and 13, 2020, Mr. Byrd worked his regular scheduled shifts. Mr. Byrd was next scheduled to work on Monday, June 15, 2020, from 11:00 a.m. to 8:00 p.m. Mr. Byrd reported for work on time, but left early at 11:45 a.m., after telling the employer that his wife was sick. Mr. Byrd thereafter called in absences for the remainder of the week and cited his wife health issue as the basis for his need to be absent. Mr. Byrd properly reported those absences. Mr. Byrd's absence continued into the next week, but Mr. Byrd discontinued reporting the absences. Mr. Byrd was a no-call/no-show on June 22, June 23, June 24, and June 25, 2020. Under the employer's policy a single no-call/no-show absence could be deemed a voluntary quit if the employee failed to make contact with the employer within the 24 hours after the scheduled start of the missed shift. On June 25, 2020, the employer sent a text message to Mr. Byrd in which Mr. Luck asked Mr. Byrd to contact the employer's payroll administrator. Mr. Byrd continued to be absent and did not respond to the message until Monday, June 29, 2020, when he replied that he was not feeling well and would see Mr. Luck soon. On July 1, 2020, Mr. Luck sent a text message to Mr. Byrd in which stated that since had not heard from Mr. Byrd since Monday, June 29, 2020 Mr. Byrd's employment was terminated as of July 1, 2020.

Mr. Byrd had established an original claim for unemployment insurance benefits that was effective April 5, 2020. Iowa Workforce Development set the weekly benefit amount for regular benefits at \$481.00. This employer is the primary base period employer. Mr. Byrd did not immediately commence making weekly claims after he established his original claim. On June 30, 2020, one day before the employer, deemed the employment terminated, Mr. Byrd had contacted Iowa Workforce Development had made weekly claimant for the several weeks from the original claim date up through June 27, 2020. Mr. Byrd ended up receiving \$9,076.00 in regular benefits for the period of April 5, 2020 through August 22, 2020. Mr. Byrd also received \$9,600.00 in Federal Pandemic Unemployment Compensation (FPUC) for the period of April 5, 2020 through July 25, 2020.

REASONING AND CONCLUSIONS OF LAW:

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.

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.

Iowa Admin. Code r. 871-24.25(4) 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:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The employer reasonably concluded on June 29, 2020 that Mr. Byrd had voluntarily quit the employment. Mr. Byrd had been absent without notice to the employer for the entire week of June 21-27, 2020. Though Mr. Byrd replied on June 29, 2020 to the employer's June 25, 2020 text message, he was thereafter a no-call/no-show for two additional shifts before the employer concluded the employment was done.

This matter may also be analyzed as a discharge for attendance.

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 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).

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 evidence in the record establishes a separation that followed several no-call/no-show absences between June 22 and July 1, 2020. Mr. Byrd did not give proper notice of any of the absences during that period and each was an unexcused absence under the applicable law. The unexcused absences were excessive, demonstrated an intentional and substantial disregard for the interests of the employer, and constituted misconduct in connection with the employment.

Based on the separation from the employment, Mr. Byrd is disqualified for benefits for the period beginning June 28, 2020 until he has worked in and has been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Byrd must meet all other eligibility requirements. The employer's account shall not be charged for benefits for the period beginning June 28, 2020.

Iowa Code section 96.3(7) provides that if a claimant receives benefits and is deemed ineligible for the benefits, Iowa Workforce Development must recover the benefits and the claimant must repay the benefits, even if the claimant was not at fault in receiving the benefits.

Mr. Byrd received regular benefits that included \$3,848.00 for eight weeks between June 28, 2020 and August 22, 2020. The September 1, 2020, reference 04, decision and this decision disqualify Mr. Byrd for those benefits. The benefits for that period are an overpayment of benefits that Mr. Byrd must repay. The employer's account shall not be charged for benefits for the period beginning June 28, 2020.

PL116-136, Sec. 2104 provides, in pertinent part:

(b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

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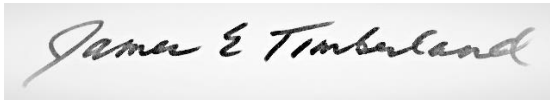
(f) Fraud and Overpayments

(2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

Because the claimant is disqualified from receiving regular unemployment insurance (UI) benefits for the period beginning June 28, 2020, the claimant is also disqualified from receiving Federal Pandemic Unemployment Compensation (FPUC) for that same period. The \$2,400.00 in FPUC benefits the claimant received for the four week period ending July 25, 2020 constitutes an overpayment of benefits. Claimant is required to repay those benefits.

DECISION:

The September 1, 2020, reference 04, decision is affirmed. The claimant voluntarily quit without good cause attributable to the employer. In the alternative, the claimant was discharged for misconduct in connection with the employment based on excessive unexcused absences. The effective date of the separation was July 1, 2020. Effective the week that began June 28, 2020, the claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits for the period beginning June 28, 2020. The claimant is overpaid \$3,848.00 in regular benefits for eight weeks between June 28, 2020 and August 22, 2020. The claimant is overpaid \$2,400.00 in FPUC benefits for the four weeks between June 28, 2020 and July 25, 2020. The claimant must repay the overpaid regular and FPUC benefits.



James E. Timberland
Administrative Law Judge

January 6, 2021
Decision Dated and Mailed

jet/mh

NOTE TO CLAIMANT:

This decision determines you are not eligible for regular unemployment insurance benefits under state law for the period beginning June 28, 2020. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.

If you do not qualify for regular unemployment insurance benefits under state law and are currently unemployed for reasons related to COVID-19, you may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** For more information on how to apply for PUA, go to <https://www.iowaworkforcedevelopment.gov/pua-information>. **If you do not apply for and are not approved for PUA, you may be required to repay the benefits you have received.**