IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

ANTHONY J HOYLE Claimant **IMKO ENTERPRISES INC** Employer	**APPEAL NO. 21A-UI-08321-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/20/20** **Claimant: Appellant (2)**

Iowa Code Section 96.5(1) – Fulfillment of the Contract of Hire
Iowa Code Section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

The claimant, Anthony Hoyle, filed a timely appeal from the March 03, 2020, reference 03, decision that disqualified the claimant for benefits and that held the employer's account would not be charged for benefits, based on the deputy's conclusion that the claimant voluntarily quit on January 14, 2021 without good cause attributable to the employer. After due notice was issued, a hearing was held on June 4, 2021. Claimant participated. Janette Arreola represented the employer. Exhibits 1, 2, 3, A, B, D and E were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: IMKO Enterprises is a temporary employment agency. In July 2019, the claimant initiated contact with IMKO and went through an orientation process. As part of that process, IMKO had the claimant sign several policies and acknowledgments. These included a Policies and Procedures Checklist that included several policies set forth under the headings Safety and Incident Policy, Substance Abuse Policy, and Communication Procedures. Included under the Communications Procedures heading was the following:

> I understand that I am an employee of IMKO; only IMKO or I can terminate my employment, but my assignment may end based on client needs and preference and for reasons beyond IMKO control. When an assignment ends, I must report to this staffing company for my next job assignment. Failure to do so or to accept my next job assignment will indicate that I have voluntarily quit and will not be eligible for unemployment benefits.

The employer did not provide Mr. Hoyle with a copy of the Policies and Procedures Checklist. The end-of-assignment notification requirement did not specify a deadline by which the claimant

needed to contact the employer upon completion of an assignment to request a new assignment.

Though the claimant went through the orientation in July 2019, his employment with IMKO did not actually start until November 2020, when the claimant began a full-time temp-to-hire assignment at Palmer Candy. The claimant's work hours were 6:00 a.m. to 4:30 p.m. Monday through Saturday. The claimant last performed work in the assignment on December 24, 2020. The claimant was next scheduled to work on Monday, December 28, 2020.

The claimant did not appear for the December 28 shift. At 8:22 a.m. on December 28, the claimant called IMKO and spoke with Staffing Coordinator Janet Keegan. IMKO's attendance policy required that the claimant call IMKO and the client at least an hour prior to the shift to give notice of an absence, which meant the claimant was expected to call no later than 5:00 a.m., at a time when the IMKO office would not yet be open. The IMKO had an answering machine where the claimant could leave a message. The claimant's call did not meet the notice requirement. The claimant notified IMKO and Palmer Candy that he had symptoms consistent with COVID-19. IMKO Staffing Coordinator Janet Keegan told the claimant that he could not return to work until he was tested for COVID-19 and until he provided medical documentation indicating that he had been cleared by a doctor to return to work.

The employer next heard from the claimant on December 31, 2020, at which time the claimant provided a document indicating he was tested for COVID-19 on December 28, 2020. The employer directed the claimant to keep the employer updated. The employer told the claimant he either needed to provide a medical release indicating he was cleared to return to work or he had to quarantine for 10 days. Shortly thereafter, the claimant received his test result, which was positive for COVID-19.

On January 7, 2021, the claimant received documentation from Siouxland District Health Department that stated he was released to return to work effective January 5, 2021, so long as his symptoms had resolved. The claimant was at that point still experiencing COVID-19-related fatigue.

On January 7, 2021, the claimant emailed his medical release to IMKO staffing coordinator Janet Keegan. The claimant then reported to the IMKO office and spoke with Ms. Keegan. Later that day, Ms. Keegan notified Palmer Candy that the claimant would be returned to the assignment on January 8, 2021.

The claimant did not return to the Palmer Candy assignment on January 8 and did not notify IMKO or Palmer Candy that he would not be at work that day. When the claimant did not appear for work on January 8, 2021, Palmer Candy ended the assignment. At 8:30 a.m. on January 8, 2021, the employer attempted to call the claimant. The claimant did not answer and his voice mail box was full, so the employer could not leave a message.

On January 9, 2021, the claimant reported on time for his shift at Palmer Candy. The claimant was unaware that the Palmer Candy had already ended the assignment. The Plant Manager at Palmer Candy directed the claimant to contact IMKO. The claimant drove to IMKO that same morning. The claimant asked the IMKO representative what had happened to his assignment. The IMKO representative told the claimant the employer thought the claimant quit when he did not appear for work on January 8. The claimant did not ask for another assignment and IMKO did not mention another assignment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Administrative Code rule 871-24.1(113) characterizes the different types of employment separations as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
>
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
>
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
>
> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

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 establishes that the claimant was discharged from the assignment for attendance, when he did not report for work or give notice that he would be absent on January 8, 2021. The evidence does not support the idea that the claimant voluntarily quit on January 8, 2021. The claimant had just provided the employer with a medical release on January 7, 2021. The claimant had not done or said anything that would lead a reasonable person to conclude he intended to quit 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 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 Iowa Administrative Code rule 871-24.32(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 establishes a discharge from the Palmer Candy assignment for no disqualifying reason. The weight of the evidence in the record establishes a January 8, 2021 unexcused absence from the Palmer Candy assignment. Information provided by the claimant on January 7 indicated he was released to return to work at that time. The claimant met with the employer on January 7. The weight of the evidence indicates there was mutual understanding that day that the claimant would report for work on January 8, 2021. The claimant was a no-call/no-show on January 8, which triggered Palmer Candy to end the assignment. The evidence also establishes a December 28, 2020 unexcused absence, when the claimant was absent due to illness, but failed to provide timely notice to the employer. The evidence does not establish any other unexcused absences. The unexcused absences were not excessive.

The evidence further establishes that the claimant's separation from IMKO was for good cause attributable to that employer.

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 issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

The employer did not comply with the statutory notice requirements set forth at Iowa Code section 96.5(1)(j). The employer buried the end-of-assignment notice requirement in a collection of other policies. The employer did not have the claimant sign a separate and distinct end-of-assignment policy acknowledgement. The employer did not give the claimant a copy of the document he signed. The policy did not include a deadline for contacting the employer at the end of an assignment. Accordingly, the Iowa Code section 96.5(1)(j) does not apply and the claimant fulfilled the contract of hire effective January 8, 2021, when Palmer Candy ended the assignment.

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

DECISION:

The March 03, 2020, reference 03, decision is reversed. The claimant's January 8, 2021 separation from the temporary employment agency was for good cause attributable to the temporary employment agency. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

September 20, 2021
Decision Dated and Mailed

jet/scn