

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

AHMED EL MAJDOUBI
Claimant

APPEAL NO. 18A-UI-10364-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE HON COMPANY
Employer

OC: 09/16/18
Claimant: Appellant (5)

Iowa Code Section 96.5(1) – Voluntary Quit
Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant Ahmed El Majdoubi filed a timely appeal from the October 15, 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 the claimant was discharged on June 14, 2018 for excessive unexcused absenteeism. After due notice was issued, a hearing was started on October 31, 2018 and concluded on November 2, 2018. Claimant participated. Malia Maples of Employers Edge represented the employer and presented testimony through Katina McDaniel. Arabic-English interpreters Alan Hafez and Moni Butko of CTS Language Link assisted with the hearing. Exhibits A through H and Department Exhibit D-1 were received into evidence.

ISSUES:

Whether the claimant voluntarily quit the employment without good cause attributable to the employer.

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: The claimant was employed by The Hon Company on a full-time sewer from 2016 and last performed work for the employer on May 4, 2018. The claimant has at all relevant times resided in East Moline, Illinois. The claimant is a native Arabic speaker, but has substantial English language skills. The workplace is Muscatine, Iowa. The claimant's work hours were 3:00 p.m. to 11:00 p.m., Monday through Friday.

On April 23, 2018, the claimant requested leave under the Family and Medical Leave Act (FMLA) for the period of May 7, 2018 through August 20, 2018, for the purpose of traveling to Morocco to be with his ill mother, who resides in Morocco. The employer granted tentative approval of the FMLA leave request, contingent upon the claimant providing a completed Certification of Health Care Provider for Family Member's Serious Health Condition that supported the leave request. The claimant's planned trip to Morocco was based more on his

desire to travel with his wife and children to spend time with his ill mother after a prolonged separation than on the claimant's need to care for his mother. This was not made clear to the employer at the time of the claimant's request for the leave. The employer provided a May 18, 2018 deadline for submission of the medical certification. The claimant discussed with the employer the likelihood that it would take longer to obtain the certification in light of the need to translate the English text of the certification form into French before presenting it to the medical provider. The claimant was aware at all relevant times that if he was absent for a reason other than an approved leave of absence, the employer's attendance policy required that he provide daily notice of his need to be absent by calling his group leader at least two hours prior to the scheduled start of his shift.

Though the claimant's request to be absent from work for an extended period, and the employer's tentative approval of the leave, was based on the claimant's stated plan to promptly leave for Morocco, the claimant did not leave for Morocco. The claimant planned to take his wife and their minor children on the trip to Morocco. However, the claimant's son's passport had expired in 2013 and had to be renewed before the son could travel outside the United States. The claimant discovered the issue with the passport during the first week of May 2018, at about the time he went off work. Also in May, the claimant checked the price of airline tickets for immediate departure to Morocco and determined that the cost was prohibitively high. The claimant decided to defer his family's departure for Morocco until his son's new passport could be processed and decided to purchase tickets for a departure several weeks in the future. The claimant did not promptly purchase the tickets. The claimant did not notify the employer the employer that he was delaying his departure or that he was remaining at home in East Moline in the interim. The claimant did not report any absences for the period on or after May 7, 2018 pursuant to the employer's absence reporting procedure. The claimant received his son's renewed passport on June 5, 2018, after the passport was forwarded to and returned by Moroccan authorities. On June 8, 2018, the claimant purchased airline tickets for a July 2018 departure date. At some point between June 9 and 13, 2018, the employer received the FMLA medical certification that indicated the claimant's mother was suffering from type 2 diabetes and hypertension.

On June 13, 2018, the employer learned that the claimant had never left East Moline. On that day, a representative of the Moline Greater Housing Authority contacted the employer to inquire about FMLA leave paperwork in connection with the claimant's request for a reduction in his rent. The claimant lived in publically-subsidized housing and the housing authority required proof of the claimant's FMLA leave status before the housing authority would increase the subsidy and reduce the claimant's rent. The housing authority representative told the employer that the claimant had been in the housing authority office that morning requesting a rent reduction. The employer asked the housing authority representative to have the claimant call the employer because the employer was under the impression the claimant was out of the country. An hour later, the housing authority representative notified the employer that she had spoken with the claimant and that the claimant said he would have his wife contact the employer because he was supposed to be out of the country. Soon thereafter, the claimant's wife called the employer to inquire about the FMLA paperwork. The employer stated that she needed to speak with the claimant. The claimant's wife asserted that the claimant was in Morocco. The employer told the claimant's wife that she believed that assertion to be untrue. The claimant's wife then hung up. Within 10 minutes, the claimant called and spoke to the employer. The claimant told the employer that he had been unable to leave the country because his child's passport had expired. The employer asked the claimant why he had not updated the employer. The claimant said it had not occurred to him. The employer told the claimant that she would further investigate the matter and contact the claimant the next day.

On June 14, 2018, the employer attempted to call the claimant and learned that the number the employer had for the claimant was no longer in service. The employer contacted the housing authority representative and had that person notify the claimant that he needed to report to the

workplace. The claimant went to the workplace that day and brought with him his son's expired passport. The claimant did not provide an answer when asked why he had not notified the employer of his change in plans or had not reported for work. The claimant had at that point been absent 28 work days. The employer told the claimant she considered him to have abandoned the employment. The employer requested the claimant's employee badge, which the claimant provided.

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 claimant's separation from the employment can be analyzed in the alternative as both a voluntary quit and a discharge. The administrative law judge will first address the voluntary quit issue.

Iowa Code section 96.5(1)c 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:

c. The individual left employment for the necessary and sole purpose of taking care of a member of the individual's immediate family who was then injured or ill, and if after said member of the family sufficiently recovered, the individual immediately returned to and offered the individual's services to the individual's employer, provided, however, that during such period the individual did not accept any other employment.

Iowa Code section 96.5(1)f 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:

f. The individual left the employing unit for not to exceed ten working days, or such additional time as may be allowed by the individual's employer, for compelling personal reasons, if so found by the department, and prior to such leaving had informed the individual's employer of such compelling personal reasons, and immediately after such compelling personal reasons ceased to exist the individual returned to the individual's employer and offered the individual's services and the individual's regular or comparable work was not available, provided the individual is otherwise eligible; except that during

the time the individual is away from the individual's work because of the continuance of such compelling personal reasons, the individual shall not be eligible for benefits.

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 evidence in the record establishes a voluntary quit without good cause attributable to the employer. The basis for the tentative leave approval was the claimant's purported need to travel to Morocco to care for his ill mother. The weight of the evidence establishes that was not the actual primary basis for the leave request. The claimant requested the leave primarily so that his family could take a vacation to Morocco and spend time with his ill mother, rather than for the purpose of caring for his mother. The basis for the tentative approval of the leave request disappeared when the claimant did not leave for Morocco within a timely manner. At that point, the absence from work became a prolonged, unauthorized personal leave. The claimant's absence from the employment under this false pretext without notice to the employer well exceeded 10 working days. Based on the voluntary quit analysis, the claimant is disqualified for 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.

The administrative law judge will now turn to the discharge analysis, which is much the same as the quit analysis.

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 Iowa Administrative Code rule 871-24.32(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 in the record establishes a discharge for misconduct in connection with the employment based on excessive unexcused absences and based on dishonesty. Again, the

basis for the tentative leave approval was the claimant's purported need to travel to Morocco to care for his ill mother, but that was not the actual primary basis for the leave request. Again, the basis for the tentative approval of the leave request disappeared when the claimant did not leave for Morocco within a timely manner. The absence from work became a prolonged, unauthorized personal leave. During that period of unauthorized leave, the claimant took no steps to update the employer and took no steps to report his absences pursuant to the absence reporting procedure. The claimant accrued upwards of 28 consecutive unexcused absences. A much smaller number of consecutive unexcused absences would be sufficient to establish excessive unexcused absences constituting misconduct in connection with the employment. The claimant also engaged in misconduct in connection with the employment through his intentionally deceptive actions, especially on June 13, 2018. These included a request that the housing authority representative contact the employer to conceal the fact that the claimant had not left East Moline. The claimant's dishonesty included the further act of having the claimant's wife contact the employer to further the attempted deception. The claimant's actions demonstrated an intentional and substantial disregard of the interests of the employer. The claimant's assertion that he did not report for work because he was consumed with concern for his mother does not provide a reasonable and legitimate basis for being absent from work. Based on the discharge analysis, the claimant is disqualified for 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.

DECISION:

The October 15, 2018, reference 01, decision is modified as follows. The claimant voluntarily quit without good cause attributable to the employer, effective May 7, 2018. In the alternative, the claimant was discharged on June 14, 2018 for misconduct in connection with the employment. 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