

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN B LEWIS
Claimant

APPEAL NO. 17A-UI-02151-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRIDGESTONE AMERICAS TIRE
Employer

**OC: 01/22/17
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

John Lewis filed a timely appeal from the February 17, 2017, reference 02, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Lewis was discharged on December 16, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on March 20, 2017. Mr. Lewis participated. Jeff Higgins, Labor Relations Manager, represented the employer. The administrative law judge took official notice Iowa Polk County Case Number FECR300353 and FECR282270, which records are available to the public at www.lowacourts.state.ia.us.

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: John Lewis was employed by Bridgestone Americas Tire as a full-time maintenance worker. Mr. Lewis began the employment in 2014 and last performed work in the employment on November 13, 2016. Mr. Lewis' immediate supervisor was Jim Anderson, Maintenance Supervisor. Mr. Anderson reports to Mike Orda, Maintenance Manager. Mr. Lewis' work hours were 6:00 p.m. to 6:00 a.m. Mr. Lewis worked a two-week schedule that had him working Monday, Tuesday, Friday and Saturday of the first week and Sunday, Wednesday and Thursday of the second week.

If Mr. Lewis needed to be absent from work, the employer's work rules required that Mr. Lewis telephone the guard shack prior to the start of his shift. The guards would document the contact and forward that information to Mr. Lewis' supervisor. The employer reviewed this policy with Mr. Lewis at the start of the employment. Mr. Lewis was aware of the absence reporting requirement.

Throughout the period of employment, Mr. Lewis was on probation and under the supervision of the Second Judicial District Department of Correctional Services. The probation was based on convictions for multiple indictable offenses wherein Mr. Lewis' wife and minor children were the victims. See Polk County Case Number FECR0282270. In connection with the prior conviction, a judge had entered a No Contact Order prohibiting Mr. Lewis from contacting his wife and naming his wife as a protected party.

On or about November 5, 2016, Mr. Lewis was arrested and charged with multiple new indictable criminal offenses wherein his spouse and minor children were again the victims. See Polk County Case Number FECR300353. Mr. Lewis posted bond on November 7, 2016 and subsequently returned to work.

On November 9, 2016, a judge issued a warrant for Mr. Lewis' arrest in connection with the Second Judicial District Department of Correctional Services' application to revoke Mr. Lewis' probation in Polk County Case Number FECR0282270. When Mr. Lewis learned that he was going to be arrested and held without bond on the pending probation revocation, he completed a written request for a leave of absence from his employment at Bridgestone, but did not reference the impending incarceration. The employer's leave policy explicitly prohibits use of leave in connection with incarceration. On November 10, 2016, Jeff Higgins, Labor Relations Manager, met with a union representative and advised the representative that the employer would terminate Mr. Lewis' employment for violation of the leave policy if he was approved for a leave of absence and the basis for the leave turned out to be a period of incarceration. Mr. Lewis subsequently withdrew the request for a leave of absence. After Mr. Lewis worked a shift that started on November 14 and ended on November 15, 2016, Mr. Lewis was arrested and incarcerated on November 15, 2016. Mr. Lewis notified his manager that he was incarcerated. Mr. Lewis subsequently attempted to contact the employer via a collect call from the jail, but the employer did not accept the call or charges. Mr. Lewis remained in custody until January 5, 2017.

On December 15, 2016, Mr. Higgins, Labor Relations Section Manager, sent a certified letter to Mr. Lewis at Mr. Lewis last known address. Mr. Lewis did not receive the letter. The letter indicated that Mr. Lewis' employment had "been terminated effective 12/14/16 for the following reason: Termination – 7-Day No Report." At that point, Mr. Lewis had been absent from the employment for about a month and had been out of contact with the employer since the call on November 15, 2016.

On or about January 5, 2017, Mr. Lewis' bond conditions were amended. On that day, Mr. Lewis posted bond and was released back to supervision of the Second Judicial District Department of Correctional Services pending the probation revocation hearing and pending prosecution on the new charges. On January 5, 2017, Mr. Lewis attempted to report for work, spoke with a union representative, and was told not to go onto the Bridgestone property.

On January 25, 2017, Mr. Lewis sent an email message to human resources clerk regarding his desire to return to the employment. On February 3, 2017, Mr. Lewis sent another email to the same clerk. On that same day, Mr. Higgins sent an email response in which he directed Mr. Lewis to cease contacting the human resources clerk to communication through the union. Mr. Lewis has not returned to the employment.

On March 27, 2017, Mr. Lewis entered a guilty plea to multiple indictable criminal offenses in Polk County Case Number FECR300353 as part of a plea agreement. On that day, Mr. Lewis was convicted on each of the offenses to which he pleaded guilty and sentenced to a number of years in prison. The prison sentences were suspended. Mr. Lewis was placed back under the

supervision of the Department of Correctional Services. Mr. Lewis was ordered to reside at the Fort Des Moines Residential Facility. Also on March 27, 2017, Mr. Lewis admitted to violating the terms of his probation in Polk County Case Number FECR0282270.

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 Supreme Court of Iowa has concluded that an unemployment insurance claimant does not voluntarily quit when the separation is based on incarceration and the claimant attempted to give notice of the absence. *Irving v. EAB*, 883 N.W.2d 179 (Iowa 2016). Under the ruling in *Irving*, the administrative law judge must conclude that Mr. Lewis did not voluntarily quit. Instead, Mr. Lewis was discharged on December 15, 2016 after he had been incarcerated on pending criminal charges and a pending probation revocation based on a prior conviction.

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 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). 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).

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.

The weight of the evidence in the record establishes a discharge based on excessive unexcused absences. Each of Mr. Lewis' incarceration-based absences between the November 15, 2016 incarceration and the December 15, 2016 discharge was an unexcused absence under the applicable law. Each was based on criminal conduct perpetrated by Mr. Lewis. The circumstances of Mr. Lewis' incarceration were fundamentally different than the circumstances address in *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016), wherein the Supreme Court of Iowa concluded as follows:

[W]e do not think the record here supports a finding of misconduct where the claimant was absent due to incarceration, where the charge was later dropped, and where the claimant made arrangements to have her mother contact her employer on a daily basis until instructed not to do so.

Mr. Lewis' case, the incarceration was based in part on a prior conviction and pending probation revocation in connection with that prior conviction. In addition, Mr. Lewis admitted to violating the terms of his probation and was adjudicated to have violated the probation. The extended period of incarceration was also based on pending criminal charges for indictable offenses. While some of those charges were dropped pursuant to a plea agreement, Mr. Lewis pleaded guilty to several indicatable offenses and was convicted of those offenses.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Lewis was discharged for misconduct in connection with the employment, based on excessive unexcused absences. Accordingly, Mr. Lewis 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. Lewis must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The February 17, 2017, reference 02, decision is affirmed. The claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences. 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 for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs