IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KEVIN K EVANS
Claimant

DEERY BROTHERS INC
Employer

APPEAL NO. 17A-UI-07819-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/17/16
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:

Kevin Evans filed a timely appeal from the July 31, 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. Evans was discharged on June 12, 2017 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on August 18, 2017. Mr. Evans participated. Christine Hunter of Employers Unity represented the employer and presented testimony through Eric Rios. Exhibits 1 through 6 and A were received into evidence.

ISSUE:

Whether Mr. Evans 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: Kevin Evans was employed by Deery Brothers, Inc., as a full-time Product Specialist from May 2, 2017 and last performed work for the employer on June 10, 2017. Mr. Evans asserts that he was diagnosed with multiple sclerosis (MS) a couple months before he began the employment and that he was suffering from depression and anxiety during the period of the employment.

As a Product Specialist, Mr. Evans was responsible for helping to sell cars. As a Product Specialist, Mr. Evans was paid a wage of $12.50 per hour and received overtime pay for weekly hours in excess of 40. Mr. Evans' work hours were 8:30 a.m. to 8:00 p.m. Monday, Tuesday, and Wednesday, noon to 8:00 p.m. on Friday, and 8:30 a.m. to 6:00 p.m. on Saturday. All members of the management staff had supervisor authority over Mr. Evans employment. Those managers included Eric Rios, Sales Manager, Tim Heiniger, Used Car Sales Manager, Brandon Juarez, Import Manager, and Terry Mertens, General Manager. During his work days, Mr. Evans would generally receive an hour lunch break. Aside from the lunch break, Mr. Evans did not receive scheduled breaks. If Mr. Evans was not feeling well, he could request an additional break. Otherwise, the employer expected Mr. Evans to remain in the vicinity of his cubicle and to direct his efforts toward selling cars.

On Saturday, June 10, Mr. Evans arrived for work 20 minutes late and missed an 8:30 a.m. sales meeting because he had overslept. Mr. Evans had not given any notice to the employer that he would be late. Under the employer's written attendance policy, Mr. Evans was required to call the workplace and speak with a manager at least an hour prior to the start of his shift if he needed to be absent or late. Mr. Evans had signed the policy on May 2, 2017, to indicate he understood the policy. Later that morning, Mr. Rios met with Mr. Evans in an office to issue a written reprimand to Mr. Evans, based on the late arrival. In the reprimand, Mr. Rios referenced that the reprimand was the third reprimand issued to Mr. Evans in a two-week period. Mr. Rios advised Mr. Evans in the reprimand that further tardiness, violation of company policies, or substandard work would result in termination of the employment. Mr. Evans was emotionally upset during the disciplinary meeting. At the end of the meeting, Mr. Rios instructed Mr. Evans to take the time he needed to take in the office to collect himself and then return to work. Mr. Evans stayed in the office for another 10 minutes and then returned to his duties.

About an hour later, Mr. Evans approached Mr. Rios and told him that he was too upset to finish the shift and was leaving. Mr. Evans told Mr. Rios that he may not be returning to the employment. Mr. Rios was under the impression that Mr. Evans was quitting the employment. Mr. Evans spoke at that time about issues in his personal relationships and stated that he had too much going on in his life. Mr. Rios told Mr. Evans that he was sorry it was not going to work out, that Mr. Evans needed to do what was best for him, that it was nice to know him and added "God bless." Mr. Evans was scheduled to work until 6:00 p.m., but clocked out and left at 12:39 p.m.

The next contact between the employer and Mr. Evans occurred at around noon on Monday, June 12, when Mr. Evans called the workplace and spoke with Tim Heiniger. Mr. Evans had decided to return to the employment. If Mr. Evans had not given the impression on Saturday, June 10 that he was quitting the employment, he would next have been scheduled to work at 8:30 a.m. on June 12. Mr. Evans told Mr. Heiniger that he was calling to see if could come back to the employment. Mr. Heiniger told Mr. Evans that Mr. Rios was not there at the time and that Mr. Heiniger would need to confer with Mr. Rios.

Mr. Heiniger tried to call Mr. Evans back on June 12, but had used an erroneous phone number. On June 13, Mr. Evans again called the dealership and spoke to Mr. Heiniger. Mr. Heiniger told Mr. Evans that he had attempted to call Mr. Evans on June 12. Mr. Heiniger told Mr. Evans that he still needed to confer with Mr. Rios. A short while later, Mr. Rios called Mr. Evans. Mr. Evans asked if he could come back to the employment. Mr. Rios agreed to discuss the matter with the other managers and to get back to Mr. Evans. Later that day, Mr. Rios called Mr. Evans and told him that that he would have to separate from the company. During that call, Mr. Evans agreed to return his employer-issued license plates and keys. After that call, Mr. Rios completed an Employee Separation Notice. The notice indicate that Mr. Rios had terminated Mr. Evans employment after Mr. Evans elected to leave work early on June 10.

On May 24, Mr. Heiniger had issued a written reprimand to Mr. Evans. On that evening, Mr. Heiniger observed Mr. Evans engaged in what appeared to be non-work related activities on his work computer. When Mr. Heiniger asked Mr. Evans what he was doing, Mr. Evans stated that he was writing a book about his life. The reprimand that Mr. Heiniger issued to Mr. Evans included the following: "Kevin is aware that if he is found to be doing anything not related to his job as a product specialist while at Deery Brothers, he is subject to discipline, up to and including termination." On May 2, Mr. Evans had signed the employer's policy regarding personal calls and activities to acknowledge that he received, read and understood the policy. The policy stated as follows:

> PERSONAL CALLS AND ACTIVITIES: Business hours are for conducting company's business. Therefore, personal activities, personal calls or visits from friends or relatives during your working hours are discouraged unless absolutely necessary. This includes the use of personal cell phones. Sales personnel and management are the only employees permitted to use or carry cell phones while on company time. Abuse of this policy may require discipline up to and including discharge.

On May 27, 2017, Mr. Rios issued a written reprimand to Mr. Evans after he observed Mr. Evans using his cell phone to work on a cross word puzzle during work hours. In the written warning, Mr. Rios advised Mr. Evans that he was to spend his work time proactively pursuing leads for new customers by speaking to customers on the lot, by speaking to customers in the service department, by contacting prospective clients through social networks and by other community-based networking. Mr. Rios directed Mr. Evans to only use his cell phone for company business or emergencies while on company time. Mr. Rios referenced a manifest list of "orphaned" customers that Mr. Evans could use to pursue leads. Mr. Rios referenced the previous warnings and added the following: This is Kevin's FINAL WARNING. If Kevin is caught, noticed, or observed doing anything not related to company business during his scheduled work hours he will be immediately terminated.

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.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.,* 494 N.W.2d 660 (1993).

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.

The weight of the evidence in the record establishes that the employer reasonably concluded that Mr. Evans had voluntarily quit the employment when Mr. Evans left on June 10, 2017 without completing his shift. Mr. Evans told the employer he was leaving. Mr. Evans did not ask for the employer's approval. Mr. Evans told the employer he may or may not return to the employment. Mr. Evans' early departure on June 10, his comments on June 10, the context of those events on June 10, and Mr. Evans' failure to report for work at this scheduled start of his shift on June 12 or give notice that he would be absent, together indicate a voluntary quit. The

quit was in response to a reprimand and, as such, was without good cause attributable to the employer. See Iowa Administrative Code rule 871-24.25(28).

The separation from the employment may be analyzed in the alternative as a discharge based on 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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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). 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 employer had not stated anything on June 10 to indicate that Mr. Evans was discharged from the employment. Mr. Evans elected to leave work early that day without permission because he concluded he was too upset to focus on work. The absence was an unexcused absence under the applicable law. That unexcused absence was followed by another on June 12, 2017, when Mr. Evans failed to appear for work at the start of his shift and had not complied with the employer's absence reporting policy. These two unexcused absences followed the unexcused tardiness on June 10, when Mr. Evans was late because he overslept. These three absences were excessive and sufficient to establish misconduct in connection with the employment. The two written reprimands for non-work related activities were not current acts of misconduct and do not provide a separate basis for a conclusion that Mr. Evans was discharged for misconduct in connection with the employment. However, each reflects a low regard for the employer's interests.

Regardless of whether the separation is analyzed as a voluntary quit or a discharge, the separation disqualifies Mr. Evans for unemployment insurance benefits. Mr. Evans 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. Evans must meet all other eligibility requirements. The employer's account shall not be charged for benefits paid to Mr. Evans.

DECISION:

The July 31, 2017, reference 02, decision is modified as follows. The claimant voluntarily quit the employment on June 10, 2017 without good cause attributable to the employer. In the alternative, the claimant was discharged on June 13, 2017 for excessive unexcused absences. The claimant is disqualified for unemployment benefits until he has worked in and 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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