

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CAYLER L BRISTOW

Claimant

APPEAL NO. 17A-UI-09887-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 08/27/17

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Cayler Bristow filed a timely appeal from the September 18, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Bristow had voluntarily quit effective August 29, 2017 without good cause attributable to the employer by being absent three days without notice to the employer. After due notice was issued, a hearing was commenced on October 12, 2017 and completed on October 13, 2017. Mr. Bristow participated and presented additional testimony through Erin Blasberg. Amy Krueger represented the employer. Exhibits 1 through 6, A, B and D were received into evidence.

ISSUE:

Whether Mr. Bristow 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: Cayler Bristow was employed by Casey's Marketing Company as a full-time Meat Manager and Food Service Leader from December 2016 until August 30, 2017, when Amy Krueger, Store Manager, discharged him from the employment for attendance and for alleged job abandonment as directed by Jolynn Sinram, Area Supervisor. Ms. Krueger was Mr. Bristow's immediate supervisor. Mr. Bristow became an employee of Casey's Marketing Company when Casey's took over operations of the Guppy's Market, a grocery store located in Tripoli, Iowa. Erin Blasberg was First Assistant Manager. Mr. Bristow's usual work hours were 8:00 a.m. to 4:00 p.m. on Monday, Tuesday, Wednesday and Friday. On Thursdays, the store received its weekly freight shipment. On Thursdays, Mr. Bristow would usually work from 6:00 a.m. to 2:30 p.m. or 3:00 p.m. Mr. Bristow worked additional hours and days as needed.

Mr. Bristow last performed work for Casey's on Thursday, August 24, 2017. That day was freight day. On or about July 24, 2017, Mr. Bristow suffered a non-work related labral tear in his left shoulder. Mr. Bristow is right-handed. On July 31, 2017, Mr. Bristow's doctor imposed medical restrictions that restricted Mr. Bristow from using his left arm. The doctor released

Mr. Bristow to perform light duty work as tolerated. Mr. Bristow provided the medical restriction document to Ms. Krueger. Ms. Krueger accommodated the medical restriction. In connection with the injury and the medical restrictions, Mr. Bristow had begun wearing a sling on his left arm when at work. Mr. Bristow's medical restrictions did not specify that he was required to wear the sling. Mr. Bristow was scheduled to undergo surgery on his shoulder in mid-September 2017. In the days that preceded August 24, the sling had been bothering Mr. Bristow when he wore it. When Mr. Bristow appeared for work on August 24, he did not wear his arm sling. On that morning, Ms. Sinram directed Ms. Krueger to send Mr. Bristow home with instructions to return in the sling or with a note from his doctor indicating the sling was not required.

Mr. Bristow would ordinarily have been scheduled to work the following day, Friday, August 25, 2017. However, on August 11, 2017, Mr. Bristow had requested August 25 off due to his infant daughter's need to undergo myringotomy, ear tube placement, in Waterloo on that day. On August 11, Ms. Krueger verbally approved Mr. Bristow's time off request. Ms. Krueger told Mr. Bristow, "Don't worry about it. Do what you need to do and we'll take care of everything." Ms. Krueger did not document her approval of the time-off request. When Ms. Krueger posted the work schedule on Saturday, August 19, that schedule erroneously indicated that Mr. Bristow was supposed to work on August 25.

During the latter half of August 2017, Mr. Bristow was facing legal consequences for not vacating his rented home at the end of his lease. Mr. Bristow's lease had expired on August 15. On August 23, 2017, Mr. Bristow spoke to Ms. Krueger to let her know that he had been served notice papers indicating that he had to appear for a Forcible Entry and Detainer (eviction) hearing at the Bremer County Courthouse at 1:00 p.m. on Tuesday, August 29, 2017. On August 23, 2017, Mr. Bristow asked Ms. Krueger for time off on August 28 to move prior to the court date. At the same time, Mr. Bristow asked Ms. Krueger for August 29 off so that he could finish moving and appear for court. Ms. Krueger was supportive of Mr. Bristow's need for the time off. Ms. Krueger told Mr. Bristow, "Get it done and get out of there." Ms. Krueger did not document that she had approved Mr. Bristow's time off request. The post schedule still had Mr. Bristow working on August 28 and 29.

Ms. Krueger has an alcohol abuse problem that significantly and negatively impacts her management of the Casey's grocery store in Tripoli. This problem factored into Ms. Krueger's failure to document Mr. Bristow's requests for time off. The problem also led to Ms. Krueger forgetting that she had approved Mr. Bristow time off requests.

Based on the approved time off request for August 25, 28 and 29, Mr. Bristow did not work his shifts on those days. During a couple of those days, Mr. Bristow was in the Casey's grocery store in the vicinity of Ms. Krueger.

When Mr. Bristow reported for his scheduled shift on August 30, 2017, Ms. Krueger, pursuant to instructions from Ms. Sinram, notified Mr. Bristow that he had abandoned the employment by being absent three days without notifying the employer and that the employer was terminating the employment under Casey's job abandonment policy. Under the written attendance policy, an employee who was absent for two days without notice to the employer was deemed to have abandoned the employment.

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. 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 weight of the evidence in the record establishes that Mr. Bristow did not voluntarily quit the employment. Rather, Mr. Bristow was discharged on August 30, 2017 for purported unexcused absences. The absences that triggered the discharge were the absences on August 25, 28 and 29.

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 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 fails to establish a current act of misconduct in connection with the employment. The weight of the evidence in the record establishes that Mr. Bristow's absences on August 25, 28 and 29 had each been approved in advance by Ms. Krueger. The August 25

absence was due to the illness of Mr. Bristow infant child and was properly reported. The August 28 and 29 absences were due to matters of personal responsibility, but were approved by Ms. Krueger five and six days in advance of the absences. Each of the absences was an excused absence under the applicable law and cannot serve as a basis for disqualifying Mr. Bristow for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Bristow was discharged for no disqualifying reason. Accordingly, Mr. Bristow is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The September 18, 2017, reference 01, decision is reversed. The claimant was discharged on August 30, 2017, for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn