IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

SYRONE L SCHMELZER Claimant **RJK INC** Employer	**APPEAL NO. 21A-UI-20821-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/15/21** **Claimant: Appellant (5)**

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 20, 2021, reference 01, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant voluntarily quit on August 18, 2021 by failing to notify a temporary employment firm within three working days of the completion of his last assignment after having been told in writing of his responsibility to provide such notice. After due notice was issued, a hearing was held on November 9, 2021. Claimant participated. Mike Thomas represented the employer and presented additional testimony through Mariano Rodriguez, Alicia McGlothlen, and Gina Othmer. Exhibits 1, A and B were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant 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: RJK, Inc. provides contract workers to Grain Processing Corporation (GPC). In November 2019, the claimant began a full-time, ongoing assignment at GPC. The assignment at GPC was long-term, at-will employment and was not a temporary work assignment within the meaning of the law. The claimant worked a roughly 12-hour shift. The work hours would be 6:45 a.m. to 7:00 p.m. for two weeks and then would switch to 6:45 p.m. to 7:00 a.m. for the next two weeks. The claimant would work three shifts during one week of the two-week rotation and would work four shifts during the other week of the two-week rotation. Throughout the employment, the claimant was required to be "on-call" on any day he was not scheduled to work. The claimant was required to be available for a phone call from the employer from an hour prior to shift start until an hour after shift start. The claimant would only be compensated for his time if he was summoned to work the shift and actually worked the shift.

Prior to the start of the assignment, the employer had the claimant sign, and gave to the claimant, a copy of an Availability Statement. The document stated:

> As an employee of Temp Associates/RJK I am required to sign Temp Associates/RJK work available log after my assignment ends or is temporarily stopped within 3 working days. My failure to do so within the time limit will be considered a voluntary quit and my eligibility for unemployment benefits will be affected. My signature below affirms that I received a copy of this statement.

The employer does not strictly require employees to sign an availability log and will also accept a phone call.

GPC supervisor Daniel Lane was the claimant's primary supervisor. RJK also maintained an On-site Coordinator, Alicia McGlothlen, who functioned as a secondary supervisor.

The claimant continued in the long-term assignment until August 13, 2021, when GPC and RJK discharged him from the employment for attendance. If the claimant needed to be absent from a shift, the employer's absence reporting policy required that the claimant called the GPC guard gate at least an hour prior to the scheduled start of the shift and state his reason to be absent. The claimant was at all relevant times aware of the absence notification requirement.

The claimant last performed work in the assignment on August 12, 2021 and completed that shift. The claimant was next schedule to work on August 13, 2021.

The final absence that triggered the discharge occurred on August 13, 2021, when the claimant was absent for personal reasons. The claimant called at 6:25 a.m. to give notice he would be gone from the shift set to start at 6:45 a.m. At that point, the claimant was next scheduled to work on August 14, 15 and 18, 2021.

On the afternoon of August 13, 2021, RJK Onsite Coordinator Alicia McGlothlen attempted to call the claimant and then sent a text message to the claimant directing him not to report to GPC and advising that the employment was ended due to attendance.

Prior to the August 13, 2021 absence, the next most recent purported absence that factored in the discharge occurred on July 8, 2021. On that date, the claimant was not scheduled to work, but was one of the designated on-call workers for the evening shift. The claimant had traveled an hour out of town to attend his son's ball game. After 6:00 p.m., a GPC supervisor sent the claimant a text message advising that a coworker scheduled to work that day had called in an absence. The claimant called to advise that he was an hour away and was unable to cover the shift.

The employer counts as another July 2021 absence, the claimant's failure to participate in any one of the four Monday morning safety meetings offered. Employees were required to participate in one of those meetings and could choose which one to attend. The meetings ran from 7:00 a.m. to 8:00 a.m. While the employer asserts there is no record of the claimant attending in July, the claimant asserts he did participate in a safety meeting in the middle of July 2021.

The employer counts as an additional absence, the claimant not answering the phone for an on-call shift on June 8, 2021. The claimant had recently changed his phone number and had provided the new number to his GPC supervisor. The GPC supervisor used an old number when attempting to reach the claimant. The claimant did not get the call.

The employer counts as an absence the claimant's failure to participate in one of the Monday morning safety meetings offered in June 2021. The claimant asserts he participated in the online meeting, but is unable to provide the date he participated.

On April 14, 2021, the claimant was absent for personal reasons. The employer and the claimant each lack additional information regarding the absence.

On April 5, 2021, the claimant was again absent for personal reasons. The claimant gave timely and appropriate notice of his need to absent from the evening shift. Neither party has additional information regarding the absence.

The claimant left work early due to illness and with proper notice on November 16, 2020. The claimant was then absent due to illness and with proper notice for shifts on November 17 and 20, 2020.

On August 23, 2020, the claimant overslept and was absent from his shift. On August 27, 2020, Ms. McGlothlen issued a written reprimand to the claimant for attendance and characterized the warning as a final warning. The employer did not issue any other reprimands to the claimant for attendance.

On May 29, 2020, the claimant was absent for personal reasons and did not notify the employer until 6:20 a.m. that he would be absent from the 6:45 a.m. shift. Neither party has additional information regarding the absence.

On April 17, 2020, the claimant was absent for personal reasons and with proper notice to the employer. Neither party has additional information regarding the absence.

On January 24 and March 6, 2020, the claimant was absent due to illness and with proper notice to the employer.

On January 1 and 2, 2020, the claimant was absent to illness, but overslept and provided late notice to the employer each day. The claimant did not call until after the scheduled start of the shift.

After the employer notified the claimant that he was being discharged for attendance, the claimant sent a text message to Ms. McGlothlen on the morning of August 14, 2021. The claimant stated that he was not sure how he could be terminated for attendance. Ms. McGlothlen attempted to call the claimant, but the claimant did not answer.

On August 16, 2021, the claimant sent a text message to Ms. McGlothlen in which he asked her to send him his attendance record. Ms. McGlothlen attempted to call the claimant, but the claimant did not answer.

Also August 26, 2021, the claimant called the RJK, Inc. off-site office and requested to speak with Mariano Rodriguez, RJK Account Manager. The claimant spoke with Gina Othmer, Office Coordinator, who advised that the Mr. Rodriguez was not available, but that she would pass along the message. The claimant did not specifically reference that he was calling to request a new assignment, but that was the purpose of his call. RJK only had one client, GPC. However, a sister business, Temp Associates, offers temporary employment assignments with multiple clients. There was no further contact between the claimant and the employer after the August 26, 2021 call.

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 evidence in the record establishes a discharge, rather than a voluntary quit. The assignment at GPC was not a temporary assignment and the relationship between the claimant and RJK was not that of temporary employee and temporary employer. Rather the claimant's employment with RJK and assignment at GPC was long-term at-will employment. Iowa Code section 96.5(1)(j), which applies only to temporary employment arrangements, simply does not apply this this long-term, ongoing at-will employment arrangement. There is no indication that the claimant voluntarily separated from the employment. There is every indication the claimant was discharged for 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:
>
> 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.
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> 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 in the record establishes a discharge for misconduct in connection with the employment. Without taking into consideration missed safety meetings or on-call issues, the evidence in the record establishes excessive unexcused absences on January 1, January 2, April 17, May 29, August 23, 2020, as well as April 5, April 14, August 13, 2021. On these days, the claimant was absent for personal reasons and/or provided untimely notice of his need to be absent. The August 23, 2020 absence triggered a final warning, meaning that the claimant was on notice thereafter that his employment could be in jeopardy if there were additional absences. The purported absences associated with on-call duties are problematic. The idea that the claimant had to be available to report to the workplace on short notice on any day he was not

scheduled to work is inherently unreasonable. Accordingly, the absences associated with on-call issues were excused absences within the meaning of the law. Likewise, absences due to illness and properly reported were excused absences within the meaning of the law. That leaves the assertion of unexcused absences associated with essentially unscheduled safety meetings, which cannot be deemed absences within the meaning of the law. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The September 20, 2021, reference 01, decision is modified as follows. The claimant was discharged on August 13, 2021 for misconduct in connection with the employment, based on excessive unexcused absences. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's 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

November 23, 2021
Decision Dated and Mailed

jet/scn