IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DEMETRIUS H DUFAUCHARD
Claimant

EXPRESS SERVICES INC
Employer

APPEAL NO. 12A-UI-04359-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/01/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Demetrius Dufauchard filed a timely appeal from the April 9, 2012, reference 02, decision that denied benefits in connection with a February 20, 2012 separation from Express Services. After due notice was issued, a hearing was held on May 10, 2012. Mr. Dufauchard participated. Jim Cole, Staffing Consultant, represented the employer.

ISSUE:

Whether Mr. Dufauchard separated from Express Services in February 2012 for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. Claimant Demetrius Dufauchard performed work for the employer in two assignments. The first was a single-day assignment on January 15, 2012. The claimant completed that assignment. The second assignment was at Con-Trol Container Management in Waterloo. The assignment was full-time, temp-to-hire. The work hours were 10:00 p.m. to 6:00 a.m., Sunday night through Friday morning. Mr. Dufauchard started the assignment on January 16, 2012. Con-Trol notified Express Services on February 20, 2012 that it was ending the assignment. Con-Trol cited an alleged no-call/no-show absence, failure to perform to Con-Trol's satisfaction, and attitude.

Mr. Dufauchard had been absent one day and that absence at some point during the last week of the assignment. Mr. Dufauchard was absent because his girlfriend's car had broken down in Cedar Falls. If Mr. Dufauchard needed to be absent from the assignment, the attendance policy required that he contact his supervisor at Con-Trol and also contact Express Services at least an hour before the assignment. The employer had provided Mr. Dufauchard with a copy of the assignment and telephone numbers to use to make the necessary contact. While Mr. Dufauchard did not contact either company an hour prior to the start of his shift, he did notify both companies before the shift had ended to explain the absence. An Express Services representative notified Mr. Dufauchard of his discharge from the assignment. Express Services is unwilling to provide additional work because of what they deem a no-call/no-show absence.

Mr. Dufauchard established an additional claim for unemployment insurance benefits that was deemed effective February 19, 2012, the Sunday of the week during which Mr. Dufauchard applied for the additional benefits.

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 weight of the evidence indicates that Mr. Dufauchard was discharged and did not voluntarily quit.

Iowa Code section 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.

871 IAC 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.

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).

The administrative law judge notes that the employer did not present testimony from anyone with personal knowledge concerning Mr. Dufauchard's employment and his separation from the employment. Of further note, the employer lacked personal knowledge concerning the alleged performance and attitude issues.

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).

While a disqualifying discharge for attendance usually requires *excessive unexcused* absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). In Sallis, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence.

The evidence does not establish a no-call/no-show absence. The evidence establishes instead a single unexcused absence wherein Mr. Dufauchard failed to properly notify the employer or the client business within the time requirements. The evidence fails to establish any of the aggravating factors that would elevate the single unexcused absence to misconduct. The

evidence concerning the alleged performance and attitude issues consists only of the bare allegation without any supporting evidence indicating misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Dufauchard was discharged on February 20, 2012 for no disqualifying reason. Accordingly, Mr. Dufauchard is eligible for benefits effective February 19, 2012, provided he is otherwise eligible. The employer is not a base period employer for purpose of the claim year that started for Mr. Dufauchard on January 1, 2012. Accordingly, the employer will not be charged for any benefits paid to Mr. Dufauchard during the current claim year. The employer's account will only be assessed in the event that Mr. Dufauchard establishes a new claim for benefits on or after December 30, 2012, is deemed eligible for benefits, and the employer is at that time deemed a base period employer.

DECISION:

The Agency representative's April 9, 2012, reference 02, decision is reversed. The claimant was discharged on February 20, 2012 for no disqualifying reason. Effective February 19, 2012, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged as outlined above.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/css