IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

KEITH M MOSS Claimant	**APPEAL NO. 18A-UI-06920-JTT**
	ADMINISTRATIVE LAW JUDGE DECISION
WINNEBAGO INDUSTRIES Employer	
	OC: 05/27/18 **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 19, 2018, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on February 12, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on July 13, 2018. Mr. Moss participated. Susan Gardner, Human Resources Supervisor, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Keith Moss was employed by Winnebago Industries as a full-time production assembler/electrical reworker from August 2017 until February 12, 2018. Mr. Moss' usual work hours were 6:00 a.m. to 3:30 p.m., Monday through Friday. Mr. Moss was also expected to perform overtime work as needed. Production Supervisor Barry Troe was Mr. Moss' immediate supervisor. On Friday, February 9, 2018, Mr. Moss was absent due to illness and properly reported the absence to the employer. Mr. Moss had also been absent on January 30 and 31 in connection with the birth of his child and had properly reported the absences to the employer. On February 6, 2018, Mr. Troe told Mr. Moss in passing that if he was absent again he would probably be discharged from the employment. Mr. Troe directed Mr. Moss not to miss any more work. On January 12, 2018, Mr. Troe had issued a final warning to Mr. Moss for attendance.

After the absence on Friday, February 9, 2018, Mr. Moss was next scheduled to work on Monday, February 12, 2018. Based on Mr. Troe's prior admonition that Mr. Moss would likely be discharged if he was again absent, Mr. Moss was concerned that he might not be allowed to return to work on February 12, 2018. On February 12, Mr. Moss approached the employer's security guard shack at 5:40 a.m. prior to the scheduled start of his shift. Mr. Moss did not wish to walk the substantial distance between the guard shack and his work area if the employer had decided to discharge him from the employment. Mr. Moss estimates the walking distance as half a mile. Mr. Moss asked the security guard to call Mr. Troe. The security guard complied. The security guard did not put Mr. Moss on the phone with Mr. Troe. Instead, the security guard functioned as an intermediary between Mr. Troe and Mr. Moss and communicated what each was saying. The security guard communicated to Mr. Moss that he was discharged and should turn in his employee ID. Mr. Moss complied with the directive and then left the workplace. Mr. Moss was unaware that only the employer's human resources staff had authority to discharge him from 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. 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.

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).

The weight of the evidence in the record establishes that Mr. Moss reasonably concluded on February 12, 2018, that he was discharged from the employment for attendance. Mr. Moss testified at the hearing from his personal knowledge regarding the February 12, 2018 contact with the employer. The employer elected not to present testimony from Mr. Troe or from the security guard with whom Mr. Moss made contact on February 12, 2018. The employer presented insufficient evidence to rebut Mr. Moss' testimony regarding the contact and conversation on February 12, 2018.

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 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 in the record establishes a discharge for no disqualifying reason. The absence that triggered the discharge occurred on February 9, 2018. That absence was due to illness, was properly reported to the employer, and therefore was an excused absence under the applicable law. The next most recent absences occurred on January 30 and 31, were due to the birth of a child, were properly reported, and were approved by the employer. Accordingly, those absences were also excused absences under the applicable law. The evidence establishes a discharge, but does not establish a current act of misconduct. Accordingly, Mr. Moss is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The June 19, 2018, reference 01, decision is affirmed. The claimant was discharged on February 12, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs