

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**MICHAEL R FENNER**  
Claimant

**MACKY REPAIR LLC**  
Employer

**APPEAL NO. 20A-UI-00754-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 12/29/19**  
**Claimant: Respondent (5)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 16, 2020, 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 deputy's conclusion that the claimant voluntarily quit on December 26, 2019 for good cause attributable to the employer. After due notice was issued, a hearing was held on February 10, 2020. Claimant Michael Fenner did not provide a telephone number for the hearing and did not participate. Troy Marlay represented the employer and presented additional testimony through Francesca Wasicek. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit 1 into evidence. 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 voluntary quit for good cause attributable to the employer.  
Whether the claimant was discharged for misconduct in connection with the employment.  
Whether the claimant has been overpaid benefits.  
Whether the claimant must repay benefits.  
Whether the employer's account may be charged for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Troy Marlay owns and operates Macky Repair, L.L.C., an automotive repair business located in Ames. Michael Fenner was employed by Macky Repair as a full-time auto mechanic/technician during two distinct periods. The most recent employment began on August 29, 2019. Mr. Fenner last performed work for the employer on December 26, 2019. Mr. Fenner's work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday. The employer paid Mr. Fenner a weekly salary of \$700.00. The weekly salary was not tied to a particular production requirement. Mr. Marlay was Mr. Fenner's immediate supervisor. Toward the end of Mr. Fenner's employment, Mr. Marlay was concerned that Mr. Fenner was producing less than

14 hours of billable work per week for his \$700.00 salary. Mr. Fenner had told Mr. Marlay that he did not want to perform engine and transmission replacement work. Mr. Marlay had agreed to accommodate Mr. Fenner's expressed preference. However, Mr. Marlay found he had engine and transmission replacement projects with no one besides himself to perform that work.

At the end of the regular work day on December 26, 2019, Mr. Marlay met with Mr. Fenner and auto mechanic/technician Francesca Wasicek to discuss a change in the compensation structure. Before Mr. Marlay could outline the proposed change in the compensation structure, Mr. Fenner got upset and walked out. Mr. Fenner left at what would have been the scheduled end of his work day. After Mr. Fenner's departure, Mr. Marlay outlined for Ms. Wasicek his plan to change the pay structure to a production-based pay structure.

Mr. Fenner reported to the workplace the next day and told Mr. Marlay that he wanted to discuss the new pay structure. Mr. Fenner told Mr. Marlay that the new pay structure would not work for him. Mr. Marlay pointed out that Mr. Fenner had not heard the pertinent facts regarding the change in the pay structure. Mr. Fenner said that he wanted to hear about the proposed change. Mr. Marlay replied that Mr. Fenner had walked out. Mr. Marlay deemed Mr. Fenner to have quit the employment by leaving at the start of the December 26 meeting and declined to repeat to Mr. Fenner the information he had provided to Ms. Wasicek.

During the most recent employment, there had been a couple times when payroll had not been processed in time for Mr. Fenner to receive a regular paycheck on the Friday weekly payday. In those instances, Mr. Marlay offered to write Mr. Fenner a personal check for his wages.

#### **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 weight of the evidence in the record establishes a discharge, not a voluntary quit. Mr. Fenner's decision to leave work at the scheduled end of his shift on December 26, 2019, rather than to stay for the meeting regarding the planned changes in the compensation structure did not constitute a voluntary quit. Mr. Fenner left at the scheduled end of his shift. Leaving at the end of the scheduled shift is not the same as walking off the job mid-shift. Mr. Fenner returned the following day with a different perspective and a willingness to engage in discussion about the proposed changes in the pay structure. Mr. Marlay declined to engage in that conversation and elected instead to call the employment done.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause.

See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes a discharge for no disqualifying reason. Mr. Fenner's decision to leave at the scheduled end of his shift on December 26, 2019 may have been rash and unreasonable, but it did rise to the level of misconduct in connection with the employment. In the absence of prior warnings, and in the context of the agreement regarding not having Mr. Fenner perform the engine and transmission replacement work, Mr. Fenner's failure to produce billable work at a level satisfactory to the employer did not constitute misconduct in connection with the employment. Mr. Fenner is eligible for benefits, provided he meet all other eligibility requirements. The employer's account may be charged for benefits.

**DECISION:**

The January 16, 2020, reference 01, decision is modified as follows. The claimant was discharged on December 27, 2019 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/scn