

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANTHONY D MEARIDY
Claimant

APPEAL NO. 11A-UI-02643-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**NPC INTERNATIONAL INC
PIZZA HUT**
Employer

**OC: 01/02/11
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Anthony Mearidy filed a timely appeal from the March 1, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 28, 2011. Mr. Mearidy participated. Dustin Balius, Restaurant General Manager, represented the employer.

ISSUE:

Whether Mr. Mearidy separated from the employment 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: Anthony Mearidy was employed by the Pizza Hut in Iowa City as a part-time prep cook. Mr. Mearidy started the employment at the beginning of August 2010 and last performed work for the employer on September 4, 2010. Dustin Balius, Restaurant General Manager, was Mr. Mearidy's immediate supervisor. Kathy Champagne, Area General Manager, was Mr. Balius' immediate supervisor.

The employer operates a concession stand inside Kinnick Stadium during Iowa Hawkeye home football games. Mr. Balius offered Mr. Mearidy an opportunity to work at the concession stand for the September 4, 2010 game day and Mr. Mearidy accepted the shift. The shift was to last for 12 hours, from 3:30 a.m. to 3:30 p.m. Mr. Mearidy was to meet Mr. Balius at the Pizza Hut restaurant to assist with preparing pizzas before the group would travel to the stadium to continue preparations at the concession stand. Mr. Mearidy did not appear at 3:30 a.m. When Mr. Mearidy did not appear at the appointed time, Mr. Balius telephoned Mr. Mearidy. Mr. Balius told Mr. Mearidy to meet him at Kinnick Stadium as soon as he could. Mr. Mearidy appeared for work at Kinnick Stadium at approximately 5:30 a.m.

Mr. Mearidy left the stadium at 10:30 a.m. Mr. Balius had led Mr. Mearidy to believe that working the concession stand at Kinnick Stadium on game day would be a pleasant experience

and that he would have an opportunity to watch some of the game. When Mr. Mearidy arrived at the stadium, Mr. Balius assigned Mr. Mearidy to wash dishes. Mr. Mearidy took a few cigarette breaks, but was otherwise kept busy washing dishes from the time he arrived to the time he left. Shortly before Mr. Mearidy left the stadium, he became upset that while he continued to wash dishes, other Pizza Hut staff appeared to be relaxing and having a good time. These included Mr. Balius. Mr. Mearidy complained to Ms. Champagne, who was supervising Mr. Mearidy's work at the time. Ms. Champagne told Mr. Mearidy that if he did not like the arrangement he could go home. So Mr. Mearidy left.

Shortly after Mr. Mearidy left, Mr. Balius telephoned him. Mr. Balius told Mr. Mearidy that since he left the stadium before the scheduled end of his shift, the employer deemed it the same as walking out of a shift at the restaurant and could no longer employ him. Mr. Mearidy took the opportunity to fully vent his frustration and did so with ample profanity.

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 establishes that that Mr. Mearidy was late for work for personal reasons on September 4, 2010. But the unusual start time, 3:30 a.m. was a mitigating factor. The weight of the evidence establishes that Mr. Mearidy left the employer's concession at Kinnick Stadium before the 3:30 p.m. scheduled end of his special shift, but only after Ms. Champagne invited him to do so in response to his complaint about having to work while others stood about. Mr. Mearidy did not intend to the quit the employment and did not know his departure from the special shift at Kinnick Stadium would be treated as a quit. The evidence indicates that the employer had misled Mr. Mearidy regarding what his experience would be working the concession at Kinnick on game day. The weight of the evidence indicates that Mr. Mearidy did not in fact voluntarily quit, but instead was discharged from the employment during a phone call between himself and Mr. Balius. Neither party provided any documentation of the events in question made close in time to the events themselves. There is no discernible reason for the administrative law judge to conclude that Mr. Balius' recollection of events is better than, or even as good as Mr. Mearidy's recollection. The weight of the evidence establishes that Mr. Balius discharged Mr. Mearidy from the employment based on the early departure from Kinnick Stadium. The weight of the evidence indicates that Mr. Mearidy's profanity-laced outburst followed the employer's statement that Mr. Mearidy was discharged from the employment.

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 a discharge 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).

As noted above, the evidence establishes an incident of unexcused tardiness on September 4, 2010, but also indicates extenuating circumstances. The weight of the evidence indicates an *authorized* early departure on September 4, 2010, when Ms. Champagne invited Mr. Mearidy to leave early if he did not like the division of labor at the stadium. The administrative law judge cannot consider the early departure unexcused when a supervisor, here the area manager, invites the worker to leave. The administrative law judge notes the employer elected not to present testimony from Ms. Champagne. The evidence establishes a discharge from the employment based on a single unexcused absence. A single unexcused absence does not constitute misconduct. Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

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

DECISION:

The Agency representative's March 1, 2011, reference 01, decision is reversed. The claimant was discharged 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/pjs