

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIE L BASKERVILLE
Claimant

APPEAL NO. 16A-UI-07132-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NPC INTERNATIONAL INC
Employer

OC: 05/15/16
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 17, 2016, reference 02, 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 an agency conclusion that the claimant was discharged on April 8, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on July 15, 2016. Claimant Willie Baskerville did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Adam Taylor represented the employer and presented additional testimony through Jonathan Heyer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant in connection with the claim that was effective May 15, 2016. Exhibit One was 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 employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Willie Baskerville was employed by NPC International, Inc., d/b/a Pizza Hut as a part-time delivery driver from April 2015 until April 8, 2016, when Adam Taylor, Restaurant General Manager, discharged him from the employment for attendance. Mr. Baskerville generally worked from 11:00 a.m. to 5:00 or 7:00 p.m. and generally worked three shifts per week. If Mr. Baskerville needed to be absent, the employer's attendance policy required that Mr. Baskerville call the workplace at least two hours before the scheduled start of his shift and speak to the manager on duty. The employer reviewed this policy requirement with Mr. Baskerville at the start of the employment.

The final absence that triggered the discharge occurred on April 8, 2016, when Mr. Baskerville was absent without providing notice to the employer. On April 9, 2016, Mr. Baskerville called the workplace and spoke to the manager on duty. Mr. Baskerville asked whether he still had a job. The manager on duty told Mr. Baskerville that the employer deemed him to have quit the employment.

In making the decision to end the employment, the employer considered several prior absences and reprimands that the employer had issued to Mr. Baskerville for attendance. On February 4, 2016, the employer issued a reprimand to Mr. Baskerville after Mr. Baskerville was late for personal reasons on January 24, January 31, February 1 and February 2. The reprimand was also based on Mr. Baskerville's absence from a shift on February 3. That absence was due to Mr. Baskerville not reviewing the schedule that had been posted two weeks earlier to see that he was scheduled to work on February 3. On or about February 9, the employer issued a reprimand to Mr. Baskerville after Mr. Baskerville was late for personal reasons on February 5, 6 and 8 and after Mr. Baskerville missed a shift on February 9 without providing a two-hour notice. On April 7, the employer issued a third and final warning to Mr. Baskerville after he was late on April 3 and 4 for personal reasons. At the time of the reprimand, the employer notified Mr. Baskerville that his next absence could result in termination of the employment. The final absence that triggered the discharge occurred the day after the final warning was issued.

Mr. Baskerville established a claim for unemployment insurance benefits that was effective May 15, 2016, but has received no benefits in connection with the claim. NPC International, Inc., is a base period employer for purposes of the claim.

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 evidence in the record establishes that employer discharged Mr. Baskerville from the employment and fails to support the assertion that Mr. Baskerville voluntarily quit. The evidence indicates that Mr. Baskerville did not indicate by word or deed an intention to quit the employment. His inquiry about the employment on April 9 reflected an intention to continue in the employment if the employer would allow him to do so. The employer elected not to continue the employment.

Iowa Code § 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.

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 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). 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 excessive unexcused absences. The evidence establishes 12 unexcused absences between January 24 and April 8. These included nine instances of unexcused tardiness. These unexcused absences also included a full-day absence on February 3 because Mr. Baskerville had not reviewed his work schedule, a full-day absence on February 9 without proper notice to the employer, and a final absence that was a no-call, no-show. The absences occurred in the context of a repeated reprimands for attendance. The final absence occurred the day after the employer warned Mr. Baskerville that he was facing discharge from the employment. The pattern of absences demonstrated a willful and wanton disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Baskerville was discharged for misconduct. Accordingly, Mr. Baskerville is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Baskerville must meet all other eligibility requirements. The employer's account has not been charged for benefits and shall not be charged for benefits.

DECISION:

The June 17, 2016, reference 02, decision is reversed. The claimant was discharged for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance. The claimant must meet all other eligibility requirements. The employer's account has not been charged for benefits and shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs