IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

BRANDON M FEICKERT Claimant **DAN LYNCH CONSTRUCTION INC** Employer	**APPEAL NO. 20A-UI-01582-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/26/20** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Brandon Feickert filed a timely appeal from the February 14, 2020, reference 02, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Mr. Feickert voluntarily quit the employment on January 18, 2020 without good cause attributable to the employer. After due notice was issued, a hearing was held on March 9, 2020. Mr. Feickert participated. The employer did not provide the Appeals Bureau a telephone number for the hearing and did not participate.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.
Whether the claimant voluntarily quit the employment without good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brandon Feickert was employed by Dan Lynch Construction, Inc. as a full-time laborer from August 2019 and last performed work for the employer on Tuesday, January 14, 2020. For most of the employment, Dan Lynch was Mr. Feickert's supervisor. During the last three weeks of the employment, a new foreman, James (last name unknown), was Mr. Feickert's supervisor. Mr. Feickert's usual work hours were 7:00 a.m. to 4:00 p.m., Monday through Friday. The employer would ordinarily collect Mr. Feickert at Mr. Feickert's home and transport Mr. Feickert to and from the job site. Mr. Feickert paid $30.00 per week for that accommodation.

On Tuesday, January 14, 2020, Mr. Feickert repeatedly slipped on ice while carrying lumber at a jobsite. Mr. Feickert advised James that he had injured his back and could not continue to work that day. Mr. Feickert has a history of back issues. On Wednesday, January 15, Mr. Feickert contacted his supervisor via text message and advised he was too sore to work that day. On Thursday, January 16, Mr. Feickert contacted his supervisor by text message to indicate that he was still not feeling well. Mr. Feickert communicated to the supervisor that he hoped to be well enough to return to work on the next day, Friday, or on the following Monday.

On Friday, January 17, Mr. Feickert was still experiencing back pain. Mr. Feickert contacted his supervisor and asked whether the work for that day would be inside or outside. When the supervisor replied that the work would be outside, Mr. Feickert told the supervisor he would probably not be in that day. The supervisor replied that was okay and that there was not much work to be done that day.

On Monday, January 20, Mr. Feickert attempted to contact his supervisor and Mr. Lynch by text message to let them know he was well enough to report for work. Neither James nor Mr. Lynch responded to Mr. Feickert's message. Mr. Feickert also called James's cellphone number and left a message in which Mr. Feickert requested a return call and indicated that he was ready to return to work. Mr. Feickert did not know the location of the jobsite where the employer would be performing work. Though the employer maintained a shop in Marion, it had never been the practice to meet at the shop prior to going to the jobsite and the jobsite location changed frequently. On Tuesday, January 21, Mr. Feickert again attempted to contact James and Mr. Lynch, but neither responded. On Wednesday, Mr. Feickert sent another text message to Mr. Lynch. Mr. Feickert told Mr. Lynch had he had been injured and did not quit. Mr. Lynch asserted in his reply that Mr. Feickert had been absent without appropriate contact, that he was sorry, but that he had to move on. The employer lacked at an attendance policy.

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. A claimant who is absent from work three consecutive days without notifying the employer, in violation of the employer's attendance policy, is presumed to have voluntarily quit the employment without good cause attributable to the employer. See Iowa Administrative Code rule 871-24.25(4).

The evidence in the record establishes a discharge, rather than a voluntary quit. The employer presented no evidence to rebut Mr. Feickert's testimony that he contacted the employer each day of his absence to give notice of his need to be absent due to injury and that when he was well enough to return to work, he gave notice to employer with the intention of resuming the employment. The evidence in the record establishes that the employer elected to terminate the employment effective Wednesday, January 22, 2020, for attendance.

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 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).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 a discharge for no disqualifying reason. The employer did not participate in the appeal hearing and did not present any evidenced to prove excessive unexcused absences or any other misconduct in connection with the employment. The evidence in the record establishes that the claimant's absences were initially based on injury suffered in connection with the employment. In the absence of an attendance policy, the claimant took reasonable steps to notify the employer of his need to be absent. Once the claimant was well enough to return to the employment, he took reasonable steps to notify the employer. The evidence in the record does not establish any absences that would be unexcused absences within the meaning of the law. Mr. Feickert is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The February 14, 2020, reference 02, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge was effective January 22, 2020. 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

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