

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEEGAN T HARRISON
Claimant

APPEAL NO. 11A-UI-05764-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 02/27/11
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 20, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 24, 2011. Claimant Keegan Harrison did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Alice Rose Thatch of Corporate Cost Control represented the employer and presented testimony through Rochelle LeGuard and Chris King. Exhibits Three through Eight were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Keegan Harrison was employed by Hy-Vee in Kansas City, Missouri beginning on December 13, 2010 and last performed work for the employer on December 18, 2010. Mr. Harrison was hired during the busy Christmas Season for what was supposed to be a part-time meat clerk position. Mr. Harrison worked full-time hours during the brief employment. Mr. Harrison's immediate supervisor was Jim Dunn, Meat Market Manager.

On December 20 and 21, Mr. Harrison was absent due to illness and properly reported the absences to the employer by notifying the employer at least two hours prior to the scheduled start of his shift. Mr. Harrison was then absent on December 22, 23, and 24, but the employer cannot say what the circumstances were, whether or when he called in, or who he might have spoken to. Chris King, Manager of Perishables, assumed that Mr. Harrison had voluntarily quit the employment. Mr. King was Mr. Dunn's immediate supervisor. At some point, Mr. King telephoned Mr. Harrison and told Mr. Harrison that the employer had hired someone else to fill Mr. Harrison's position. Mr. Harrison told Mr. King that he had been ill, had been going to the doctor, but that he understood the employer's position.

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 in the record establishes a discharge, not a voluntary quit. Mr. Harrison had not voiced any intention to voluntarily separate from the employment. The employer is unable to say what happened with regard to the absences on December 22-24 or what happened with the dates beyond that when Mr. Harrison's name appeared on the schedule. The employer notified Mr. Harrison that the employment was done, but cannot say when such notice occurred. It appears that much of the contact between Mr. Harrison and the employer occurred through Mr. Dunn, who did not make himself available for the hearing.

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.

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 this matter. See Iowa Code § 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).

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence to establish a voluntary quit or a discharge based on *unexcused* absences. It appears that some or all of the gaps and deficiencies in the employer's evidence might have been better addressed if Mr. Dunn had made himself available for the hearing. As it stands, the evidence establishes two excused absences due to illness properly reported on December 20 and 21, followed by Mr. King discharging Mr. Harrison from the employment at some *unspecified* point thereafter.

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

DECISION:

The Agency representative's April 20, 2011, reference 01, decision is affirmed. 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