

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**WILLIE T LARD**  
Claimant

**APPEAL NO. 11A-UI-06160-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PER MAR SECURITY & RESEARCH CORP**  
Employer

**OC: 03/27/11  
Claimant: Respondent (1-R)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 27, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 6, 2011. Claimant Willie Lard participated. Derek Burkeybile, Operations Manager, represented the employer.

**ISSUE:**

Whether Mr. Lard 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: Willie Lard was employed by Per Mar Security & Research Corporation as a part-time security guard from 2007 and last performed work for the employer on March 10, 2011. Mr. Lard was assigned to provide evening security at the Davenport Bus Transit Center. On March 11, 2011, Mr. Lard was on his way to work when he received a telephone call from Per Mar Operations Manager Derek Burkeybile, Mr. Burkeybile told Mr. Lard not to report to work until further notice. Mr. Burkeybile told Mr. Lard that there had been a theft, or attempted theft, of some gumball machines at the Bus Transit Center and that the client, City of Davenport, believed the theft or attempted theft had occurred because Mr. Lard had failed to secure one or more doors. Mr. Burkeybile told Mr. Lard to wait for a phone call within a couple days. This one incident was the only basis for what was at that time a suspension from the employment.

Mr. Lard had provided the employer with two contact phone numbers. One was for his cell phone. The other was for his wife's cell phone. A couple days after the suspension, Mr. Burkeybile left a message for Mr. Lard on Mr. Lard's wife's cell phone. Mr. Lard did not receive the message and continued to wait to hear from Mr. Burkeybile. When Mr. Burkeybile did not hear back from Mr. Lard, he decided he would speak with Mr. Lard at a sexual harassment class for which Mr. Lard was enrolled. Mr. Lard assumed he was to wait for a call from Mr. Burkeybile before he was to take any further steps and did not attend the sexual harassment class. Mr. Lard waited two weeks to hear from Mr. Burkeybile. Mr. Lard then spoke

to a bus driver friend who said that Mr. Lard had allegedly quit the employment. There was no further contact between the parties.

#### **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.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

The weight of the evidence establishes that both parties acted unreasonably in connection with Mr. Lard's separation from the employment. Mr. Burkeybile acted unreasonably by not taking more formal steps to communicate with Mr. Lard after one unsuccessful attempt to reach him by phone. There is insufficient evidence in the record to establish further meaningful attempts to contact Mr. Lard. Mr. Lard acted unreasonably by failing to take steps to contact the employer after he did not hear back within the timeframe provided by the employer. Ultimately, it was the employer who initiated the separation by suspending Mr. Lard from the employment. With that in mind, the employer had a greater responsibility for taking steps to communicate to Mr. Lard that he could return to the employment, if that was the case. The weight of the evidence establishes a discharge, not a voluntary quit.

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 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). 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).

There is insufficient evidence to establish that Mr. Lard neglected to lock the Bus Transit door(s) on March 10, 2011. Even if he did fail to lock the doors on that date, the evidence would have established only a single, isolated incident of negligence and that would not be enough to disqualify Mr. Lard for unemployment insurance benefits.

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

The evidence raises the question of whether Mr. Lard has met the work ability and availability requirements since he established his claim for benefits. This matter will be remanded to the Claims Division for adjudication of that issue.

**DECISION:**

The Agency representative's April 27, 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.

This matter is remanded to the Claims Division for adjudication of Mr. Lard's work ability and availability since he established his claim for benefits.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/css