

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANA L EGGERS

Claimant

APPEAL NO. 10A-UI-03206-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXPRESS SERVICES INC

Employer

**Original Claim: 03/22/09
Claimant: Appellant (5-R)**

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

STATEMENT OF THE CASE:

Dana Eggers filed a timely appeal from the March 1, 2010, reference 04, decision that denied benefits. After due notice was issued, a hearing was held on April 13, 2010. Mr. Eggers participated. Holly Burtness, Staffing Consultant, represented the employer.

ISSUE:

Whether Mr. Eggers separated from the employer 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: Dana Eggers started a full-time work assignment at Winnebago Industries through Express Services, Inc., on November 16, 2009 and last performed work in the assignment on February 1, 2010. Mr. Eggers did not complete the assignment. On February 2 and 3, Mr. Eggers was absent from the assignment without notifying the employer. The employer's written attendance policy required that Mr. Eggers notify Express Services and the client company prior to the start of his shift if he needed to be absent. On February 2 and 3, Mr. Eggers was absent, but contacted neither Express Services nor Winnebago Industries. On February 3, Holly Burtness of Express Services telephoned Mr. Eggers' home. As Ms. Burtness was speaking with the person who answered the phone, she could hear Mr. Eggers in the background saying, "I don't want to talk to her and I don't need a lecture from Express." Ms. Burtness had the person who answered the phone tell Mr. Eggers that his assignment was ended.

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 indicates that Ms. Burtness discharged Mr. Eggers from the assignment and thereby initiated the separation from the employment. The weight of the evidence does not indicate that Mr. Eggers voluntarily quit the assignment or 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).

The weight of the evidence indicates that Ms. Burtness discharged Mr. Eggers after he was absent from his assignment for two consecutive days without notifying the employer. To make matters worse, Mr. Eggers refused to speak with the employer when the employer contacted him on the second day of his no-call, no-show absence. Under the circumstances, Mr. Eggers' unexcused absences constituted misconduct in connection with the employment. Accordingly, Mr. Eggers is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Eggers.

The administrative law judge found much of the testimony provided by Mr. Eggers and his spouse not reliable and not credible. Mr. Eggers jumbled his days and appears to have jumbled his injuries as well. Mr. Eggers' spouse provided an explanation concerning her communication with Mr. Eggers on February 3, 2010 that defies reason and common sense. The weight of the evidence indicates that Mr. Eggers was in the room as Ms. Eggers was on the phone with Ms. Burtness and that Mr. Eggers refused to speak with the employer about his continued absence from the assignment.

DECISION:

The Agency representative's March 1, 2010, reference 04, decision is modified as follows. The claimant was discharged for misconduct. 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, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether the claimant has been able to work and available for work since he established his claim for unemployment insurance benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw