

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JAMES F MARBERRY**  
Claimant

**APPEAL NO. 17A-UI-04820-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MANPOWER INC OF D M**  
Employer

**OC: 04/09/17**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 27, 2017, reference 01, 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 October 27, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on June 5, 2017. Claimant James Marberry participated. Barbara Hamilton of ADP/Equifax represented the employer and presented testimony through Ann Origer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

**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: Manpower Inc. of Des Moines is a temporary employment agency. James Marberry established his employment with Manpower in October 2016 and performed work in a single, full-time, temporary work assignment at International Paper. International Paper had Mr. Marberry sorting materials for recycling. Mr. Marberry's work hours in the assignment were 8:00 a.m. to 4:30 p.m. Mr. Marberry's immediate supervisor in the assignment was Charity Kester, Warehouse Supervisor. Manpower Client Relations Specialist Lynnea Malone placed Mr. Marberry in the assignment.

Mr. Marberry last performed work in the International Paper assignment on October 27, 2016. On that day, Mr. Marberry went home during his lunch break as usual. While Mr. Marberry was on his lunch break, he received a call from a Wal-Mart representative regarding a potential opening for an overnight stockperson. The Wal-Mart representative invited Mr. Marberry to sit for an interview that same afternoon. Mr. Marberry accepted the invitation to interview with Wal-

Mart. Mr. Marberry telephoned Manpower and spoke with Client Relations Specialist Ann Origer. Mr. Marberry told Ms. Origer that he would not be returning to International Paper for the second half of his shift that day because he needed to appear for an interview with Wal-Mart. Mr. Marberry told Ms. Origer that he would be returning to the assignment the next day. Ms. Origer told him to be certain to return to the assignment the next day. Ms. Origer also directed Mr. Marberry to notify International Paper of the absence. When Mr. Marberry finished speaking with Ms. Origer, he telephoned International Paper and left a voice mail message at the voicemail extension for Michelle, last name unknown. Michelle was Ms. Kester's immediate supervisor. Mr. Marberry indicated in his message that he would not be returning to work for the rest of the day.

After Mr. Marberry went to his interview with Wal-Mart, he received a telephone call from Manpower Client Relations Specialist Lynnea Malone. An International Paper representative had notified Manpower that Mr. Marberry had quit the assignment halfway through his shift on October 27. When Ms. Malone contacted Mr. Marberry that afternoon, she indicated that International Paper said Mr. Marberry had quit the assignment at International Paper for a job at Wal-Mart. Mr. Marberry explained that he had not quit the assignment and that he had left a message at International Paper regarding his absence to participate in the interview. Ms. Malone told Mr. Marberry to let her get the matter resolved and that she would then make further contact with Mr. Marberry. Mr. Marberry understood the directive to mean that he should not appear for work at the assignment the next day and should wait for further contact from Manpower. Ms. Malone did not document her telephone call with Mr. Marberry. Mr. Marberry waited for a week, but did not hear from Manpower. At that point, Mr. Marberry contacted Manpower. The Manpower representative with whom Mr. Marberry spoke told Mr. Marberry that Manpower would not have additional work for him because he had quit the assignment at International Paper. Manpower did not document the contact with Mr. Marberry.

#### **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 establishes that Mr. Marberry was discharged from the assignment and from the employment. The weight of the evidence in the record fails to support the notion that Mr. Marberry voluntarily quit the assignment at International Paper or the employment with Manpower. The weight of the evidence indicates that Mr. Marberry provided notice over the noon hour on October 27 that he would need to miss the remainder of his shift that day. Mr. Marberry did not intend to quit the assignment or the employment and did not state that he was quitting the assignment or the employment. Indeed, he told Manpower that he intended to return to the assignment the following day. Mr. Marberry did not return to the assignment the next day because he reasonably concluded that Manpower had directed him to refrain from further contact with International Paper while Manpower investigated the matter. Mr. Marberry reasonably waited for further contact from Manpower, but Manpower did not further contact him. When Mr. Marberry did not hear from Manpower, he made contact with the employment agency and was told there was not work for him.

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 a discharge from the assignment and from the employment based on a single unexcused absence. Despite the fact that the absence was reported to Manpower and to International Paper, the absence was unexcused under the applicable law because it concerned a matter of personal responsibility, a search for other employment. The discharge did not disqualify Mr. Marberry for unemployment insurance benefits. Mr. Marberry is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

**DECISION:**

The April 27, 2017, reference 01, decision is affirmed. The claimant was discharged on October 27, 2017 for no disqualifying reason. 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

jet/scn