IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

RICHARD J WENCK
Claimant

HOUSBY MACK INC
Employer

APPEAL NO. 18A-UI-02134-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/14/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Richard Wenck filed a timely appeal from the February 5, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Wenck was discharged on January 17, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on March 13, 2018. Mr. Wenck participated. Morgan Wentland represented the employer. Valerie Huntley was present at the start of the hearing as a witness for Mr. Wenck, but disconnected from the hearing prior to the time in the hearing for her testimony and was thereafter unavailable at the telephone number registered for the hearing. Exhibits 1 through 6 and A were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Richard "RJ" Wenck was employed by Housby Mack, Inc. as a full-time auto body paint technician from April 2016 until January 17, 2018, when Bob Daniel, Body Shop Manager, discharged him for attendance. Mr. Wenck's immediate supervisor was John Smart. Mr. Smart reported to Mr. Daniel. Until about October 2017, Mr. Wenck's regular work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. Mr. Wenck, Mr. Smart and Mr. Daniel then entered into an agreement whereby Mr. Wenck's work hours adjusted to 7:30 a.m. to 4:00 p.m. to allow Mr. Wenck to attend to family matters prior to reporting to work.

Mr. Wenck last performed his work duties on Friday, January 5, 2018. On Monday, January 8, Mr. Wenck was absent, but did not notify the employer of his need to be absent. The employer's absence reporting policy required that Mr. Wenck notify his supervisor prior to the scheduled start of his shift if he needed to be absent. Mr. Wenck was aware of the policy.

Mr. Wenck reported to the workplace on Tuesday, January 9, 2018, but not for the purpose of performing working. Instead, Mr. Wenck spoke with Mr. Daniel regarding his substantial personal struggles and his adjustment to a new medication. Mr. Daniel authorized Mr. Wenck to take the remainder of the week off. Mr. Wenck was next supposed to work on Monday, January 15, 2018.

On Friday, January 12, Mr. Wenck sent a text message to Mr. Smart in which he asked, "Do we have Monday off?" The Monday in question was Martin Luther King, Jr. Day. Mr. Smart replied, "No." Mr. Wenck then responded, "Ok thank you." The communication made clear that Mr. Wenck and Mr. Smart mutually understood that Mr. Wenck was expected to report for work on Monday, January 15, 2018. Mr. Wenck did not appear for work on January 15 or 16 and did not notify the employer of his need to be absent on either day. When Mr. Wenck reported for work on Wednesday, January 17, Mr. Daniel sent him home. Later that day, Mr. Daniel notified Mr. Wenck that the employer was terminating the employment, based on the handbook policy that deemed two consecutive no-call/no-show absences a voluntary quit. The attendance policy, including the no-call/no-show policy, was included in the employee handbook the employer provided to Mr. Wenck at the start of the employment.

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.

Iowa Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
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> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Mr. Wenck was discharged from the employment and did not voluntarily quit. Mr. Wenck gave no notice of an intent to quit. The two consecutive no-call/no-show absences were insufficient to establish a voluntary quit under the administrative rule, despite the employer's policy.

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:
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> 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 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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence in the record establishes no-call/no-show absences on January 8, 15 and 16, 2018. The administrative law judge empathizes with Mr. Wenck and his substantial personal struggles. However, the evidence establishes that Mr. Wenck knew he was scheduled to work on each of the three no-call/no-show dates, elected not to report for those days, had the ability to give notice of his need to be absent on those days, but failed provide such notice on any of the three days. The no-call/no-show absences were unexcused absences under the applicable law. The unexcused absences were excessive. The administrative law judge has carefully weighed Mr. Wenck's testimony and the other evidence, including Exhibit A. The weight of the evidence establishes that significant aspects of Mr. Wenck's testimony were not credible, including his assertion that he did not know he was expected to work on Monday, January 15.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Wenck was discharged for misconduct in connection with the employment. Accordingly, Mr. Wenck 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.

DECISION:

The February 5, 2018, reference 01, decision is affirmed. The claimant was discharged for misconduct in connection with the employment based on excessive unexcused absences. 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 amount, provided he meets all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs