

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**ADAM J KULMATYCKI**  
Claimant

**APPEAL NO. 19A-UI-07459-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARROLL DISTRIBUTING  
& CONSTRUCTION**  
Employer

**OC: 08/18/19  
Claimant: Respondent (1)**

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Iowa Code Section 96.5(2)(a) – Discharge  
Iowa Administrative Code Rule 871-24.26(21) – Quit in Lieu of Discharge

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 10, 2019, reference 01, decision that allowed benefits to the claimant provided the claimant was otherwise eligible and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on August 21, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on October 14, 2019. Claimant Adam Kulmatycki did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Curtis Humphrey represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 4 into evidence. The administrative law judge took official notice of the fact-finding materials.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment.  
Whether the claimant voluntary quit for good cause attributable to the employer.  
Whether the employer's account may be charged for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Adam Kulmatycki was employed by Carroll Distributing & Construction as a full-time warehouse laborer from 2016 until August 21, 2019. On August 20, 2019, Mr. Kulmatycki was a no-call/no-show for his scheduled shift. Mr. Kulmatycki reported for his scheduled shift on August 21, 2019. At that time, Curtis Humphrey, Branch Manager, spoke with Mr. Kulmatycki regarding the August 20 no-call/no-show absence. Prior to the meeting, Mr. Humphrey had decided to discharge Mr. Kulmatycki from the employment unless Mr. Kulmatycki provided a good reason for the August 20 absence and demonstrated a satisfactory degree of remorse and positive attitude. During the meeting Mr. Kulmatycki told Mr. Humphrey that he was unhappy in the employment and mentioned that another employee could take over his duties. Mr. Humphrey told Mr. Kulmatycki that he was "prepared to let [Mr. Kulmatycki] go." Mr. Kulmatycki told

Mr. Humphrey that he “would rather just quit” to avoid having a discharge on his employment record. Mr. Humphrey provided Mr. Kulmatycki with a resignation form that he and Mr. Kulmatycki signed. The pre-printed form indicated that the quit was effective immediately.

The August 21, 2019 discussion occurred in the context of prior absences. On July 16 and on August 7 and 8, 2019, Mr. Kulmatycki was absent due to illness and properly reported the absence to the employer. On July 24, 25 and 26, 2019 Mr. Kulmatycki was absent. Mr. Kulmatycki had requested in advance to be absent on those three days and the employer had approved the absence in advance.

### **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 Administrative Code Rule 871-24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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 a quit in lieu of discharge. Prior to the August 21, 2019, Mr. Humphrey had decided to discharge Mr. Kulmatycki from the employment unless Mr. Kulmatycki was able to persuade Mr. Humphrey to take another course. During the meeting, Mr. Kulmatycki did not give Mr. Humphrey a reason to reconsider and Mr. Humphrey told Mr. Kulmatycki that he was prepared to discharge him from the employment. A reasonable person in Mr. Kulmatycki's position would conclude that discharge was imminent and that that was the point of Mr. Humphrey's utterance. Mr. Kulmatycki had reported for work that day, which would be inconsistent with an intention to quit the employment. Mr. Kulmatycki's expression of dissatisfaction with the employment was not a quit. Mr. Kulmatycki's statement that another employee was capable of performing his duties was not a quit. Only in the context of Mr. Humphrey communicating that discharge was imminent did Mr. Kulmatycki state that he would rather quit to avoid having a discharge on his employment record. Mr. Humphrey promptly produced a resignation form that required only signatures and a date.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

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:

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 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 Iowa Admin. Code Rule 871-24.32(4).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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 for no disqualifying reason. The August 20 final absence was a no-call/no-show and was an unexcused absence under the applicable law. The evidence establishes no other absences that can be deemed unexcused absences under the applicable law. The evidence does not establish excessive unexcused absences or other misconduct in connection with the employment. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The September 10, 2019, reference 01, decision is affirmed. The claimant was discharged on August 21, 2019 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