**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**LISA A COULSON**
Claimant

**KEY CITY ENTERPRISES LLC**
**KEY CITY RECYCLING**
Employer

**APPEAL NO. 18A-UI-08077-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 03/04/18**
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Lisa Coulson filed a timely appeal from the July 20, 2018, reference 02, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Coulson was discharged on June 28, 2018 for excessive unexcused absenteeism. After due notice was issued, a hearing was started on August 17, 2018 and concluded on August 24, 2018. Ms. Coulson participated. James Miller represented the employer. Exhibits 1 through 10, A and B were received into evidence.

**ISSUE:**

Whether Ms. Coulson separated from the employment for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: James Miller owns and operates Key City Enterprises, L.L.C., d/b/a Key City Recycling, located in Dubuque. Mr. Miller and claimant Lisa Coulson have been next door neighbors for a decade. On June 14, 2018, Ms. Coulson sat for an interview with Mr. Miller concerning an opening Mr. Miller had for a full-time office manager. The office manager duties included greeting customers, weighing customer vehicles in connection with scrap metal purchases, paying customers for the scrap metal, and cleaning the workplace. During the interview, the pair discussed work hours and Mr. Miller provided a few options. These included working 8:00 a.m. to 5:00 p.m. Monday through Friday with a lunch break, working 9:00 a.m. to 4:00 p.m. Monday through Friday without a lunch break, and working four hours on the weekend with a corresponding reduction in hours during the week. Ms. Coulson left the interview with a misunderstanding that Mr. Miller was more flexible on the work hours than he actually was, including a misunderstanding that it would be okay to appear for work sometime between 8:00 a.m. and 9:00 a.m. and that it would be okay to leave work sometimes between 4:00 p.m. and 5:00 p.m. Mr. Miller hired Ms. Coulson as his new full-time office manager. In connection with hiring Ms. Coulson and having her commence employment, Mr. Miller did not have Ms. Coulson provide information for completion of an I-9 work authorization or W-4 payroll tax deduction. The employer lacks and employee handbook or written work rules.

Ms. Coulson started the employment on Tuesday, June 19, 2018 and last performed work for the employer on Friday, June 22, 2018. On that day, Ms. Coulson clocked in at 7:56 a.m. and clocked out at 4:59:54 p.m. On Wednesday, June 20, Ms. Coulson clocked in at 7:53 a.m. and clocked out at 4:45 p.m. On Thursday, June 21, Ms. Coulson clocked in at 8:01:03 a.m. and clocked out at 4:30 p.m. Mr. Miller had not noted Ms. Coulson's 8:01 clock in time. Before Ms. Coulson left on June 20 and 21, she asked Mr. Miller whether it was okay for her to leave and Mr. Miller approved her departure. Mr. Miller thought it was odd that Ms. Coulson was requesting to leave early from a job she had just commenced, but did not address this with Ms. Coulson at the time. Ms. Coulson was next scheduled to work on Friday, June 22.

On the evening of June 21, Ms. Coulson attended a rock music concert. While at the concert, Ms. Coulson consumed two 12 ounce cans of beer and a portion of a third can of beer. While Ms. Coulson was at the concert, she posted photos and messages to her Facebook page memorializing her experience at the concert. Ms. Coulson got home at 12:30 a.m. and went to bed at 1:00 a.m.

On the morning of June 22, Ms. Coulson got up at 5:10 a.m., meaning that Ms. Coulson had at most slept for four hours and 10 minutes. At 5:44 a.m., Ms. Coulson posted a message on her Facebook page, "It's going to be a long day." Ms. Coulson followed up with Facebook comments indicating the time she got home from the concert, the time she went to bed, the time she got up, the fact that she usually goes to bed at 8:30 p.m., and the additional comment, "I'm dying this [morning]." Ms. Coulson ate breakfast, bathed, and brushed her teeth before she reported for work. Ms. Coulson clocked in at work at 8:05 a.m. and made her way to the employer's front office area to wait for customers. Mr. Miller noted that Ms. Coulson was not her usual talkative self and noticed at one point that she was propping her head with her forearm. At 8:22 a.m., a customer entered the business. Mr. Miller took the lead in assisting the customer in connection with a scrap metal purchase that was somewhat more complicated than others. At one point in the transaction, Mr. Miller needed to be right next to Ms. Coulson and noted what he believed to be a faint odor of alcohol. Mr. Miller continued helping the customer, but soon returned to Ms. Coulson and asked if she had gone out the night before. Ms. Coulson stated that she had gone to the concert. Mr. Miller asked Ms. Coulson whether she was hung over. When Ms. Coulson did not immediately respond, Mr. Miller asked her whether she had been drinking. Ms. Coulson stated she had been drinking while at the concert. Mr. Miller told Ms. Coulson that he could smell alcohol on her breath, that he could not have her helping customers, and that he thought it was best that she went home. Ms. Coulson said, "Wow, I brushed my teeth. No one has ever told me that before." Mr. Miller had also observed that Ms. Coulson's eyes appeared to be bloodshot and red. Though Ms. Coulson was just very tired and not at that time under the influence of alcohol, Mr. Miller jumped to the conclusion that Ms. Coulson might be under the influence of alcohol. Mr. Miller has no training in discerning whether someone is under the influence of alcohol. Mr. Miller returned to helping the customer outside with the scrap purchase. Ms. Coulson waited in the business' driveway in front of the office for Mr. Miller to become free. Ms. Coulson wanted to provide her Social Security number so that she could be paid for her time. That day was supposed to be payday. Ms. Coulson also wanted to know whether she should return to the employment. When she had the opportunity to speak with Mr. Miller, Ms. Coulson asked Mr. Miller whether he wanted her to come back. Mr. Miller told Ms. Coulson that the situation was "pretty serious" and that he would send her a text message. While Mr. Miller asserts he said he would send a text message *if he did not want Ms. Coulson to return*, Ms. Coulson heard no such qualifying statement. Ms. Coulson returned inside with Mr. Miller to provide him with her Social Security number, clocked out, and left the workplace under the belief that she most likely would not be allowed to return to the employment. Ms. Coulson drove to the Dubuque Workforce Development Center and

reactivated a previously established unemployment insurance claim. Ms. Coulson was under the erroneous belief that a claimant cannot be eligible for unemployment insurance benefits if a claimant quits employment. Ms. Coulson continued under this erroneous belief at the time of the appeal hearing.

The parties next had contact on the evening of Monday, June 25, 2018, when Ms. Coulson sent Mr. Miller a text message asking, "Did you have a check for the 3 days I worked last week?" Mr. Miller replied, "I will drop it in your mailbox in the morning," to which, Ms. Coulson responded, "Ok thank you." Neither said anything more about the employment at that time. Though Mr. Miller asserts that he prepared three reprimands for Ms. Coulson on June 22 after she left work the workplace that morning, Mr. Miller made no mention of these in the text message exchange on the evening of June 25. Two of the written reprimands were for late arrivals on June 21 and 22. The third reprimand was for arriving at work smelling of alcohol.

On the morning of Tuesday, June 26, 2018, Mr. Miller placed Ms. Coulson's paycheck in her mailbox on his way to work. The mailbox was next to the street, rather than attached to Ms. Coulson's home. Mr. Miller elected not to make more direct contact with Ms. Coulson.

The parties next had contact on Thursday, June 28, 2018. On that morning, Mr. Miller received a notice of claim from Iowa Workforce Development. After Mr. Miller received the notice of claim, he sent a text message to Ms. Coulson that same morning stating as follows: "I have some paperwork I need you to sign regarding Friday morning. Can you stop by my office?" Ms. Coulson immediately replied, "What kind paperwork?" Mr. Miller replied, "Paperwork stating what happened Friday morning. I just need it for my files. Normally I would have written something up at the time but considering the circumstances I thought it best for you to leave and not be confronted by any customers who might have come in the office and smelled alcohol on your breath." A couple hours later, Ms. Coulson responded, "I'm not signing any paperwork with false accusations." Soon thereafter, Mr. Miller sent another text, "Who said you were signing paperwork with false accusations?" Later that afternoon, Mr. Miller sent Ms. Coulson another message, "Were you planning on stopping to look at the paperwork regarding Friday? Please let me know." Ms. Coulson did not respond to the message.

**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.

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 in the record establishes that Ms. Coulson reasonably concluded, based on Mr. Miller sending her home on the morning of June 22 and his failure to contact her

to authorize her to return to work thereafter, that she was discharged from the employment. The weight of the evidence does not support a conclusion that Ms. Coulson voluntarily separated from the employment. Ms. Coulson reported for work on June 22, despite her significant lack of sleep. The evidence establishes that but for Mr. Miller's decision to send Ms. Coulson away from the workplace on June 22, Ms. Coulson would have remained to work her shift and would have reported for additional shifts. The weight of the evidence fails to support Mr. Miller's assertion that he told Ms. Coulson on the morning of June 22 that she could return unless he notified her otherwise.

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 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 Iowa Administrative Code rule 871-24.32(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 Administrative 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 weight of the evidence in the record establishes a discharge for no disqualifying reason. The weight of the evidence indicates that Ms. Coulson was unrested, but not under the influence of alcohol on June 22, 2018. Mr. Miller unreasonably reached the conclusion that Ms. Coulson was hung-over or under the influence. The weight of the evidence establishes that Mr. Miller was less than clear regarding Ms. Coulson's expected work hours and through that lack of clarity led Ms. Coulson to reasonably conclude there was flexibility in the work hours. The evidence fails to establish unexcused absences on June 21, June 22 or thereafter. While Ms. Coulson's participation in the appeal hearing demonstrated that she struggles to retain information, the weight of the evidence establishes that Mr. Miller was the primary contributor to any miscommunication that occurred between the two. Mr. Miller intentionally avoided contact with Ms. Coulson after sending her home on the morning of June 22 and initiated contact with her only after receiving the notice of claim on June 28, 2018. Ms. Coulson is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The July 20, 2018, reference 02, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she 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/rvs