

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TIMOTHY C ORLANDO
Claimant

RAILCREW XPRESS LLC
Employer

APPEAL NO. 21A-UI-08705-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/03/21
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 March 22, 2021, reference 01, decision that allowed benefits to the claimant provided the claimant met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on January 18, 2021 for no disqualifying reason. After due notice was issued, a hearing was held on June 10, 2021. The claimant did not provide a telephone number for the hearing and did not participate. Danielle Powers represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record reflects that the claimant made not weekly claims and received not weekly benefits in connection with the claim. Exhibits 1 and 2 were received into evidence.

ISSUES:

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

Whether the claimant voluntarily quit without good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as an on-call driver from January 2020 until January 20, 2021, when the employer discharged him from the employment. The claimant's duties involved transporting railroad personnel. The employer alleges the claimant was discharged because he refused work. The employer allows on-call drivers discretion to accept or decline proposed assignments. The employer has an auto-dialing system calls one on-call driver after another in an automated cue until a driver answers and accepts the assignment. The employer representative does not know the claimant's scheduled on-call hours or the particulars of any call the claimant allegedly refused. The employer representative is unaware of a particular final incident that led to the claimant separating from the employment. The employer alleges that the claimant voluntarily separated from the employment by refusing assignments. The employer representative has nothing to indicate that claimant desired to separate from the employment. The employer alleges that the claimant was included in 49 auto-dialed notifications between January 1, 2021 and January 18, 2021. The employer alleges that the claimant answered just

seven of the calls. The employer does not know the dates and times of any of the 49 calls. It is unclear whether the claimant was aware of the 40 calls the employer says he did not answer or whether those calls were made within or outside the claimant's assigned on-call hours. Of the nine calls the claimant answered, the employer alleges the claimant accepted seven assignments and declined two, but cannot say when or why the two allegedly declined assignments were or the circumstances under which the claimant may have declined the assignments.

The claimant established an original claim for benefits that was effective January 3, 2021, but did not make any weekly claims and did not receive any weekly benefits in connection with the claim.

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.

The weight of the evidence establishes a discharge, rather than a voluntary quit. The evidence in the record is insufficient to establish that the claimant intended to sever the employment relationship or that he engaged in overt acts indicating such intent.

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 871 IAC 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.

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The

administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The employer presented in sufficient evidence to prove a current act of misconduct, whether that was an alleged absence or an alleged refusal to follow a reasonable directive. The employer's sole witness lacked personal knowledge of the matters in question. The employer's two exhibits lack detail pertaining to the particular incidents or events that factored into the separation. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The March 22, 2021, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The discharge was effective January 20, 2021. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.



James E. Timberland
Administrative Law Judge

June 24, 2021
Decision Dated and Mailed

jet/mh