

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSE A MURILLO
Claimant

APPEAL NO. 15A-UI-03455-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAGEN INC
Employer

OC: 02/22/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 12, 2015, reference 01, decision that disqualified the claimant for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that the claimant had voluntarily quit on February 20, 2015 because a non-work-related illness or injury without good cause attributable to the employer. An appeal hearing was set for April 14, 2015 and the parties and notice of the hearing was mailed to the parties on March 25, 2015. Neither party responded to the hearing notice. Based on review of the administrative file, the administrative law judge concludes that the March 12, 2015, reference 01, decision was in error and cannot be affirmed. Based on the content of the administrative file and the law, the administrative law judge enters the following decision.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jose Murillo was employed by Fagen, Inc. as a full-time pipe welder from November 17, 2014 and last performed work for the employer on Monday, February 16, 2015. Mr. Murillo had injured his foot on Sunday, February 15, 2015. On February 16, a coworker notified Tracey Black, Job Site Safety Director, which Mr. Murillo was having a hard time walking and was limping around the job site. Mrs. Black directed Mr. Murillo to report to the safety trailer. Once there, Mr. Murillo stated that he had hurt his foot on February 15, 2015 at the motel. Mrs. Black directed Mr. Murillo to go to a doctor and have them look at his foot. Mrs. Black told Mr. Murillo that he could not return to the employment until he saw a doctor. The employer did not want Mr. Murillo to further injure his foot or risk further injury as a result of his limping gait. Mrs. Black provided Mr. Murillo with a copy of an Essential Job Functions Information Sheet for Mr. Murillo to provide to his doctor for use by the doctor in determining whether Mr. Murillo could be released to return to work with or without restrictions and reasonable accommodations. Mr. Murillo saw a doctor on February 17, 2015. The doctor provided a note in the space provided for that purpose at the bottom at the employer's Essential Job Functions Information

Sheet: "Unable to walk >50 feet. No work until 2/23/15 unless he improves quickly. If so, I will update this. He can return without restrictions on 2/23/15." Mr. Murillo provided the completed form to the employer. The employer then told Mr. Murillo that the employer deemed Mr. Murillo to be a voluntary quit due to his inability to perform at that time. Mr. Murillo had given no notice to the employer that he intended to quit and had not engaged in any conduct indicating an intention to quit the employment.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs; A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits; A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge; A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations; Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

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 employer's decision to call this involuntary separation from employment a voluntary quit does not make it so. The claimant took no steps whatsoever to indicate an intention to sever the employment relationship. Those steps were initiated, and concluded, by the employer. The claimant was directed by Mr. Murillo to seek medical attention for what employer deemed a non-work related injury. Mr. Murillo complied. Mr. Murillo saw a doctor who indicated Mr. Murillo would need to be off work a week at most, but could then return to work without restrictions. Rather than approving the need to absent a brief period due to injury, the employer elected to discharge Mr. Murillo from the employment.

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 when the employer initiates the separation from employment. 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).

The evidence in the record establishes no misconduct whatsoever. The employer's decision to discharge the claimant from the employment based a minor injury that would take the claimant off work for no more than a week was not based on misconduct on the part of Mr. Murillo. Based on the content of the administrative file and application of the appropriate law, the administrative law judge concludes that Mr. Murillo was discharged for no disqualifying reason. Accordingly, Mr. Murillo is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The March 12, 2015, reference 01, decision is reversed. The claimant was discharged on or about February 20, 2015 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/can