IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MIKE D MUHLBAUER Claimant	**APPEAL NO. 20A-UI-01400-JTT** **ADMINISTRATIVE LAW JUDGE DECISION**
HRABIK WELDING LLC Employer	**OC: 01/19/20** **Claimant: Respondent (1/R)**

Iowa Code § 96.5(2)(a) – Discharge for Misconduct
Iowa Code § 96.18 & Iowa Admin. Code r. 871-23.19 – Employment Defined

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 7, 2020, reference 02, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and that employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on January 20, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on March 4, 2020. Claimant Mike Muhlbauer did not provide a telephone number for the hearing and did not participate. Bill Hrabik represented the employer and presented additional testimony through Amber Hrabik. Exhibits 1 and 2 were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record reflects that no benefits have been disbursed to the claimant.

ISSUES:

Whether the claimant was an employee or an independent contractor while he performed work for Hrabik Welding, L.L.C.
Whether the claimant was discharged for misconduct in connection with the employment.
Whether the claimant was laid off.
Whether the claimant voluntarily quit without good cause attributable to the employer.
Whether the employer account of Hrabik Welding, L.L.C. may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Bill Hrabik owns and operates Hrabik Welding, L.L.C., a welding repair business located in Denison. Mike Muhlbauer performed welding work for Hrabik Welding. While the employer elected to call the relationship independent contracting, it was in fact employment. Mr. Hrabik recruited Mr. Muhlbauer to perform casual labor for $16.00 per hour. Mr. Hrabik regular welding staff was behind on projects. Mr. Hrabik knew Mr. Muhlbauer had recently separated from an employment where Mr. Muhlbauer performed welding work similar to the work Hrabik Welding needed help with. Mr. Muhlbauer provided his own grinder, some hand tools, a light, and a welding hood. Hrabik Welding provided the shop space in which the work was performed and

provided all other materials needed to perform the work. Mr. Hrabik did not tell Mr. Muhlbauer how to perform the work, but Mr. Hrabik reserved the right to determine whether Mr. Muhlbauer's work was satisfactory. Mr. Hrabik retained the right to fire Mr. Muhlbauer if needed. Mr. Muhlbauer was not free to hire assistants to help him with the work. The work was performed under the name of Hrabik Welding, L.L.C. Hrabik Welding absorbed all expenses related to the work performed and Mr. Muhlbauer did not bear any of the expenses related to the work performed.

Mr. Muhlbauer performed work for Hrabik Welding on Monday, Tuesday and Wednesday, January 13 through 15, 2020. On January 13, Mr. Muhlbauer worked from 8:45 a.m. to 5:00 p.m. On January 14, Mr. Muhlbauer worked from 8:00 a.m. to 5:00 p.m. On Wednesday, Mr. Muhlbauer worked an additional eight hours. While Mr. Hrabik did not give Mr. Muhlbauer a work schedule, Mr. Hrabik said he was there every day from 8:00 a.m. to 5:00 p.m., implying that he expected Mr. Muhlbauer to work during those hours. Mr. Muhlbauer took an equally casual approach to the employment relationship. Mr. Muhlbauer would disappear from the workplace to go to a nearby gas station and then would return to consume his food in front of Hrabik Welding employees as they performed their work. Mr. Muhlbauer did not show up on Thursday, January 16 or Friday, January 17, 2020 and did not make any contact with Mr. Hrabik on those days. Mr. Muhlbauer did not show up on the weekend and did not contact Mr. Hrabik. On Monday, January 20, 2020, Mr. Muhlbauer called Mr. Hrabik to give notice that he would not be there at that day, but would come in on Tuesday, January 21, 2020. During that call, Mr. Hrabik told Mr. Muhlbauer that as far as he was concerned, Mr. Muhlbauer could just be done.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.8 provides the applicable statutory definition of "employment. Iowa Code section 96.8(1)(a) states that "Except as otherwise provided in this subsection, "employment" means service, including service in interstate commerce, performed for wages or under any contact of hire, written oral, express or implied."

Iowa Administrative Code rule 871-23.19 sets forth the factors Iowa Workforce Development is to consider in determining whether there is an employer-employee relationship or an independent contracting relationship. Iowa Administrative Code rule 871-23.19(6) provides:

> Services performed by an individual for remuneration are presumed to be employment unless and until it is shown to the satisfaction of the department that the individual is in fact an independent contractor. Whether the relationship of employer and employee exists under the usual common law rules will be determined upon an examination of the particular facts of each case.

Iowa Administrative Code rule 871-23.19(7) makes clear that if the facts establish and employer-employee relationship, the parties' decision to call the relationship something other than employment does not matter:

> If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

Iowa Administrative Code rule 871-23.19(1) through (5) sets forth the various factors to be considered in determination whether the relationship is employment, as follows:

> 23.19(1) The relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right to discharge or terminate a relationship is also an important factor indicating that the person possessing that right is an employer. Where such discharge or termination will constitute a breach of contract and the discharging person may be liable for damages, the circumstances indicate a relationship of independent contractor. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools, equipment, material and a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, that individual is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, occupation, business or profession, in which they offer services to the public, are independent contractors and not employees. Professional employees who perform services for another individual or legal entity are covered employees.
>
> 23.19(2) The nature of the contract undertaken by one for the performance of a certain type, kind, or piece of work at a fixed price is a factor to be considered in determining the status of an independent contractor. In general, employees perform the work continuously and primarily their labor is purchased, whereas the independent contractor undertakes the performance of a specific job. Independent contractors follow a distinct trade, occupation, business, or profession in which they offer their services to the public to be performed without the control of those seeking the benefit of their training or experience.
>
> 23.19(3) Independent contractors can make a profit or loss. They are more likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed. Independent contractors often have significant investment in real or personal property that they use in performing services for someone else.
>
> 23.19(4) Employees are usually paid a fixed wage computed on a weekly or hourly basis while an independent contractor is usually paid one sum for the entire work, whether it be paid in the form of a lump sum or installments. The employer-employee relationship may exist regardless of the form, measurement, designation or manner of remuneration.
>
> 23.19(5) The right to employ assistants with the exclusive right to supervise their activity and completely delegate the work is an indication of an independent contractor relationship.

It was the above-referenced law that the administrative law judge had in mind when the administrative law questioned Mr. Hrabik about the relationship. Mr. Hrabik's testimony made it

readily apparent that this was in fact an employer-employee relationship, based on the factors referenced in the Findings of Fact, above.

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 that Mr. Hrabik terminated Mr. Muhlbauer's employment on Monday, January 20, 2020, when he told Mr. Muhlbauer that he wanted Mr. Muhlbauer to be done, despite Mr. Muhlbauer's offer to report for work the following day. Mr. Muhlbauer had given no notice that he intended to leave the employment relationship. Given the employer's decision to leave attendance expectations unsaid, Mr. Muhlbauer's absence from the workplace on the Thursday, Friday and Monday cannot be deemed a voluntary quit.

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 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.

The evidence in the record establishes a discharge for no disqualifying reason. Given the employer's decision to leave the attendance expectations and the absence notification expectations undefined, Mr. Muhlbauer's absences for the period of January 16-20, 2020 cannot be deemed unexcused absences. Though Mr. Hrabik was less than pleased with Mr. Muhlbauer's performance, Mr. Muhlbauer's failure to perform to unspecified expectations cannot be deemed misconduct in connection with the employment that would disqualify him for unemployment insurance benefits. Mr. Muhlbauer is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 7, 2020, reference 02, decision is affirmed. The claimant was discharged from the employment on January 20, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Investigations & Recovery unit/Integrity Bureau for further action as it deems appropriate in light of the information contained in this decision.

____
James E. Timberland
Administrative Law Judge

____
Decision Dated and Mailed

jet/scn