IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

JUAN J FLORES
Claimant

TUCKER STAFFING LLC
Employer

APPEAL NO. 18A-UI-11490-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/28/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Juan Flores filed a timely appeal from the November 21, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Flores was discharged on October 31, 2018 for insubordination in connection with the employment. After due notice was issued, a hearing was held at 9:00 a.m. on December 11, 2018. Mr. Flores participated personally and was represented by attorney Randall Schueller. The employer did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate.

The employer submitted an untimely request to postpone the hearing, which request failed to set forth good cause to postpone the appeal hearing. At 7:55 a.m. on the December 11, 2018, the Appeals Bureau received an emailed postponement requested from Michael Little of Tucker Staffing. Mr. Little attached to the email a copy of the hearing notice that the Appeals Bureau had mailed to the employer's Cedar Rapids address of record on November 29, 2018. Mr. Little's email stated as follows:

> We need to reschedule our hearing from today at 9:00 am to another date because our owner was out of town and we also need a transcript of the previous hearing entered into evidence. As well as having a copy of the transcript sent to Tucker Staffing.

At 8:06 a.m. on December 11, 2018, the undersigned administrative law judge sent an email response to the email address the employer used to submit the postponement request. The administrative law judge denied the postponement request due to the untimeliness of the request and for lack of good cause shown. The administrative law judge wrote as follows:

> Good morning.
>
> This morning's request to reschedule the hearing set for this morning is denied. The reschedule request is untimely. The law requires that a reschedule request be made at least three days prior to the hearing date. In addition, delayed preparation for the hearing does not provide good cause to reschedule the hearing. In the context of a telephone hearing, the mere fact that someone is out of town does not provide good cause to reschedule the hearing. See Iowa Administrative Code rule 871-26.8. The hearing set for 9:00 a.m. this morning will proceed as scheduled. I would note that no one has registered for the hearing, as required by the hearing notice.

The administrative law judge would further note as follows. The prior proceeding was not a hearing, but a less formal proceeding called a fact-finding interview. No transcript of the fact-finding interview exists. The appeal hearing is a de novo proceeding, rather than a review of what transpired at the fact-finding interview. The November 29, 2018 hearing notice advised the parties to submit exhibits for the hearing before the hearing date.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Juan Flores was employed by Tucker Staffing, L.L.C., d/b/a Actually Clean, as a full-time manager from 2015 until October 31, 2018, when Jason Bailey, the business owner, discharged him from the employment. Mr. Flores managed daily operations for the employer's water extraction and carpet, floor, furniture and duct cleaning business. Mr. Flores' scheduled start time was 9:00 a.m. Mr. Flores would complete his work day sometime between 6:00 p.m. and 9:00 p.m. Mr. Flores carried an employer-issued cell phone and was on-call 24 hours per day seven days per week. The discharge occurred in the context of Mr. Flores' pending worker's compensation claim.

On October 30, 2018, Michael Little, sent an email message to Mr. Flores. Mr. Little wrote that he had attached written reprimands that Mr. Bailey wanted Mr. Flores to sign. Attached to the email were three or four written reprimands for conduct alleged to have occurred a month earlier. One reprimand alleged that Mr. Flores had failed to make certain employees turned in appropriate paperwork before they left the employer's shop. That reprimand warned that future similar conduct would result in loss of commission and termination of the employment. A second reprimand alleged that Mr. Flores had disobeyed a directive to check on a project at an apartment complex. A third reprimand was for Mr. Flores calling in sick a second day within a 30-day period. A fourth reprimand alleged that Mr. Flores had failed to take the employer's trucks to be serviced. Mr. Flores did not agree with the reprimands and did not understand one or more of the reprimands. Mr. Flores was under the belief that signing the reprimands indicated agreement with the reprimands, rather than mere acknowledgement of receipt of the reprimands. Based on his prior experience with the employer, Mr. Flores was aware that the employer would not allow him to add comments to the reprimands.

On October 31, 2018, Mr. Bailey called Mr. Flores and asked whether Mr. Flores was going to sign the reprimands. When Mr. Flores stated his refusal to sign the reprimands, Mr. Bailey told Mr. Flores he was discharged from the employment. Prior to the discharge, Mr. Bailey had not told Mr. Flores that he would be discharged from the employment if he did not sign the reprimands.

REASONING AND CONCLUSIONS OF LAW:

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).

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).

In *Green v. Iowa Department of Job Service*, the Supreme Court of Iowa held that a claimant's continued refusal to sign to acknowledge receipt of a written reprimand constituted misconduct in connection with the employment. *Green v. IDJS*, 299 N.W.2d 651, 655-656 (Iowa 1980). In that case, the employer notified the claimant that by signing the reprimand the claimant would only be acknowledging receipt of the reprimand, not indicating agreement with the reprimand. *Green*, 299 N.W.2nd at 655. In *Green*, the employer specifically told the claimant that she would be discharged if she refused to sign the written reprimand and the claimant continued her refusal after receiving such notice. *Green*, 299 N.W. 2d at 653. In a 2002 unpublished opinion, the Court of Appeals of Iowa considered *Green* and held a claimant did not engage in misconduct in connection with the employment for refusing to sign a reprimand wherein the employer failed to make clear that signing meant mere acknowledgment of receipt, rather than agreement, and wherein the employer did not warn the claimant that refusal to sign would mean discharge from the employment. *Etcher Farms, Inc. v. Iowa Workforce Development and Employment Appeal Board*, 2002 WL 31018409 (Iowa Ct. App. 2002). Because the *Etcher* decision is an unpublished opinion, it is not controlling law. Nonetheless, Etcher provides guidance in analyzing this matter.

The evidence in the record establishes a discharge for no disqualifying reason. The employer failed to participate in the appeal hearing and thereby did not present any evidence to meet its burden of proving a discharge for misconduct in connection with the employment. The employer presented no evidence to rebut Mr. Flores' testimony that signing the reprimands meant agreement with the reprimands, rather than mere receipt, or his testimony that the employer did not warn him prior to the discharge that refusal to sign the reprimands would result in discharge from the employment. Issuance of three or four reprimands at the same time, calls into question the motive for doing so. The employer failed to present evidence to address that concern or the concern raised by Mr. Flores that the reprimands were connected to his pending worker's compensation claim. Mr. Flores is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The November 21, 2018, reference 01, decision is reversed. The claimant was discharged on October 31, 2018 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/rvs