IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RONALD GREVE
Claimant

FOCUS SERVICES LLC
Employer

APPEAL NO: 11A-UI-13024-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/04/11
Claimant: Appellant (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Ronald Greve (claimant) appealed an unemployment insurance decision dated September 27, 2011, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Focus Services, LLC (employer) for work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 21, 2011. The claimant participated in the hearing. The employer participated through Chris Hislop, human resources director. Employer's Exhibits One through Three and Claimant's Exhibit A were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The employer is a telemarketing company. The claimant was hired as a full-time agent on March 9, 2009 and was promoted to a coach and then to a process administrator. The employer became aware of some information in July 2010 that involved the claimant sending text messages to his subordinates in which he asked for drugs. A meeting was held on July 18, 2011 to discuss an assault in the parking lot, THRAXX or marijuana, drug use on the floor, and text messages. The claimant first denied sending any text messages but then admitted he sent "the text message." However, he "declared he did not do drugs and could test clean any time but this one time he helped someone and now he got burned."

The claimant was adamant that he know who reported it and it was only after further discussion with Chris Hislop that he finally agreed that it would not be appropriate. He appeared "genuinely apologetic and contrite" and the employer said they would meet again in the morning. The employer asked the claimant to think about what he would do if he were the claimant's supervisor. On the following morning, the claimant stated that he believed the best "penalty for

his actions would be demotion to an agent level." The employer agreed and the claimant became upset but knew what he had done was wrong and wanted a second chance. The claimant was advised to not have any contact with certain employees.

That would have been the end of it, but co-employee Vicki Steffens brought a complaint to the employer on August 31, 2011 indicating that the claimant continued to ask for pain killers. Ms. Steffens provided a full-page statement explaining how the claimant was going through other people to contact her to get some pills and he would not leave it alone. She felt like she was being stalked every day, she felt exhausted and wanted to be successful with the company. Ms. Steffens told the employer that on the following day, she would forward a text message to the employer that claimant had sent to her. On September 1, 2011, the employer received a copy of the text message from the claimant to Ms. Steffens.

The text message is rather intense, to put it mildly, and what made it worse was that the claimant was a supervisor. Once the employer read this text message, the decision was made to terminate the claimant. The claimant testified that the message was sent before the July 18, 2011 meeting and he feels that he was punished twice. There is no evidence as to when this particular text message was sent, but it appears likely it was before that date. The employer's position was that they were unaware of the complete information and had this text message been brought forward at that time, the claimant would have been discharged in July 2011. The claimant had the opportunity to fully disclose his involvement in his drug seeking, but he failed to do so and kept the information hidden. The employer discharged him on September 5, 2011.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

871 IAC 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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982)*. The claimant was discharged on September 5, 2011 for trying to persuade his subordinates to sell him their own prescription narcotics. He contends that the text message over which he was discharged was a past act and he was supposed to have been given a second chance. Employees cannot be disqualified from receiving unemployment benefits for a past act.

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge or disciplinary suspension for misconduct cannot be based on such past act(s). The termination or disciplinary suspension 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). In the case herein, the employer only became aware of the claimant's true involvement on September 1, 2011. This was the first time the employer saw the text message that the claimant sent to Vicki Steffens. Consequently, the termination was not for a past act. The employer has met its burden. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated September 27, 2011, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits, because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/kjw