IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PATRICK E WILTGEN
Claimant

PALMER & COMPANY
Employer

APPEAL NO. 14A-UI-06177-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/11/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Patrick Wiltgen filed a timely appeal from the June 9, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on July 9, 2014. Mr. Wiltgen participated personally and was represented by his attorney, Dennis McElwain. Hanna Reinders represented the employer and presented additional testimony through Brenda Huls. Exhibits 1 through 15 were received into evidence.

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: Patrick Wiltgen was employed by Palmer & Company as a full-time inventory control specialist from March 2011 until May 15, 2014 when the employer discharged him in response to an email message that Mr. Wiltgen sent to a coworker on May 7, 2014 and also in response to ongoing concerns about untimely completion of assigned work duties. Mr. Wiltgen had various responsibilities related to ongoing inventory measurements, production planning, and forecasting. Mr. Wiltgen was responsible for a variety of reports that others relied upon in performing their duties. Mr. Wiltgen has a bachelor's degree in finance. At the time the employer hired Mr. Wiltgen, the employer agreed to accommodate a second, part-time seasonal employment that Mr. Wiltgen had as a soccer referee. The soccer employment paid a higher wage than the wage at Palmer & Company. Mr. Wiltgen's immediate supervisor at Palmer & Company was Brenda Huls, Controller.

In October 2012 the employer issued to Mr. Wiltgen the only formal warning issued to him during the course of the employment. The employer's main concern was "time management and timeliness of completion of his work." The employer advised Mr. Wiltgen that the month-end inventory count reconciliation was to be completed no more than a week after the inventory was completed. The warning had been prompted by Mr. Wiltgen taking two and one-half weeks to complete the August 2012 inventory. The employer pointed out in the

warning that the data would become too old and unreliable if the inventory count reconciliation took that long to complete. The employer directed Mr. Wiltgen to work on time management and to complete tasks by the deadlines the employer provided. The employer warned that further similar issues could lead to further discipline up to and including discharge from the employment.

In January 2013 the employer noted that it did not have any performance concerns regarding Mr. Wiltgen at that time.

In March 2013 Ms. Huls notified Mr. Wiltgen that he would no longer be allowed to make up the time he took away from Palmer & Company to perform the soccer refereeing employment. This reduced the amount of time that Mr. Wiltgen had to perform his various duties for the employer. Until March 2013 the employer had allowed Mr. Wiltgen to make up the time he took away from Palmer & Company for the soccer-related employment. The employer removed the opportunity to make up the time after the employer concluded that Mr. Wiltgen was not using the make-up time wisely. In March 2013 Ms. Huls told Mr. Wiltgen that she perceived a particular email sent by Mr. Wiltgen to be very negative in tone because he had included bolding, underlining and exclamation points. The employer counseled Mr. Wiltgen that if he had concerns, he was to convey those to Ms. Huls and not include other staff in such emails.

Mr. Wiltgen then went about a year in the employment without the employer documenting any concerns with his work performance.

Toward the end of February 2014 Mr. Wiltgen asked Mr. Palmer for clarification of why he would not be assigned to lead a new warehouse project and Mr. Palmer clarified that it was due to his difficulty in completing assigned tasks on time.

On March 3, 2014 Mr. Wiltgen met with Mr. Palmer and Ms. Huls to further discuss concerns that he and the employer had about his position and performance. The employer expressed concern about Mr. Wiltgen performing assigned tasks in a timely manner by assigned deadlines. Mr. Wiltgen believed that the employer's inventory practices generated an excessive number of errors that made it difficult for him to meet inventory reporting deadlines set by the employer and asked the employer to make changes to his position and to the employer's inventory practices that would make it easier for him to meet reporting deadlines. Mr. Wiltgen expressed his belief that as an inventory specialist his workspace should be on the warehouse floor, not in the office. Mr. Wiltgen believed that the employer was underutilizing him. The employer wanted Mr. Wiltgen to conform to the employer's practices and did not always welcome Mr. Wiltgen's suggestions regarding changes that would make his job easier or changes that he felt would increase his usefulness to the employer. Prior to that meeting, both sides had expressed concern about whether the duties Mr. Wiltgen had been hired to perform were a good fit for him.

On the morning of March 14 Ms. Huls had observed Mr. Wiltgen engaged in non-inventory-related activity. Mr. Wiltgen had spent the first 25 minutes of his workday facilitating the workplace March Madness basketball brackets selection for his coworkers. Mr. Wiltgen admitted to have been engaged in that activity when Ms. Huls inquired about it.

On March 20, 2014 Mr. Wiltgen met with Ms. Huls and Ms. Reinders. Mr. Wiltgen discussed with the employer his upcoming soccer refereeing schedule, that he would have two to three games per week at 4:30 p.m. from April to mid-June. Mr. Wiltgen advised that he would need to leave Palmer & Company at 3:30 p.m. for the 4:30 p.m. games. Mr. Wiltgen's usual work hours were 8:00 a.m. to 4:30 p.m., Monday through Friday. The employer agreed to accommodate the soccer schedule, though Ms. Huls was disappointed that Mr. Wiltgen had not discussed the

soccer schedule with her before he agreed to it. However, Mr. Wiltgen had only a narrow window, a few days, in which to accept or decline the proposed schedule after it was presented to him. Ms. Huls reaffirmed at that meeting that Mr. Wiltgen would not be allowed to make up the time he missed from Palmer & Company to perform work in the other employment. This reduced the time that Mr. Wiltgen had to perform assigned duties by two to three hours per week. Ms. Huls told Mr. Wiltgen that in the future he would need to clear his soccer obligation with Ms. Huls prior to committing to the soccer refereeing schedule. Ms. Huls told Mr. Wiltgen that the employer might not always accommodate the two to three games per week schedule in the future.

On April 16, 2014 Mr. Wiltgen met with Mr. Palmer, Ms. Huls, and Ms. Reinders to discuss many concerns that he had with the employment. These concerns included the number of mistakes that the warehouse staff were making in performing inventory counts, which led to extra work for Mr. Wiltgen when he performed the inventory count reconciliation. Mr. Wiltgen asked that the employer have someone at the dock to check orders before they left the warehouse to ensure accurate inventory accounting at that point. Mr. Wiltgen asked that his work area be moved to the warehouse. Mr. Wiltgen told the employer that if his work hours were adjusted to the warehouse work hours, 6:00 a.m. to 2:30 p.m., then his soccer schedule would become a non-issue. Mr. Wiltgen raised concerns about the competing responsibilities that were assigned to him and his ability to perform them within the time allotted. Ms. Huls raised the question of whether Mr. Wiltgen was discontent with his job. Mr. Wiltgen replied that working in the office did not fit well with his assigned inventory duties. Mr. Wiltgen asked for clarity from the employer regarding how the employer saw his position evolving.

On Wednesday, May 7, 2014 Janet Colyer, Repack Scheduler, sent Mr. Wiltgen a message asking for a report that she needed to schedule production work. Mr. Wiltgen's duties included responsibility for such reports three times per week. The reports were to be submitted on Monday, Wednesday and Friday. When Ms. Colyer contacted Mr. Wiltgen on that Wednesday morning, Mr. Wiltgen had not yet submitted Monday's report. Ms. Colyer wrote: "I need a new report this morning ASAP, not at the end of the day." Mr. Wiltgen replied:

> I WILL GET YOU ONE WHEN I CAN. I DON'T NEED TO BE REMINDED!
>
> IF YOU HAVE CONCERNS ABOUT THE REPORT, PLEASE BRING IT TO HANNA [REINDERS] AND SHE CAN EXPLAIN TO YOU WHY MY HOURS ARE BEING CUT. THIS IS WHY YOU AREN'T GETTING REPORTS (YES I AM SHOUTING IN ALL CAPS).

Mr. Wiltgen had not completed the report that Ms. Colyer and others were after because he had been working on the month-end inventory reconciliation. Ms. Colyer forwarded the email to Ms. Reinders. Later that day, Mr. Palmer and Ms. Reinders met with Mr. Wiltgen to discuss the email. Mr. Wiltgen indicated that he felt it was unfair that the employer was not allowing him to make up time he lost from Palmer & Company when he was performing the soccer-related work. Mr. Palmer told Mr. Wiltgen that the arrangement was not going to change and that Mr. Wiltgen needed to move past it. Mr. Wiltgen indicated he could not move past it and that he was starting to think he should not be working for the employer. The employer subsequently decided to discharge Mr. Wiltgen from the employment.

REASONING AND CONCLUSIONS OF LAW:

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:
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> 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.
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> 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). 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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989). The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See Myers v Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

The evidence in the record establishes multiple reasons for the discharge. The employer considered the email message that Mr. Wiltgen sent on May 7, 2014. The employer considered what it believed to be a misrepresentation by Mr. Wiltgen that the employer had cut his hours. The employer considered Mr. Wiltgen's statement to the employer May 7 that he could not get over being upset by not being able to make up time missed due to his other employment. The employer considered Mr. Wiltgen's difficulty in meeting deadlines. The employer considered the impact of Mr. Wiltgen's second job on his primary employment. The employer concluded that Mr. Wiltgen was not a good fit for the employment.

In Richers v. Employment Appeal Board, 479 N.W.2d 308 (Iowa 1991), the Iowa Supreme Court concluded that where an employee's negligence in failing to perform a particular set of assigned duties arose out of a failure to prioritize competing duties to the employer's satisfaction, the conduct did not rise to the level of misconduct in connection with the employment and would not disqualify the claimant for benefits.

In this case, the employer minimizes its impact on Mr. Wiltgen's problem with meeting various report deadlines. The employer had indeed reduced the amount of time that Mr. Wiltgen had to perform his competing work duties. This made it more difficult for Mr. Wiltgen to get his work done in the time allotted. Mr. Wiltgen had gone to the employer a number of times with concerns about not having enough time to perform the various tasks assigned to him. Mr. Wiltgen had gone to the employer with recommendations of how the employer could assist him in improving his performance. The employer declined to act on those suggestions and insisted instead that Mr. Wiltgen find a way to make the employer's regimen work. Under the circumstances, the administrative law judge cannot find Mr. Wiltgen's failure to meet particular report deadlines to be misconduct that would disqualify him for unemployment insurance benefits. The employer's one instance of non-work-related activity on March 14, 2014 was not sufficient to prove a similar pattern of behavior. The evidence fails to establish a wanton or willful disregard of the employer's interests.

Mr. Wiltgen's email message was inappropriate. However, Mr. Wiltgen was responding in kind to a less than courteous email from the coworker. The email message demonstrated frustration and poor judgment, but did not rise to the level of misconduct that would disqualify Mr. Wiltgen for benefits.

The weight of the evidence indicates that the employer decided to move forward with discharging Mr. Wiltgen after the employer grew tired of dealing with various aspects of his employment and after he indicated dissatisfaction with the employment. Mr. Wiltgen's suggestions about how the employer could make the employment work better for him and better for the employer did not rise to the level of misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Wiltgen was discharged for no disqualifying reason. Accordingly, Mr. Wiltgen is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claims deputy's June 9, 2014, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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