IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANTHONY S JARMOLUK
Claimant

OLYMPIC STEEL IOWA INC
Employer

APPEAL NO. 15A-UI-11135-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/30/15
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Olympic Steel Iowa (employer) appealed a representative's September 28, 2015, decision (reference 01) that concluded Anthony Jarmoluk (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 19, 2015. The claimant participated personally. The employer participated by Lori Bassow, Human Resources Representative. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on July 24, 2013, and at the end of his employment he was working as a full-time outside sales representative. He was one of four outside sales representatives. The claimant received a copy of the employer's handbook when he was hired. The employer had some conversations with the claimant but did not issue the claimant any warnings.

On July 31, 2015, the employer issued the claimant a 90-day performance improvement plan. The claimant was to improve his performance within 90 days or he would be terminated. The employer indicated it would review his performance in 45 days, on September 14, 2015. The claimant was to send in his call reports daily, his expense reports weekly, to answer e-mails and voice messages on the day they were received, improve his engagement with inside sales people, set up sales calls a week in advance, develop a spread sheet, contact Robert Brinser, and improve tonnage and gross profit dollars in the third quarter of 2015.

By August 31, 2015, all of the outside sales representatives except one were struggling to send in daily call reports. Two of the four outside sales representatives were struggling to provide weekly expense reports. The claimant was answering e-mails and voice messages on the day they were received. He had a good relationship with inside the sales people and was uncertain

how to improve. The claimant was setting up his sales calls a week in advance. He had developed a spread sheet and had been using it since starting as an outside sales representative. He called Robert Brinser on August 31, 2015, and left a message. The third quarter of 2015, was not complete but he gained a large order and was certain his numbers for the quarter would improve.

The employer terminated the claimant on August 31, 2015, for unsatisfactory work performance. No other outside sales representatives were terminated. The employer did not have a specific final incident for which the claimant was terminated.

The claimant filed for unemployment insurance benefits with an effective date of August 30, 2015. The employer did not participate in the fact-finding interview on September 25, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer terminated the claimant for unsatisfactory work performance. Unsatisfactory conduct does not rise to the level of misconduct. The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer was not able to provide any evidence of a final incident of misconduct The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's September 28, 2015, decision (reference 01) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs