IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KOREY D HARRIS
Claimant

TRUGREEN LP
Employer

APPEAL NO. 06A-UI-11159-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/08/06 R: 02
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Korey Harris filed a timely appeal from the November 13, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 5, 2006. Mr. Harris participated. Kellen Anderson of Unemployment Services represented the employer and presented testimony through Operations Manager Rob Casey and Field Manager Martin Simpson. The hearing in this matter was consolidated with the hearing in Appeal Number 06A-UI-11160-JTT concerning a related overpayment issue. Employer's Exhibit One was received into evidence.

ISSUE:

Whether the claimant voluntarily quit the employment for good cause attributable to the employer.

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: Korey Harris was employed by Trugreen as a full-time laborer from April 2006 until September 18, 2006, when Operations Manager Rob Casey discharged him for failing to appear for a Saturday shift on September 16. Mr. Harris worked 6:30 a.m. to 4:30 or 5:00 p.m., Monday through Friday. The employer occasionally assigned Saturday work. The employer was aware that Mr. Harris had a part-time, weekend construction job. On September 4, Mr. Casey announced that the employer would require employees to work one or more Saturdays during September. On Monday, September 11, Mr. Casey had announced that there would be mandatory Saturday work on September 16. On September 15, Mr. Casey reminded Mr. Harris that the employer needed him to work on Saturday, September 16. The employer needed Mr. Harris to transport a spray technician to a job site because the spray technician had lost his driving privileges. Mr. Harris told Mr. Casey that he would be unable to appear for work on September 16 because he was obligated to appear for his weekend construction job. Mr. Casey told Mr. Harris he had to choose between his full-time employment with Trugreen and his part-time weekend

construction job. Mr. Harris did not appear for work at Trugreen on September 16. When Mr. Harris subsequently appeared for work, Mr. Casey told Mr. Harris that the employer no longer needed his services. Aside from Mr. Harris' inability to appear for Saturday shifts, Mr. Casey considered Mr. Harris a dependable worker. Aside from the absence on September 16, Mr. Harris had been absent for all or part of August 25 for personal reasons.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether Mr. Harris quit or was discharged from the employment. 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. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 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 871 IAC 24.25.

The weight of the evidence indicates that the employer initiated the separation from the employment. First, the employer told Mr. Harris he had to choose between his two jobs. Second, after Mr. Harris went to his weekend job instead of appearing at Trugreen on September 16, the next time Mr. Harris appeared for work the employer told him he was no longer needed. The evidence fails to indicate that Mr. Harris at any point announced an intention to sever the employment relationship. The evidence fails to establish that Mr. Harris engaged in any overt act that indicated an intention to sever the employment relationship. Based on the evidence in the record, the administrative just concludes Mr. Harris did not voluntarily quit but was discharged from the employment.

The next question is whether the evidence in the record establishes that Mr. Harris was discharged for misconduct in connection with the employment. It does not.

Iowa Code section 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 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).

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).

In order for Mr. Harris' absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his *unexcused* absences were excessive. See 871 IAC 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 871 IAC 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).

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 Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed

over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The evidence in the record establishes that both the employer's request that Mr. Harris work on Saturday, September 16, and Mr. Harris' refusal to work that day were reasonable. In addition, the evidence fails to establish any other instances wherein Mr. Harris refused to follow the employer's directive. Accordingly, the evidence does not establish insubordination. The evidence further establishes that Mr. Harris was absent on September 16 for what amounted to personal reasons. Accordingly, the absence would be unexcused under the applicable law. Likewise, the August 25 absence for a court appearance would also be unexcused. The evidence fails to establish any other unexcused absences. The administrative law judge concludes that Mr. Harris' unexcused absences were not excessive and, therefore, did not constitute misconduct.

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

DECISION:

The Agency representative's November 13, 2006, 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

jet/kjw