IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

WILLY M LUMBWELE
Claimant

HAWKEYE SEWER & DRAIN
Employer

APPEAL NO: 08A-UI-01278-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/06/08 R: 03
Claimant: Respondent (1)

Section 96.5-1 – Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Hawkeye Sewer & Drain (employer) appealed a representative's January 31, 2008 decision (reference 01) that concluded Willy Lumbwele (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 20, 2008. The claimant participated personally. The employer participated by Jeff Waite, Owner. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

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 September 5, 2007, as a full-time trainee. The claimant came to the United States of America in 1993 and his first language is French. When he first learned English he learned a British form of English. He continues to have problems knowing the correct American English name for items.

The employer hired the claimant as an unskilled worker hoping to give the claimant a chance to learn the job. The claimant gave the employer his driver's license. The employer discovered the claimant's license was suspended for failure to pay a fine. The employer loaned the claimant money to pay the fine. The reissuance of the license was delayed as the government had to perform a Homeland Security check.

The employer issued the claimant a company cellular telephone. The claimant and other workers used the cellular telephone for personal use. On or about October 18, 2007, the employer received the bill and talked to the employees. The claimant signed the employer's manual containing the company's Cell Phone Use Policy on October 18, 2007.

Unknown workers told the employer the claimant was smoking dope and trying to talk other workers into engaging in that activity. The employer had no first-hand knowledge of any drug activity on the part of the claimant. The claimant denies such conduct.

The claimant lived across the hall from an older gentleman. The gentleman asked the claimant to run errands for him with his car. The claimant did so. Later the man was ill and had to go to the hospital. He asked the claimant to take care of the car while he was in the hospital. Someone complained that the claimant had stolen the car. On or about December 25, 2007, the police questioned the claimant about the car. The employer was upset about this incident and the claimant's failure to understand the work. He terminated the claimant. After the claimant begged for his job back, the employer complied. At the neighbor's request, the claimant continues to run errands using the neighbor's car now that the gentleman is out of the hospital.

On January 5, 2008, the claimant was working with the employer. The employer sent the claimant to the truck to get emery cloth. The claimant returned and said he could not find emery cloth. The employer went to the truck, picked up what the claimant understood to be sand cloth and yelled at the claimant for not finding the emery cloth. The claimant terminated the claimant during a probationary period for not grasping the work and learning the names of the tools. The employer felt the claimant was trying to learn and meant well but was not learning quickly enough.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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.

871 IAC 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). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979). The employer did not provide any evidence of intent at the hearing. The claimant's failure to properly perform his work was due to inability or incapacity.

The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer provided areas of concern such as the problem with the driver's license in September 2007, the incident with the police around December 25, 2007, and the use of the company cellular telephone in October 2007. None of these issues occurred near the time of termination.

The employer indicated that his employees said the claimant was using an illegal substance and encouraging other employees to use the substance. The employer did not hear the claimant engage in this conversation and did not offer any witness who heard this type of conversation. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct.

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. Benefits are allowed

DECISION:

The representative's January 31, 2008 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