IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CODY D WEINACHT
Claimant

WORLD CLASS INDUSTRIES INC
Employer

APPEAL NO. 07A-UI-02591-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/04/07 R: 03
Claimant: Respondent (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

World Class Industries filed a timely appeal from the March 6, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 29, 2007. Claimant Cody Weinacht did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Jenny Gundacker, Controller, represented the employer and presented additional testimony through Dennis Cobb, Director of Manufacturing. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Cody Weinacht was employed by World Class Industries as a full-time warehouse assembler from December 4, 2006 until February 6, 2007, when Dennis Cobb, Director of Manufacturing, discharged him for attendance and poor attitude.

The final incident that prompted the discharge was Mr. Weinacht's absence from work on February 1 and 2, 2007, when Mr. Weinacht was absent due to illness. The employer has a written attendance policy set forth in an employee handbook. The policy required Mr. Weinacht to notify his immediate supervisor prior to the scheduled start of his shift if he needed to be absent. Mr. Weinacht properly notified the employer of the absences on February 1 and 2. Mr. Weinacht properly reported another absence due to injury on January 25, after Mr. Weinacht had been assaulted. Mr. Weinacht properly reported an additional absence due to illness on December 11, 2006. Mr. Weinacht was tardy at times, but the employer documented only the tardiness on January 4, when Mr. Weinacht was late because he had overslept.

On January 25, after Mr. Weinacht was assaulted by an ex-girlfriend, Mr. Weinacht made comments about getting revenge. The employer is not aware of anything to indicate that Mr. Weinacht acted upon those comments. The employer is otherwise unable to provide details regarding remarks Mr. Weinacht may have made that the employer deemed inappropriate.

REASONING AND CONCLUSIONS OF LAW:

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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).

In order for Mr. Weinacht's 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).

The evidence in the record establishes that Mr. Weinacht's absences on February 1 and 2 were for illness properly reported to the employer and, therefore were excused absences under the applicable law. Because the final absences that prompted the discharge were excused absences, the evidence fails to establish the "current act" upon which a disqualification for benefits must be based. See 871 IAC 24.32(8). Mr. Weinacht's absences on January 25 and December 11 were also for illness properly reported and were excused absences under the applicable law. The evidence in the record establishes only one absence that would be unexcused, the tardiness on January 4. This absence did not constitute a "current act." In addition, one unexcused absence does not constitute misconduct. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Mr. Weinacht's off-color remark about getting revenge on his ex-girlfriend, uttered the day after the ex-girlfriend gave him a broken nose, did not constitute misconduct and was not a "current act." See 871 IAC 24.32(1)(a) and (8).

Though the decision to discharge Mr. Weinacht from the employment was within the discretion of the employer, the evidence in the record establishes that Mr. Weinacht was discharged for no disqualifying reason. Accordingly, Mr. Weinacht is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Weinacht.

The administrative law judge notes that this employer is not a "base period" employer and, therefore, is not being assessed for benefits paid to Mr. Weinacht during the current benefit year that began February 4, 2007 and that will end February 3, 2008. Thus, the employer's potential liability for benefits would be limited to benefits Mr. Weinacht might receive during the next benefit year that would begin on or after February 4, 2008. The employer's liability at that point would rest on Mr. Weinacht having an active claim for benefits and being eligible for benefits, and would be commensurate with the limited wages paid to Mr. Weinacht during the short period of employment.

DECISION:

The claims representative's March 6, 2007, reference 01, decision is affirmed. 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

_____
Decision Dated and Mailed

jet/pjs