IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

KYLE J BIXLER Claimant **OSKALOOSA WATER DEPARTMENT** Employer	**APPEAL NO. 21A-UI-23579-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/12/21** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant, Kyle Bixler, filed a timely appeal from the October 15, 2021, reference 01, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on September 14, 2021 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on December 14, 2021. The claimant participated personally and was represented by attorney Kathryn Leidahl. Attorney Lindsay Vaught represented the employer and presented testimony through Kelly Hefner and Jason Hacker. Exhibits 1, 3, 4, 6 through 9, and A through E 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: The claimant, Kyle Bixler, was employed by Oskaloosa Water Department as a full-time maintenance worker from July 2019 until September 14, 2021, when Kelly Hefner, General Manager, discharged him from the employment. The claimant's work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. The claimant was required to work at the water plant every fifth weekend on Saturday and Sunday. Jason Hacker, Operations Manager, was the claimant's immediate supervisor. The claimant's duties included mowing, "weed-wacking," switching out water meters, and assisting with water main leaks and breaks. From August 16, 2021 through September 13, 2021, the claimant was off work due to COVID-19 illness. The claimant was medically released to return to work on September 14, 2021 and was discharged on his first day back at work.

The employer cites alleged insubordination and an unauthorized extended break on September 14, 2021 as the final incidents that triggered the discharge. At 6:27 a.m. on September 14, 2021, Mr. Hacker sent a text message to the claimant: "Kyle, I want you to go to the plant this morning and weed eat and mow around wells and markers in the well field. I will

be out a little later to finish brush hogging." The claimant operated the handheld string trimmer for four to five hours that day. The claimant also performed some or all of the mowing around the well heads.

At about 11:00 a.m., shortly before the claimant took his 30-minute lunch break, Mr. Hacker spoke to the claimant at the water plant. Mr. Hacker asked the claimant how he was feeling. The claimant told Mr. Hacker that things were a little difficult. The claimant referenced issues with his breathing. Mr. Hacker remarked that he could tell the claimant had lost weight in connection with his illness. Mr. Hacker told the claimant that if it became too hot, the claimant could probably do performing "brush hogging," but that Mr. Hacker would otherwise perform that work later in the day when he arrived. In light of the claimant's lingering health issues, Mr. Hacker told the claimant to take it easy and slow that day.

The claimant performed additional string trimming work after his lunch break. The claimant got the tractor and headed to the levy area to perform "brush hogging" work that he knew Mr. Hacker did not like to perform because of the inclined slopes. Mr. Hefner had seen someone drive by on the tractor and assumed it was Mr. Hacker until he contacted Mr. Hacker and learned the claimant was on the tractor. While the claimant was performing the brush hogging work, he received a non-work related telephone call. Mr. Hefner generally did not mind if staff took outside calls during the workday. The claimant's call lasted less than six minutes. While the claimant was in the levy area, Mr. Hefner and Mr. Hacker went to check up on the claimant. They noted the tractor was stationary for more than 20 minutes. Mr. Hefner assumed the claimant was loitering and decided to discharge the claimant from the employment. Later that day, after the claimant had performed additional brush hogging, Mr. Hefner summoned the claimant to a meeting at which he discharged the claimant from the employment. The employer did not ask the claimant what he had been doing while the tractor was stationary. When the claimant attempted to explain, Mr. Hefner told the claimant it would make no difference in his decision. There had been no prior concern with the claimant taking unauthorized or extended breaks.

The employer cites earlier incidents as factors in the discharge. In April 2021, Mr. Hacker had directed the claimant to wash and clean out vehicles while Mr. Hacker was away from work. The claimant ended up helping another plant work at the plant. In May 2021, the claimant burned a pile of tree limbs too close to a pine tree. The wind carried the flames to the pine tree and burned a portion of the tree. Earlier in the week, the claimant and another staff member had conducted a controlled burn. The claimant and a coworker had previously burned two other piles of brush in the vicinity of the fire that moved to the pine tree. The employer had directed the claimant to trim the trees and move the limbs across the road to a disposal area. The claimant elected to burn the limbs instead. On one day in July 2021, the claimant brought his private backpack weed sprayer to the workplace and used it to perform his work duties. The claimant had previously asked to bring the sprayer to work and the employer had told the claimant not to bring it. The employer had two concerns about the sprayer. The employer did not want to have to replace the sprayer if it was broken in the course of the claimant performing his work duties. The employer was concerned about the weight of the backpack sprayer and the associated potential for injury. The claimant did not again bring the backpack sprayer.

The employer did not issue formal reprimands to the claimant prior to discharging the claimant from the employment. At a couple of performance reviews, the employer raised concerns about the claimant's ability to follow and comply with instructions. In January 2021, the employer issued a memo in which the employer raised concern about the claimant using his sick-time allotment. The claimant had hip issue that required him to use sick time in November and December 2020. The claimant has a jaw issue for which he wears a retainer. The retainer

broke in January 2021. Given the nature of the health issue, time was of the essence and seeking a replacement. The claimant requested time off for that purpose and Mr. Hefner approved the request. However, Mr. Hefner subsequently issued the memo regarding the claimant's use of sick time. In the spring of 2020, the claimant fell and broke his phone in the course of performing his work duties. Mr. Hefner instructed the claimant to report his time away from the workplace to address the phone issue as sick time, but later faulted the claimant for using the time.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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).

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 Iowa Administrative Code rule 871-24.32(4).

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).

The evidence in the record establishes a discharge for no disqualifying reason. The evidence fails to establish a refusal to follow reasonable directives on September 14, 2021. The employer had assigned tasks and added the brush hogging option in light of the claimant's lingering health issues. The claimant performed a substantial amount of work that day. The employer unreasonably discounts the physical toll of operating a handheld string trimmer for four to five hours, especially given the claimant's post-COVID status. The employer asserts the claimant took an excessive, unauthorized break. Even if true, Mr. Hacker had invited the claimant to "take it easy" and "take it slow" that day. Even if true, the incident was an isolated incident. The evidence does not establish a pattern of loitering or of taking unauthorized breaks. The employer's decision to discharge the claimant on his first day back from a month-long absence due to illness is by itself suspect.

The evidence does not establish a pattern of unreasonable refusal to comply with reasonable directives demonstrating a willful and wanton disregard of the employer's interests. That is not to say there were no incidents wherein the claimant unreasonably failed to comply with reasonable directives. The employer presented insufficient evidence to establish an unreasonable refusal to comply with a reasonable directive in connection with the April 2021 car washing concern. The claimant ended up assisting another staff member at the plant instead. The employer presented insufficient evidence to prove that the claimant's action was unreasonable under the circumstances. The claimant unreasonably disregarded a reasonable directive and was careless in connection with the burnt pine tree incident in May 2021. The claimant unreasonably failed to follow the employer's reasonable directive not to bring the backpack sprayer to work by bringing the sprayer to work one time in July 2021.

Because the weight of the evidence establishes a discharge for no disqualifying reason, the claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 15, 2021, reference 01, decision is reversed. The claimant was discharged on September 14, 2021 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

January 18, 2022
Decision Dated and Mailed

jet/scn