IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAKOTA J TROYER
Claimant

CHAPMAN CONTRACTING LLC
Employer

APPEAL NO. 16A-UI-06519-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/08/16
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 31, 2016, reference 01, decision that allowed benefits to the claimant, provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant had been discharged on May 9, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on June 28, 2016. Claimant Dakota Troyer did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Dan Chapman represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit A into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview.

ISSUES:

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

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dan Chapman owns and operates Chapman Contracting, L.L.C., a construction contracting firm. Dakota Troyer was employed by Chapman Contracting as a full-time laborer from January 25, 2016 until May 9, 2016, when Mr. Chapman discharged him from the employment. The work hours were generally 7:30 a.m. to 5:00 p.m., Monday through Friday. Mr. Chapman generally functioned as Mr. Troyer's immediate supervisor. Mr. Troyer worked as part of a construction crew.

The final incident that triggered the discharge occurred on Friday, May 6, 2016. On that day, Mr. Troyer was assigned to assist the crew with a roofing project. Mr. Troyer was specifically assigned to hand shingles and nails to another member of the crew. While Mr. Troyer was up on the roof of the one-story house, Mr. Troyer slid, became frightened, and told another crew

member that he could not remain on the roof. The roof had a standard 4/12 pitch and was not steep. After Mr. Troyer said he could not remain on the roof, the employer assigned Mr. Troyer to collect garbage from the job site for the last couple hours of the shift. Mr. Chapman did not speak directly with Mr. Troyer about the matter. On Monday, May 9, 2016, Mr. Chapman notified Mr. Troyer that he no longer needed him to come to work.

In making the decision to end Mr. Troyer's employment, Mr. Chapman also considered Mr. Troyer's attendance. Mr. Troyer had been absent on April 11 and 12, 2016 without notifying Mr. Chapman. Though Mr. Chapman's company lacked a written attendance policy, Mr. Chapman had told Mr. Troyer that he expected Mr. Troyer to call him at or before the scheduled start of the work day if Mr. Troyer needed to be absent. After the absence on April 12, there were no additional absences that factored in the discharge. There were a couple earlier absences wherein Mr. Troyer notified Mr. Chapman that he would be late, but then did not appear for the shift.

Mr. Troyer established a claim for benefits that was effective the week that started May 8, 2016. Mr. Troyer's base period for purposes of the claim year that started on May 8, 2016 consists of the four quarters of 2015. The employment with Chapman Contracting, L.L.C. started during the first quarter of 2016. Chapman Contracting is not one of Mr. Troyer's base period employers and has not been charged for benefits paid to Mr. Troyer in connection with the claim year that started on May 8, 2016.

REASONING AND CONCLUSIONS OF LAW:

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).

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 a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The evidence in the record fails to establish a current act of misconduct. The final incident that triggered the discharge was Mr. Troyer's expression of concern for his safety toward the end of the work day on Friday, May 6, 2016. Mr. Troyer expressed his concern to another member of the crew. The weight of the evidence fails to establish that Mr. Troyer refused to perform assigned duties on May 6, 2016. The evidence indicates instead that Mr. Troyer expressed

concern for his safety in connection with a particular project and that a more senior crew member elected to assign Mr. Troyer to other duties for the remainder of the day. The matter appears to have been an isolated incident. The evidence fails to establish misconduct in connection with the final incident that triggered the discharge. The next most recent matters that factored in the discharge were the no-call, no-show absences on April 11 and 12. While both absences were unexcused absences under the applicable law, they were too remote in time to constitute a current act for purposes of determining Mr. Troyer's eligibility for unemployment insurance benefits.

Because the evidence establishes a discharge that was not based on a current act of misconduct, the evidence fails to establish a basis for disqualifying Mr. Troyer for unemployment insurance benefits. Because Mr. Troyer was discharged for no disqualifying reason, he is eligible for benefits, provided he is otherwise eligible. Because the employer is not a base period employer, the employer has not and will not be charged for benefits paid to Mr. Troyer in connection with the benefit year that began for Mr. Troyer on May 8, 2016. However, in the event that Mr. Troyer establishes a new claim year, is deemed eligible for benefits, and the employer is at that point determined to be a base period employer, the employer's account may then be charged for benefits paid to Mr. Troyer.

DECISION:

The May 31, 2016, 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 as outlined above.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs