**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**HEITH G KESSLER**
Claimant

**D A BUNCH CO**
Employer

**APPEAL NO. 15A-UI-11189-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 01/18/15**
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Heith Kessler filed a timely appeal from the September 28, 2015, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Mr. Kessler had been discharged on September 4, 2015 for misconduct in connection with the employment. After due notice was issued, a hearing was held on October 21, 2015. Mr. Kessler participated. Craig Dostal represented the employer and presented additional testimony through Dean Melsha. Exhibit A was received into evidence.

**ISSUE:**

Whether Mr. Kessler was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits and that relieves the employer of liability for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a commercial painting contractor. Heith Kessler worked for the employer during multiple separate periods. The most recent period of employment began in the spring of 2015 and lasted until September 4, 2015, when Craig Dostal, President, discharged Mr. Kessler from the employment. Mr. Kessler worked as a full-time journeyman painter. Mr. Dostal was Mr. Kessler's primary supervisor. Estimator/Project Managers Dean Melsha and Rick Ciha also had authority over Mr. Kessler's day-to-day work assignment. A designated jobsite foreman, if one was assigned to the particular project, also had limited authority over Mr. Kessler's work. Mr. Kessler's work involved working both outdoors and indoors, depending on the particular project. The indoor work was not always in a temperature controlled environment.

During the summer of 2014, Mr. Kessler began to suffer from a rectal medical issue that was made worse when Mr. Kessler worked in the heat. Mr. Kessler had undergone a surgical procedure to address the issue, but that did not resolve the issue. Mr. Kessler's medical issue again worsened in 2015 as the warm weather returned. In June 2015, Mr. Kessler left work early a few times due to his medical condition and his inability to remain and perform his duties due to pain and other attending medical issues. On June 11, 2015, Mr. Kessler provided the

employer with a doctor's note that stated Mr. Kessler should only be assigned work indoors for the next month and that his condition would be reevaluated in July 2015. In mid-July, Mr. Kessler provided the employer with a doctor's note that stated he "will need to remain indoors for work until 9-1-15." On July 27, 2015, Mr. Kessler again left work early due to his aggravated medical condition. With each departure, Mr. Kessler had notified the jobsite supervisor of his need to leave. Prior to his discharge from the employment, Mr. Kessler did not provide the employer with any additional medical documentation after the note he provided to the employer in mid-July.

The final incident that prompted the discharge concerned text messages that Mr. Kessler sent to Mr. Ciha and Mr. Melsha on the morning of September 3, 2015. As far as the employer knew, Mr. Kessler's need to work indoors had expired on September 1, 2015, as indicated in the note that Mr. Kessler had provided in mid-July. On September 3, Mr. Kessler and another employee were assigned to a painting project at the VA Center in Iowa City. The coworker advised Mr. Kessler that, pursuant to the employer's instructions, Mr. Kessler was to perform the outside work and the other employee was to perform the inside work. This arrangement was upsetting to Mr. Kessler. Mr. Kessler elected to express his displeasure through the text messages he sent to Mr. Ciha and Mr. Melsha. At 8:29 a.m., Mr. Kessler sent the following message to Mr. Ciha: "How the fuck do I end up in a fucking parking lot on a fucking 90 degree day? This is fucking bullshit." Mr. Melsha shared the text message with Mr. Dostal.

Mr. Kessler sent a series of text messages to Mr. Ciha. Mr. Kessler began by writing, "Really, a fucking parking lot on the 90* day. It's going to be a short day." Mr. Ciha replied, "Not my call man." Mr. Kessler then wrote, "Apparently a fucking doctor's excuses aren't enough. Good chance I'm not coming in tomorrow unless I'm inside." Mr. Ciha replied, and erroneously asserted, "Heith, that doctor's excuse expired almost two months ago." Mr. Kessler then wrote, "I have a new one I didn't bother turning in. Just figured you assholes would figure it out." Mr. Kessler was referring to Mr. Dostal, Mr. Ciha, and Mr. Melsha. Mr. Ciha showed the text message correspondence to Mr. Dostal. Mr. Dostal directed Mr. Ciha to have Mr. Kessler come speak with him. Mr. Kessler initially responded, "Great," but then began to make apologies for his offensive language and behavior.

On September 4, Mr. Dostal met with Mr. Kessler and discharged him from the employment. Mr. Dostal considered the text messages, the prior early departures, and the negative effect that the early departures had on the morale of other employees. The employer did not encourage or tolerate the sort of offensive language that Mr. Kessler used in his text messages. Instead, the employer encouraged employees to remain professional in their dealings.

**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.

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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant

disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

Mr. Kessler's medical circumstances, and his concern about his health issues, in no manner justified or excused the offensive language he directed at people he knew to have supervisory authority over his work. Mr. Kessler stepped over the line before he wrote the "assholes" remark. But with that remark, he sealed his fate, both with regard to his employment and with regard to his eligibility for unemployment insurance benefits. That utterance was an extraordinarily offensive attack on the employer's authority to direct Mr. Kessler's work. The work assignment on September 3 had been based on the information that Mr. Kessler had provided to the employer. The employer could not be faulted for assigning work that the employer in good faith believed Mr. Kessler was at that point released to perform. Instead, Mr. Kessler had been negligent in not providing the employer with updated medical information. In any event, Mr. Kessler elected to wage a verbal assault directed at multiple supervisors, rather than address his concerning in a rational manner. Mr. Kessler's text messages constituted misconduct in connection with the employment. Mr. Kessler is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Kessler for the period on or after September 4, 2015.

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).

The June and July absences that the employer considered were each due to illness and were each appropriately communicated to a supervisor. Accordingly, the absences were excused absences under the applicable law and did not constitute misconduct in connection with the employment.

**DECISION:**

The September 28, 2015, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged for benefits paid to the claimant for the period on or after September 4, 2015.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css