IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEFFREY L MYERS
Claimant

CONSOLIDATED GRAING & BARGE CO
Employer

APPEAL NO. 15A-UI-00698-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/07/14
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 January 8, 2015, 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 December 3, 2014 for no disqualifying reason. After due notice was issued, a hearing was held on February 11, 2015. Claimant Jeff Myers participated. Jennifer Groenwold of Equifax represented the employer and presented additional testimony through Nancy Parli, Trent Woulfe, and Franki Houston. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five 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: Jeffrey Myers was employed by Consolidated Grain & Barge Company as a full-time outside laborer at the employer's Weaver, Iowa location from June 2013 until December 3, 2014 when Trent Woulfe, Supervisor, discharged him from the employment for attendance. Mr. Woulfe joined the company and became Mr. Myers immediate supervisor on November 14, 2014. The employer had an attendance policy located in an employee handbook. The written policy indicates that employees are required to notify their supervisor "as soon as reasonably possible" if they needed to be absent from work. The policy also indicates that failure to give the supervisor sufficient notice may result in disciplinary action. The policy also indicates that, "Employees who fail to report to work without notifying their manager will be considered to have voluntarily resigned his/her employment with CGB." Mr. Myers received a copy of the employee handbook when he started in the employment.

The absences that prompted the employer to call the employment terminated occurred on November 26, November 29, and December 3, 2014. Mr. Myers was absent due to illness on each of those days. In the past, Mr. Myers had contacted his former supervisor at the supervisor's cell phone number when he needed to be absent. Mr. Myers had the cell phone number for the prior supervisor. At the time of the three absences that led to the separation from the employment, the employer had not yet provided Mr. Myers with Mr. Woulfe's cell phone number. In that absence of such contact information, Mr. Myers elected to notify the employer his need to be absent by sending word with his coworker that he rode to work with; Randy Nichols. While Mr. Nichols did not have any supervisory authority over Mr. Myers' employment, Mr. Nichols had been with the employer for 20 years. Mr. Myers knew that Mr. Nichols would arrive at the worksite before others and would provide his absence information to the employer. Mr. Myers did not think to contact the employer's office to obtain Mr. Woulfe's contact information. Mr. Myers had returned to work on November 28 after his absences on November 26 and the Thanksgiving holiday on November 27. When Mr. Myers returned to work, no one said anything to him to indicate that his method of notifying the employer of his need to be absence was unacceptable.

After Mr. Myers sent word with Mr. Nichols on December 3 that he would be absent due to illness that day, Mr. Woulfe telephoned Mr. Myers and told him the employment was ended due to attendance. Mr. Myers had not received any reprimands for attendance.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The weight of the evidence does not support the employer's assertion that Mr. Myers voluntarily quit the employment. Mr. Myers said nothing to indicate he intended to quit and took no overt action to suggest that he intended to quit. The evidence indicates instead that the employer discharged Mr. Myers from the employment.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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.
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> 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 establishes a bonafide good faith error in judgment on the part of Mr. Myers with regard to reporting the three absences in question. There was a new supervisor. The new supervisor had not provided Mr. Myers with a contact phone number. In the absence of such contact information, Mr. Myers did what he in good faith concluded was the next best thing and sent word with his much senior coworker. The coworker did indeed convey the information to Mr. Woulfe. The absences were due to illness. The employer contributed to the absences not being reported to the supervisor by failing to provide appropriate contact information to the supervisor. Under the circumstances, the administrative law judge concludes that each of the absences was an excused absence under the applicable law and, therefore, cannot be used as a basis for a finding of misconduct or for disqualifying the claimant for benefits. The claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

January 8, 2015, 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

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Decision Dated and Mailed

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