IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NICHOLAS J BIERMAN
Claimant

US GRAIN STORAGE SYSTEMS INC
Employer

APPEAL NO. 17A-UI-09925-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/30/17
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 September 22, 2017, reference 04, 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 the claims deputy's conclusion that the claimant was discharged on September 9, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on October 26, 2017. Claimant Nicholas Bierman participated. Jennifer Briggs-Moen, Hiring Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which reflects that no benefits have been disbursed to the claimant since the separation from the employment. Exhibits 1, 2, 3, 5 and 6 were into evidence.

ISSUE:

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: Nicholas Bierman was employed by U.S. Grain Storage Systems, Inc., as a full-time general laborer from August 7, 2017 until September 9, 2017, when Larry Moen, President and owner, discharged him from the employment for failure to follow instructions and unsatisfactory work performance. Mr. Bierman is a 26-year-old high school graduate.

Mr. Bierman has been diagnosed with attention deficit hyperactivity disorder (ADHD) and obsessive compulsive disorder (OCD). One-fourth of Mr. Bierman's high school coursework was regular coursework. Three-fourths of Mr. Bierman's high school coursework was special education programming.

When Mr. Bierman worked for U.S. Grain Storage Systems, he worked as part of a construction crew that would travel from Iowa to the designated construction site for the work week. The employer initially assigned Mr. Bierman to a site in Wisconsin, but moved Mr. Bierman to a site in Illinois after the jobsite supervisor in Wisconsin complained to Jennifer Briggs-Moen, Hiring Manager, that Mr. Bierman was not following instructions or staying on task. After the employer moved Mr. Bierman to the Illinois jobsite, Larry Moen and others at the jobsite became frustrated by Mr. Bierman's less than satisfactory performance. However, Mr. Bierman performed the work in good faith and to the level of his ability. Mr. Bierman did not knowingly or intentionally perform assigned tasks in an unsatisfactory manner. Mr. Moen ended the employment and told Mr. Bierman that he could not let him travel with the crew to the next jobsite.

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 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).

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 fails to establish misconduct in connection with the employment. The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish that Mr. Bierman willfully and wantonly disregarded instructions or the interests of the employer. The administrative law judge notes that the employer did not have anyone who was actually on the jobsite with Mr. Bierman testify in the hearing. The employer had the ability to present such testimony. The weight of the evidence establishes that Mr. Bierman performed the work in good faith and to the level of his ability. Under the circumstances, Mr. Bierman's failure to perform to the employer's satisfaction was not misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Bierman was discharged for no disqualifying reason. Accordingly, Mr. Bierman is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits. The administrative law judge notes that this employer is not a base period employer for purposes of the claim year that began for Mr. Bierman on April 30, 2017. For that reason, the employer is not subject to charges for benefits in the current year. However, the employer's account may be charged for benefits paid in a subsequent benefit year if Mr. Bierman is at that time deemed eligible for benefits and the employer is at that time deemed a base period employer.

DECISION:

The September 22, 2017, reference 04, decision is affirmed. The claimant was discharged on September 9, 2017 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/rvs