IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 04A-UI-04051-CT
OC: 03/14/04 R: 04
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Donald Stecklein filed an appeal from a representative's decision dated April 6, 2004, reference 01, which denied benefits based on his separation from FBG Service Corporation (FBG). After due notice was issued, a hearing was held by telephone on May 3, 2004. Mr. Stecklein participated personally and was represented by Mark Sullivan, Attorney at Law. Exhibits A through F, and K were admitted on Mr. Stecklein's behalf. The employer participated by Al Williams, Corporate Director of Safety and Risk, and was represented by Dawn Fox, Attorney at Law. Exhibits One through Six were admitted on the employer's behalf.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Stecklein was employed by FBG from November 23, 1998 until March 16, 2004. He was last employed full time performing striping and other duties as assigned. He was discharged based on allegations of dishonesty. Mr. Stecklein received a written warning on November 28, 2001 for falsifying his time records. He claimed he worked almost two hours more than he actually worked. On May 17, 2002, Mr. Stecklein received a written warning for taking excessive and unscheduled breaks.

The decision to discharge Mr. Stecklein was based on responses he gave during a deposition held on November 11, 2003 concerning his worker's compensation claim. He was asked if he did anything different in his job as a result of his injury. He indicated that he did not carry five-gallon totes anymore. He also stated, ". . . I won't help on snow removal or do lawn care, you know, push a lawnmower or any of that manual stuff because it tends to irritate the testicle." He did assist in both snow removal and lawn care after the injury. He limited himself to snow removal that he could perform from the riding implement and to lawn care he could perform from the riding mower. He was later asked during the deposition if he had missed out on a lot of overtime because of his injury, to which he indicated that he had. He was also asked if he was working as much overtime at that point as he had prior to the injury. Mr. Stecklein indicated that he was not. The actual number of overtime hours he had worked after the injury exceeded the number of overtime hours he had worked prior to the injury. However, but for the residuals of his injury, he could have worked even more overtime after the injury.

Mr. Stecklein's deposition responses were brought to the employer's attention in December of 2003 when the attorney representing the employer in the deposition requested information relative to the responses. The employer received a transcript of the deposition in February but no action was taken until March. Al Williams was away from his office during the bulk of February. The other management individual involved in the matter, Bill Redmond, was available during this time and had the authority to discharge. Mr. Stecklein was not notified of his discharge until March 16, 2004.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Stecklein was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct in connection with the employment. The employer had the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer's burden included establishing that the discharge was predicated on a current act of misconduct. See 871 IAC 24.32(8). In the case at hand, the employer was made aware of Mr. Stecklein's deposition statements in December but he was not discharged until March. The employer could have obtained a transcript in December but did not obtain one until February. The employer still delayed the discharge until mid-March. While Mr. Williams may not have been available, Mr. Redmond was and had the authority to take disciplinary action, including discharge, in Mr. Williams' absence. The evidence of record does not establish any good cause for the delay in discharging Mr. Stecklein. It is concluded, therefore, that the employer has failed to establish a current act of misconduct in relation to the discharge date.

Even if the administrative law judge were to conclude that the conduct complained of constituted a current act, the evidence still would not establish disqualifying misconduct.

Mr. Stecklein did not deny performing either lawn care or snow removal duties during the deposition. He qualified his response by indicating that he did not perform the more manual aspects of those jobs because of irritation to his injury. His response regarding overtime is susceptible of two interpretations. One would be that he was not getting as many hours of overtime as he had prior to the injury. The other interpretation would be that he was not getting as much overtime as he could if he did not have the injury. The administrative law judge cannot conclude that his statement was absolutely false. For the above reasons, the administrative law judge concludes that Mr. Stecklein did not make false statements during the deposition. Therefore, the employer's allegation of dishonesty in reference to the deposition has not been established.

After considering all of the evidence and the contentions of the parties, the administrative law judge concludes that the employer has failed to satisfy its burden of proof in this matter. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). For the reasons stated herein, benefits are allowed.

DECISION:

The representative's decision dated April 6, 2004, reference 01, is hereby reversed. Mr. Stecklein was discharged by FBG but misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

cfc/b