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

DOUGLAS J OLIVER
3717 – 210TH ST
CLINTON IA 52732-8920

ALTORFER INC
2600 – 6TH ST SW
PO BOX 1347
CEDAR RAPIDS IA 52406-1347

Appeal Number: 06A-UI-02629-RT
OC: 02/12/06 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:

The claimant, Douglas J. Oliver, filed a timely appeal from an unemployment insurance decision dated February 27, 2006, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on March 23, 2006, with the claimant participating. Linda A. Rose, Field Service General Manager, and Erik C. Driessen, Human Resources Manager, participated in the hearing for the employer, Altorfer, Inc. Employer's Exhibits One through Three and Claimant's Exhibit A were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Three and Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a full-time field service technician assigned to Nichols Aluminum from October 25, 1999, until he was discharged on February 9, 2006. The claimant was discharged for being tardy for work on February 7, 2006 and not promptly notifying the employer. The claimant's father operates a hog confinement feeding operation. His father was gone and the claimant was responsible for the chores related to the feeding operation. On February 6, 2006, at approximately 2:30 p.m. the claimant spoke to his supervisor, Linda A. Rose, Field Service General Manager, and informed her that he was going to be late the next day, February 7, 2006, because he had chores to do for his father. He informed Ms. Rose that he would be in by 8:00 a.m. The claimant ordinarily started his shift at 7:30 a.m. Ms Rose approved. However, when the claimant arrived at the hog confinement unit on February 7, 2006, he discovered that the pipes were frozen and he was delayed in reporting to work in order to unfreeze the pipes. The claimant attempted to call the employer using his cell phone provided by the employer but it did not work. The claimant had been attempting for three weeks to get a working cell phone but without success. The hog confinement unit was seven miles away from his father's home and the claimant did not go to the home to call the employer. The claimant reported for work at approximately 10:30 a.m. He finished his shift that day. On February 9, 2006, Ms. Rose talked with the claimant and sent him home for the day pending an investigation as to his tardy on February 7, 2006. The next day, February 10, 2006, the claimant was discharged.

On January 13, 2006, the claimant was suspended for seven days and given a last-chance warning as shown at Employer's Exhibit Two. The suspension and warning were for failing to keep his work area clean, failure to notice broken bearings, and including hours that he did not work. The claimant signed a written statement conceding that he wrote down and was paid for approximately 16 to 18 hours that he did not work. The employer has policies prohibiting such activities as show at Employer's Exhibit Three. The claimant received a copy of those rules and signed an acknowledgement also shown at Employer's Exhibit Three. At the time of the claimant's suspension the employer determined not to discharge the claimant if the claimant was honest. The claimant was honest about the hours paid but not worked and the employer agreed to comply with the promise not to discharge the claimant because of the claimant's honesty. This is shown at Claimant's Exhibit A.

The employer had no other evidence of other warnings or disciplines received by the claimant or any other absences or tardies by the claimant.

REASONING AND CONCLUSIONS OF LAW:

The question present by this appeal is whether the claimant's separation from the employment was a disqualifying event. It was not.

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.

871 IAC 24.32(1)a, (7) provide:

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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The parties agree, and the administrative law judge concludes, that the claimant was effectively discharged on February 9, 2006. Although some of the evidence indicates that the claimant was not discharged until February 10, 2006, the evidence establishes that the claimant was suspended or sent home on February 9, 2006. The administrative law judge would conclude that this was in effect a disciplinary suspension and whenever one is suspended for disciplinary reasons the claimant is considered to have been discharged. See 871 IAC 24.32(9). Accordingly, the administrative law judge concludes that the claimant was effectively discharged on February 9, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove a current act of disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982).and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for a current act of disqualifying misconduct.

The incident that triggered the claimant's discharge was a tardy on February 7, 2006. On that day the claimant was tardy approximately three hours when he arrived at work at 10:30 a.m. when he was to start at 7:30 a.m. The claimant was tardy because he had to fix frozen pipes in the hog confinement unit belonging to his father. The claimant's father was out of town and the claimant had agreed to take care of the chores at the hog confinement unit. The day before, February 6, 2006, at 2:30 p.m. the claimant informed his supervisor, Linda A. Rose, Field Service General Manager, that he would be late the next day, February 7, 2006 to take care of chores at the hog confinement unit. The claimant stated that he would be in by 8:00 a.m. Ms. Rose approved. However, when the claimant arrived at the hog confinement unit he noticed the frozen pipes and was delayed in returning to work. The claimant attempted to call the employer but his employer-provided cell phone did not work. The hog confinement unit was seven miles away from his father's house and the claimant could not go there to call in a reasonable fashion. The administrative law judge is constrained to conclude that this tardy was for reasonable cause and properly reported to the extent that the claimant was able to do so and therefore the tardy is not excessive unexcused absenteeism. Even if this tardy was not for reasonable cause and/or not properly reported, it is only one such tardy or absence. The employer's witnesses had no other evidence of any other absences or tardies on the part of the claimant. The term "excessive unexcused absenteeism," implies more than one absence or tardy and in general, three unexcused absences or tardies are required to establish disqualifying misconduct. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here, at most, the evidence establishes only one.

The employer's position is that this incident coupled with the claimant's suspension on January 14, 2006 and final warning establishes disqualifying misconduct. The administrative law judge concludes otherwise. The claimant was suspended for seven days on January 13, 2006 and given a final warning as shown at Employer's Exhibit Two. The principle reason for the suspension and final warning was that the claimant reported and was paid for between 16 and 18 hours of work that he did not perform. The claimant admitted such at Employer's Exhibit One. The warning was also for failure to note a broken bearing and for not keeping his work area clean. The claimant concedes that he did not note the broken bearing but argues that his work area was clean at least to the extent that he was able to control the cleanliness of his work area. At the time the claimant was suspended and given the final warning, the employer agreed not to discharge the claimant if he was honest. This appears at Claimant's Exhibit A. It is true that the claimant's behaviors giving rise to the suspension and final warning violated the employer's policies at Employer's Exhibit Three, but the administrative law judge concludes that the claimant was fully and completely disciplined for such violations. A discharge now for such violations would be a discharge for past conduct. A discharge for misconduct can not be based on past acts or warnings. See 871 IAC 24.32(8). Past acts and warnings can be used for determining the magnitude of a current act of misconduct but as noted above, the administrative law judge finds no current act of misconduct. Even assuming that the claimant's tardy was not for reasonable cause and/or not properly reported, it is not disqualifying misconduct because it was only one such tardy and there was no evidence of any others on the claimant's record. The administrative law judge in no way condones the behaviors of the claimant that gave rise to his suspension and final warning, but must conclude that discharging the claimant now for such behaviors would be a discharge for past conduct and would not therefore disqualify the claimant from receiving unemployment insurance benefits.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for a current act of disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to

warrant the denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct, at least of a current nature, so as to disqualify the claimant from receiving unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

DECISION:

The representative's decision of February 27, 2006, reference 01, is reversed. The claimant, Douglas J. Oliver, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct, at least not for a current act of disqualifying misconduct.

cs/tjc