IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ADAM S GERST
Claimant

BROCKWAY MECHANICAL & ROOFING
Employer

APPEAL NO. 15A-UI-11481-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/27/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Adam Gerst filed a timely appeal from the October 14, 2015, reference 01, decision that that disqualified the claimant for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that the claimant had been discharged for excessive unexcused absences. After due notice was issued, a hearing was held on October 29, 2015. Mr. Gerst did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Shannon McKenzie represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 15A-UI-11482-JTT. The administrative law judge took official notice of the following Agency administrative records: DBRO and KCCO.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits or 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: Adam Gerst began his employment with Brockway Mechanical & Roofing in October 2014 and continues in that employment at this time as a full-time roofing laborer. Mr. Gerst is assigned to work at various job sites. Matt Shriver, Superintendent, is Mr. Gerst's supervisor. Mr. Gerst also answers to the job site foreman. On September 24, 2015, Mr. Shriver notified Mr. Gerst that he was discharged from the employment for attendance. On that day, Mr. Gerst had been absent for personal reasons and had failed to notify the employer of his need to be absent. Mr. Gerst asserted the absence had been based on a flat tire, but did not explain why he had not notified the employer. Mr. Gerst asked for another chance in the employment. After discussion, Mr. Shriver notified Mr. Gerst on October 7, 2015 that the employer was rescinding the discharge and that the employer would provide Mr. Gerst one more chance. Mr. Gerst returned to the full-time employment on Monday, October 12, 2015. The employer treated the return as a continuation of the prior employment, rather than as a new hire.

If Mr. Gerst needed to be absent from work, the employer's work rules required that he notify his supervisor and the employer's office at least 30 minutes prior to the start of his shift. Mr. Gerst's shift would usually start at 5:00 or 6:00 a.m. If Mr. Gerst was unable to speak with someone directly, the employer's work rules required that Mr. Gerst leave a message on the office answering machine. The employer had reviewed the absence reporting policy with Mr. Gerst at the start of the employment.

In making the decision on September 24, 2015 to notify Mr. Gerst that he was discharged, Mr. Shriver considered Mr. Gerst's attendance history. Most of Mr. Gerst's prior absences had been due to illness and had been properly reported to the employer. These included absences due to illness on March 5 and 30, April 27, May 11, June 9, 11 and 29, and August 17-20, 2015. The employer asserts that on January 1,2 and 3, Mr. Gerst notified the employer that he would not be reporting for work for personal reasons. On February 24, 2015, Mr. Gerst properly notified the employer that he would not be reporting for work because he needed to accompany his wife to a doctor appointment. Mr. Gerst's wife was in the first trimester of her pregnancy at the time. Mr. Shriver also considered a verbal warning for attendance issued to Mr. Gerst on March 30, 2015 and a written warning issued to Mr. Gerst on June 30, 2015.

Mr. Gerst established a claim for benefits that was effective September 27, 2015. Mr. Gerst made weekly claims for the weeks ending October 3 and 10, 2015. Mr. Gerst then discontinued his claim for benefits. Brockway Mechanical & Roofing is Mr. Gerst's sole base period employer for purposes of the claim that was effective September 27, 2015.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.
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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.

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).

The administrative law judge notes that the employer did not present testimony from Mr. Shriver or from anyone else with personal knowledge of the absences that factored in the break in the employment. The employer had the ability to present such testimony.

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.

Iowa Administrative Code section 871 IAC 24.32(9) provides as follows:

> Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The evidence in the record establishes that the employer effectively suspended Mr. Gerst on September 24, 2015 and that the suspension was in effect for the period of September 24 through October 11, 2015. The evidence establishes an unexcused absence on September 24, when Mr. Gerst was absent for personal reasons and failed to properly notify the employer of the absence. The evidence in the record establishes the absences between March 5 and August 20 were due to illness, were properly reported to the employer and, therefore, were excused absences under the applicable law. The employer asserts three additional absences on January 1, 2, and 3. The administrative law judge notes that January 1 was a public holiday and January 3 was a Saturday, a day outside what the employer described as Mr. Gerst's work week. The evidence in the record is insufficient to establish unexcused absences on January 1-3, 2015. The evidence in the record is also insufficient to establish an unexcused absence on February 24, 2015, when Mr. Gerst was absent with proper notice to the employer so that he could accompany his pregnant wife to a medical appointment.

The evidence in the record fails to establish excessive unexcused absences. The September 24, 2015 discharge and de facto suspension was for no disqualifying reason. Mr. Gerst is eligible for benefits for the benefit weeks that fell within the period of the de facto suspension, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Gerst for the period of those two weeks. The weeks in question were the benefit weeks that ended October 3 and 10, 2015.

DECISION:

The October 14, 2015, reference 01, decision is reversed. The claimant was suspended on September 24, 2015 for no disqualifying reason. The claimant is eligible for benefits for the weeks ending October 3 and 10, 2015, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant for those weeks.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs