IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DUSTIN BAIN Claimant **TUCKER STAFFING LLC** Employer	**APPEAL 19A-UI-09137-AD-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/27/19** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

On November 20, 2019, Dustin Bain (claimant) filed an appeal from the November 18, 2019 (reference 01) unemployment insurance decision that found claimant was not eligible for benefits.

A telephone hearing was originally scheduled for December 13, 2019. On December 10 and 11, Tucker Staffing LLC (employer) requested the hearing be rescheduled to December 23 and that the hearing be conducted in-person. The employer also requested a copy of the November 18 fact-finding hearing. The administrative law judge entered an order on December 12, 2019, and for the reasons stated therein granted the request in part and denied it in part.

A telephone hearing was held on December 23, 2019. The parties were properly notified of the hearing. The claimant participated personally. Employer participated by Owner Jason Bailey. Claimant's Exhibit 1, the fact-finding documents, was admitted. Employer's Exhibits 1-14 were admitted.

Bailey's testimony was received at the December 23, 2019 hearing. The administrative law judge then began to receive testimony from claimant. However, due to issues with claimant's phone, it was difficult to understand claimant's testimony. To ensure claimant's due process rights, the administrative law judge continued the hearing to January 17, 2020, and advised claimant to make sure he had a working phone at the time of the next hearing.

Claimant did not register a different phone number prior to the January 17, 2020 hearing date and time. The administrative law judge called claimant at the previous number provided and left a voicemail message, advising claimant that the record would be left open for 15 minutes for him to call in and participate in the hearing. After that time, the administrative law judge would issue a decision based on the evidence received thus far. The administrative law judge called employer and advised it of the same information. Claimant did not call in within the 15-minute timeframe and the record was closed.

ISSUE:

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for employer as a full-time carpet cleaning crew chief. Claimant's first day of employment was October 18, 2016. The last day claimant worked on the job was October 15, 2019. Claimant's immediate supervisor was Office Manager Jay Garrels. Claimant separated from employment on October 15, 2019. Claimant was discharged by Bailey on that date.

Bailey made the decision to terminate claimant. The final incident leading to termination occurred on October 15, 2019. Claimant was heading to a job and reported to Garrels that he needed someone to bring him an extra hose, as he did not have enough hose to do the next job. It was written in his work log to bring a hose but he did not bring it. This showed that he had not closely read his work log and recorded his first job before leaving for the next job, as if he had very likely would have seen that he needed an extra hose for the following job. He had been written up in the past for not appropriately completing the work log and so was aware of that policy. The reason employer requires employees to record jobs is because it's hard to remember everything that was done on each job if one waits until the end of the day to record everything.

Another employee went to claimant's location to drop off the hose he needed. At this time, the employee notified employer that claimant was hooked up to outside water on the building. This is also a policy violation. The reason for the policy is that customers often leave hoses hooked up to the outside of the building during the winter, which can result in damage. If an employee is the next to hook up that water source and the damage is discovered at that time, employer could be blamed for the damage, which can be very expensive. There were many other places to hook up at the claimant's location. Claimant was aware of the policy and knew if there were no other places to hook up he should have called the office to ask what to do.

Employer told the other employee to relieve claimant and send him back to the office. At the end of the day, employees are to check in with the office. However, instead of coming into the office, claimant sat in his truck in the parking lot for approximately 30 minutes and then left. Bailey texted him later to see where he was and claimant responded he had gone home. Bailey had hoped to "talk some sense" into claimant when he returned to the office. However, when Bailey learned claimant had gone home without permission, he decided to terminate him.

Claimant had been disciplined on several prior occasions for not following proper procedure. He received a written warning on September 27, 2019, for failing to properly notify the office scheduler to schedule a follow-up with a customer. He received a written warning on August 29, 2019 for not dry-stroking during the cleaning process. He was warned that if that happened again he would be terminated. He received a written warning on July 16, 2019, for failing to respond to text messages from the office. He received another written warning on July 16, 2019, for failing to report damage. He received a written warning on March 18, 2019, for failing to notify the Office Manager when his helper did not show up for a shift. He received a written warning on October 24, 2018 for not immediately notifying Bailey about damages that had occurred. He received another written warning on October 24, 2018, for not having his truck in order. He was warned he would be immediately terminated if his truck was found in that condition again. He received a written warning on September 5, 2018, for driving on a customer's lawn when he did not have permission to do so, resulting in damage to the lawn. He was warned that he would be terminated if he did that again. See Employer's Exhibits 3-8, 10, 14.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the November 18, 2019 (reference 01) unemployment insurance decision that found claimant was not eligible for benefits is AFFIRMED.

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 provides in relevant part:

> 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 bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman*, *Id*.

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.,* 386 N.W.2d 552, 554 (Iowa Ct. App.1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd*., 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd*., 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

Employer has carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2). While the final incident on October 15 may not by itself constitute substantial work-related misconduct, claimant's pattern of failing to follow instructions and abide by known policies increases the magnitude of this final incident. This pattern of conduct shows his actions were not mere negligence or failure in good performance, but were instead deliberate violations of employer's instructions and policies. The administrative law judge finds claimant's discharge was for substantial work-related misconduct and as such he is disqualified from receiving benefits.

DECISION:

The November 18, 2019 (reference 01) unemployment insurance decision is AFFIRMED. Claimant is not eligible to receive benefits until he has earned wages for insured work equal to ten times his weekly benefit amount and meets all other eligibility requirements.

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Andrew B. Duffelmeyer
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Decision Dated and Mailed

abd/scn