IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

DRAYTON J CONLEY
Claimant

SABRE COMMUNICATIONS CORP
Employer

APPEAL NO. 19A-UI-06716-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/21/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Drayton Conley filed a timely appeal from the August 13, 2019, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on July 10, 2019 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on September 18, 2019. Mr. Conley participated. Joli Gehring represented the employer and presented additional testimony through Mike Thompson and Dean Dawdy. Exhibits 1, 2, 3 and A were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Drayton Conley was employed by Sabre Communications Corporation as a full-time welder from 2012 until July 10, 2019, when the employer discharged him from the employment. On July 6, 2019, Mr. Conley's supervisor, Welder Lead Mike Thompson, observed Mr. Conley inhaling welding gas vapors from an industrial hose located at Mr. Conley's work station. When Mr. Thompson confronted Mr. Conley about the conduct, Mr. Conley initially asserted that he had been inhaling the compressed oxygen hose. Mr. Conley had in fact been inhaling from hose that provided a mixture of argon and carbon dioxide gases for use in welding.

On July 7, 2019, Mr. Thompson and Joli Gehring, Human Resources Business Partner, met with Mr. Conley to discuss the conduct. During that interview, Mr. Conley admitted that he had been inhaling from the argon and carbon dioxide line on July 6, 2019 and that he had previously engaged in similar behavior. The employer had a drug testing policy, but concluded that such testing would not be able to identify the presence of the argon gas. Mr. Conley asked Ms. Gehring to issue a final warning, rather than discharge him from the employment. The employer suspended Mr. Conley from the employment pending further investigation.

On July 10, 2019 the employer notified Mr. Conley that he was discharged from the employment. The employer considered the risk that Mr. Conley's conduct presented to Mr. Conley's wellbeing and to the wellbeing of others in the workplace. The employer's written work rules prohibited "Engaging in or committing any act on company property which jeopardizes or could jeopardize the physical safety of an employee." Earlier in the employment, the employer had provided Mr. Conley with a copy of the work rules that contained the above-referenced prohibition.

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).

The evidence in the record establishes a discharge for misconduct in connection with the employment. On July 6, 2019, Mr. Conley knowingly and intentionally acted with substantial disregard for the employer's interests by inhaling industrial-use gases, argon and carbon dioxide, from an industrial hose in an attempt to get high at work. The employer directly observed the conduct. Mr. Conley was initially intentionally dishonest with the employer by asserting that he had merely been inhaling compressed oxygen. This dishonesty demonstrated a disregard for the employer's interests. Mr. Conley subsequently confessed to inhaling the argon/carbon dioxide mix and to having engaged in similar behavior on prior occasions. There was no need for the employer to have a specific work rule to address such inherently and obviously dangerous and self-destructive behavior in the workplace. Mr. Conley knew that he was acting contrary to the employer's interests at the time of July 6 conduct, which explains his initial dishonesty when questioned by Mr. Thompson. Mr. Conley's unsafe conduct placed him and others at risk in the workplace. The employer reasonably concluded that the drug testing protocol designed to screen for the presence of scheduled controlled substances would not discern the presence of argon gas. Mr. Conley is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Conley must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The August 13, 2019, reference 01, decision is affirmed. The claimant was discharged on July 10, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs