IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GARY L LOHR
Claimant

GETTING INC
Employer

APPEAL NO. 07A-UI-05782-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/22/07 R: 01
Claimant: Appellant (2)

Iowa Code Section 96.6(2) - Timeliness of Appeal
Iowa Code Section 96.5(2)(a) - Discharge

STATEMENT OF THE CASE:

Gary Lohr filed an appeal from the May 22, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was commenced on July 12, 2007 and concluded on July 20, 2007. Mr. Lohr participated. Leslee Stanley, owner, represented the employer and presented additional testimony through Don Stanley, Supervisor. Both parties waived formal notice on the issues of whether the claimant voluntarily quit the employment with good cause attributable to the employer and whether the claimant was discharged for misconduct. Exhibits A through K and Department Exhibits D-1, D-2 and D-3 were received into evidence.

ISSUES:

Whether the claimant's appeal was timely.

Whether good cause exists to deem the claimant's late appeal timely.

Whether the claimant voluntarily quit or was discharged from the employment. The administrative law judge concludes that the claimant was discharged from the employment.

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On April 22, 2007, Iowa Workforce Development mailed the May 22, 2007, reference 01, decision denying benefits to Gary Lohr's address of record. The decision contained a June 1, 2007 appeal deadline. Mr. Lohr did not receive the decision. On May 24, Iowa Workforce Development mailed a May 24, 2007, reference 03, overpayment decision to Mr. Lohr's address of record. Mr. Lohr received the overpayment decision in a timely fashion, prior to the June 3, 2007 deadline for appeal. Because the June 3 deadline fell on a Sunday, the deadline was extended by operation of law to Monday, June 4, 2007. Mr. Lohr went to his local Workforce Development Center on May 30 or 31 in response to receiving the reference 03 overpayment

decision and was advised to file an appeal. Mr. Lohr drafted his appeal of both decisions on June 4 and mailed the appeal the same day. The envelope in which the appeal arrived does not bear a legible postmark.

Gary Lohr was employed by Getting Inc. trucking company as a full-time truck driver from September 20, 2004 until April 26, 2007. During the employment, Mr. Lohr worked primarily as an over-the-road long-distance truck driver. Mr. Lohr also handled some local trucking routes. On or about January 25, 2007, Mr. Lohr slipped and fell while he was working for the employer in Dodge City, Kansas and suffered a back injury that included an "L5/S1 herniated nucleus pulposus," or herniated disk, and related neurological problems affecting one leg. Mr. Lohr reported the injury to the employer on January 29 or 30. Mr. Lohr filed a workers' compensation claim in connection with the back injury. Mr. Lohr's immediate supervisor, Don Stanley, was incensed by the workers' compensation claim and communicated his anger concerning the claim to Mr. Lohr. Mr. Lohr was off work on a medical leave effective January 25 and was released to work without restrictions effective April 16, 2007. Mr. Lohr received workers' compensation benefits for temporary total disability (TTD) until April 15, 2007.

In preparation for his return to work, Mr. Lohr met with his immediate supervisor, Don Stanley, on April 13, 2007. Mr. Lohr had begun secretly taping his contact with the employer in January 2007, when the employer responded negatively to the workers' compensation claim. On April 13, Mr. Lohr told Don Stanley that his doctor wanted him to only handle local trucking routes until his back adjusted to the jostling movements of the semi tractor. Mr. Stanley told Mr. Lohr that he would assign Mr. Lohr to perform local "tending" work. The tending work involved driving a fertilizer tanker truck and refilling farming fertilizer sprayers with liquid fertilizer. The work would involve less driving than the over-the-road long-distance routes, but would require Mr. Lohr to climb ladders and carry a huge hose. After Mr. Lohr spoke with Don Stanley on April 13, Mr. Lohr went to his doctor and obtained a written release. The written release stated, "Gary is released to return to work Mon April 16th No restrictions." Mr. Lohr immediately provided the release to Mr. Stanley. Mr. Stanley told Mr. Lohr that he expected to receive a call regarding "tending" work on Monday or Tuesday morning, April 16 or 17.

On April 16, Mr. Lohr reported to the workplace. Owner Leslee Stanley was present at the workplace for the purpose of reviewing the employer's new employee handbook with Mr. Stanley. The employer had created the handbook in March. The employer had not previously had an employee handbook. Mrs. Stanley had created the handbook to address communication problems and/or lapses that existed in the workplace. The handbook was created in part as a response to Mr. Lohr's workers' compensation claim and Mr. Lohr's four or five day delay in reporting the alleged workers' compensation injury to the employer. Mrs. Stanley reviewed the entire handbook with Mr. Lohr and had Mr. Lohr sign an acknowledgment of receipt of the handbook and obligation to follow the policies contained therein. One policy required drivers to generate 40 billable hours and/or drive 2200 miles per week. The employer did not have any "tending" work for Mr. Lohr to perform on April 16.

On April 17, Mr. Lohr reported to the workplace. Mr. Lohr asked Don Stanley whether there was any trucking to perform and Mr. Stanley told Mr. Lohr there was not. Mr. Stanley told Mr. Lohr that Mr. Stanley needed to call a company that morning regarding the tending work. Mr. Stanley told Mr. Lohr that Mr. Lohr would be performing tending work for one company and Mr. Stanley would perform tending work for another company. Mr. Stanley told Mr. Lohr that Mr. Lohr would be performing tending duties for the company that utilized a smaller, more easily maneuvered hose. Mr. Stanley told Mr. Lohr that he would contact Mr. Lohr at Mr. Lohr's home once he received the necessary information regarding the tending work.

Later on April 17, Don Stanley contacted Mr. Lohr at his home. Mr. Stanley told Mr. Lohr that the employer was going to send Mr. Lohr to Minneapolis with a load. Mr. Lohr asked Mr. Stanley about the status of the tending assignment and Mr. Stanley told Mr. Lohr that the companies in question were not yet spraying fertilizer. Mr. Lohr drove the employer's truck from Hartley to LeMars and returned to Hartley with the load for Minneapolis. The air suspension system in Mr. Lohr's assigned truck had a leaking valve, which negatively impacted Mr. Lohr's back. Mr. Lohr took the load to Minneapolis and returned the same day. Mr. Lohr told Mr. Stanley that his back and rear were hurting. Mr. Lohr requested to be assigned only the local tending work. At this time, Mr. Stanley told Mr. Lohr that the tending work would be assigned to part-time driver and would not be made available to Mr. Lohr. This was a marked changed from Mr. Lohr's position on April 13 and earlier on April 17. Mr. Lohr did not challenge Mr. Stanley at that time regarding the change in Mr. Lohr's position. Mr. Stanley had decided that the tending work would be too difficult on Mr. Lohr's back because the work would require Mr. Lohr to climb up and down ladders and drag a heavy hose.

On April 18, Mr. Lohr went to the workplace and asked Don Stanley if there was any work for him. Mr. Stanley said there was not. Mr. Lohr again asked about the tending work and Mr. Stanley again told Mr. Lohr that the tending work would be performed by another, part-time driver. Mr. Lohr then departed for his home.

Later on April 18, Mrs. Stanley contacted Mr. Lohr at his home. Mrs. Stanley told Mr. Lohr that the employer had a load for Mr. Lohr to take to Chicago. Mr. Lohr told Mrs. Stanley that his back was still tender and that he would rather not drive to Chicago. Mr. Lohr told Mrs. Stanley that he would perform the local tending work. Mrs. Stanley told Mr. Lohr that was not an option and that the only work the employer had for Mr. Lohr at the moment was the load for Chicago.

On April 19, Mr. Lohr contacted Don Stanley and again asked if he could perform the local tending work. Mr. Stanley said, "No," and Mr. Lohr said, "Okay." Mr. Lohr decided he was going to call Mr. Stanley every day and request the local tending work. Mr. Lohr also decided that he would not accept any work/load assignments other than the local tending work.

On April 20, Mr. Lohr contacted Don Stanley and asked if there was any tending work for him. Mr. Stanley said no, that the work was assigned to another driver. Mr. Lohr and Mr. Stanley did not discuss any other possible work/load assignments at that time.

On April 23, Mr. Lohr went to the workplace and spoke with John Stanley, Vice President. John Stanley is Leslee Stanley's and Don Stanley's son. Mr. Lohr asked John Stanley whether there was any local tending work available. Mr. Stanley said no, that the tending work was being performed by another driver and by Don Stanley. Mr. Lohr gave Mr. Stanley the company checkbook and keys he had held in his possession since he started the employment in 2004. Mr. Lohr told Mr. Stanley that he no longer wished to be responsible for the checkbook and keys. Mr. Lohr told Mr. Stanley that if the employer had any <u>part-time</u> work for Mr. Lohr, the employer should contact Mr. Lohr. Mr. Lohr then departed for home. Prior to Mr. Lohr's return to work in mid-April, Roger Dubois, another driver employed by Getting Inc. had gone to Mr. Lohr's house to collect the employer's ladder. At that time, Mr. Dubois told Mr. Lohr, "John said to get any other fucking tools he might have, too." Mr. Dubois told Mr. Lohr that tools had gone missing out of the shop and the employer did not know where they had gone. Mr. Dubois told Mr. Lohr that if he were Mr. Lohr, he would turn in his keys because the employer was looking for a reason to fire Mr. Lohr.

On April 23, after Mr. Lohr spoke to John Stanley, Leslee Stanley called Mr. Lohr at his home. Mrs. Stanley asked Mr. Lohr why he had turned in the keys and checkbook. John Stanley had

reported to Mrs. Stanley that Mr. Lohr had said he was leaving the employment. Mr. Lohr told Mrs. Stanley that he no longer wished to be responsible for the items. Mr. Lohr told Mrs. Stanley that his doctor wanted him to drive only local routes. Mr. Lohr referenced that the employer did not have any local routes available for him. Mr. Lohr told Ms. Stanley that due to his back problems, he was no longer able to drive a truck. Mrs. Stanley asked Mr. Lohr to provide the employer with a resignation letter as required by the new employee handbook.

On April 24, Mr. Lohr went to his doctor and obtained a new medical release. This release stated, "Pt to be no short route, local city X 3 wks then may return to full duty after that pt." Mr. Lohr did not provide this release to the employer.

On April 25, the employer received a written statement from Mr. Lohr in its mailbox. The statement was dated April 23. Mr. Lohr had placed the document in the mailbox. Mr. Lohr indicated in the document that he was not quitting, but was unable to drive 2200 miles per week or generate 40 billable hours per week as required by the employer's new handbook.

On April 26, Leslee Stanley contacted Mr. Lohr at his home and requested that he come to the workplace for a meeting. At the meeting, Mrs. Stanley told Mr. Lohr that she was issuing Mr. Lohr a Level 1 reprimand for refusing the load to Chicago on April 18. Mrs. Stanley told Mr. Lohr that the Level 1 reprimand did not entail immediate dismissal from the employment. Mrs. Stanley then told Mr. Lohr that she had reviewed the details of Mr. Lohr's employment with the company's attorney and that she was going to accept the verbal resignation she deemed Mr. Lohr to have tendered to John Stanley on April 23 in connection with returning his company checkbook and keys. Mr. Lohr told Mrs. Stanley that his doctor only wanted him to drive local routes. Mrs. Stanley stressed that Mr. Lohr's release from April 13 had indicated that Mr. Stanley was released without restrictions. Mrs. Stanley told Mr. Lohr that he had been hired to perform full-time over-the-road truck driving. Mrs. Stanley told Mr. Lohr that he was eligible to reapply for work in 30 days, but that the part-time employees would perform the part-time, tending work. Mr. Lohr then left the workplace. Thereafter, Mrs. Stanley had no more contact with Mr. Lohr.

Mr. Lohr established a claim for unemployment insurance benefits that was effective April 22, 2007 and did not receive any workers' compensation benefits for temporary total disability (TTD) after the claim for unemployment insurance benefits was established.

On April 27, Mr. Lohr saw his doctor. The doctor's notes from the appointment indicate that Mr. Lohr was dealing with a "Resolving L5/S1 herniated nucleus pulposus" or herniated disk. The doctor's notes indicated that Mr. Lohr was to follow up with the doctor as needed. Finally, the doctor's notes indicate, "Will have him return to work with short distance driving for approximately 4 weeks and then he can return to full duty."

On April 30, 2007, Mr. Lohr commenced part-time employment at a golf course, where Mr. Lohr mows grass 25-30 hours per week. Mr. Lohr indicates that his doctor wants him to only work part-time until his back improves. Mr. Lohr indicates that he also suffers pain in his left leg. Mr. Lohr indicates that his back doctor has referred him for a second opinion and that Mr. Lohr's back condition might require surgery. Mr. Lohr's doctor has recommended additional treatment with epidural shots.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs “a” through “h”. Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The greater weight of the evidence in the record establishes that Mr. Lohr did not receive the May 22, 2007, reference 01 decision in a timely fashion and was denied a reasonable opportunity to file a timely appeal. The evidence indicates that Mr. Lohr filed an appeal of the reference 01 decision on June 4. The evidence indicates that Mr. Lohr did not unreasonably delay in filing his appeal of the May 22, 2007, reference 01 decision once he became aware of

the decision. The administrative law judge concludes that the tardiness of Mr. Lohr's appeal was attributable either to Iowa Workforce Development or the United States Postal Service. Accordingly, there is good cause to deem the late appeal timely.

The next question is whether Mr. Lohr quit or was discharged from the employment. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The evidence indicates that Mr. Lohr suffered an injury in the course of the employment. The evidence indicates that Mr. Lohr filed a workers' compensation claim, which the employer's workers' compensation insurance carrier recognized and addressed as a bonafide workers' compensation matter. The evidence indicates that Mr. Lohr's doctor granted Mr. Lohr a full release to return to work on April 16, 2007, with the understanding that Mr. Lohr would handle only short routes or "tending" work. The evidence indicates that Mr. Lohr properly communicated his doctor's instructions to the employer and the employer agreed to assign Mr. Lohr local work that would comply with the doctor's instructions. Only after the employer agreed to provide Mr. Lohr with local route work did Mr. Lohr return to his doctor for the medical release. Based on the understanding between Mr. Lohr and Mr. Stanley that Mr. Lohr would perform only local tending work, Mr. Lohr's doctor did not set forth any restrictions on the cursory medical release drafted on April 13 and provided to the employer on the same day. The employer had a duty to reasonably accommodate Mr. Lohr's work-related medical condition. See Sierra v. Employment Appeal Board, 508 N.W.2d 719 (1993), citing Foods, Inc. v. Civil Rights Commission, 318 N.W.2d 162 (Iowa 1982). The evidence indicates that the employer refused to accommodate Mr. Lohr's work-related medical condition after agreeing to do so. The evidence indicates that the employer assigned Mr. Lohr a long-distance route to Minneapolis in a truck with broken suspension and that this trip aggravated Mr. Lohr's work-related medical condition. Only after the employer refused to accommodate Mr. Lohr's request for local work, did Mr. Lohr restrict his availability for long-distance over-the-road work. Mr. Lohr did not restrict his availability for local route or tending work.

The greater weight of the evidence indicates that Mr. Lohr did not voluntarily quit, but was discharged from the employment. The greater weight of the evidence fails to establish that Mr. Lohr tendered a "verbal resignation" to John Stanley on April 23. The employer has failed to present available testimony from John Stanley to support the assertion that Mr. Lohr indicated a quit to Mr. Stanley. The weight of the evidence indicates instead that Mr. Lohr affirmed his availability for local route or tending work at the time he spoke with John Stanley. The evidence also fails to establish that Mr. Lohr quit during the conversation with Mrs. Stanley on April 23. The evidence indicates instead that Mr. Lohr again iterated his need and desire for local route or tending work pursuant to his doctor's instructions and Mrs. Stanley reiterated the employer's position that it would not make such work available. The evidence indicates that Mrs. Stanley required and requested a written resignation before the employer would accept a resignation, but that Mr. Lohr never provided a written resignation. The evidence indicates that at start of the meeting on April 26, Mrs. Stanley still deemed Mr. Lohr an employee and that no separation had occurred. The evidence indicates that any suggestion that Mr. Lohr intended to quit the employment was dispelled by the document the employer received from Mr. Lohr on April 25.

The administrative law judge concludes that the employer discharged Mr. Lohr on April 26, 2007.

The remaining question is whether Mr. Lohr was discharged for misconduct that would disqualify him for unemployment insurance benefits.

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 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.

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).

In light of Mr. Lohr's work-related medical condition, the employer's instructions that Mr. Lohr accept over-the-road long-distance load assignments was unreasonable. In light of the instructions Mr. Lohr had received from his doctor, the employer's earlier agreement to provide local route assignments, and Mr. Lohr's negative experience on the Minneapolis route, Mr. Lohr's refusal to accept the long-distance assignments was reasonable.

The evidence in the record fails to establish misconduct in connection with the employment that would disqualify Mr. Lohr for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Lohr was discharged for no disqualifying reason. Accordingly, Mr. Lohr is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Lohr.

DECISION:

The claimant's appeal was timely. The Agency representative's May 22, 2007, reference 01, decision is reversed. The claimant was discharged for not disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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