IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

BRIAN K MORRIS
Claimant

DIMITRI WINE & SPIRITS INC
Employer

APPEAL NO. 18A-UI-06362-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/22/18
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 30, 2018, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on April 26, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on July 10, 2018. Claimant Brian Morris participated. Demetrios Papageorgiou represented the employer and presented additional testimony through Brandon Randolf. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUES:

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

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dimitri Wine & Spirits, Inc. is a beer and wine wholesaler/distributer located in Davenport. Demetrios Papageorgiou is President and owner. Brian Morris was employed by Dimitri Wine & Spirits as a full-time route delivery driver and warehouse worker from August 2017 and last performed work for the employer on April 5, 2018. Mr. Morris was assigned to the employer's Des Moines delivery route. That route included about 20 stops in Des Moines, Ankeny, Altoona, Pleasant Hill, Indianola, Ankeny, Marshalltown and Pella. Mr. Morris delivery duties included delivering kegs of beer. The route included multiple Hy-Vee stores. Mr. Papageorgiou was Mr. Morris' immediate supervisor.

In February 2018, Mr. Morris began to experience back and leg pain attributable to the heavy physical work of delivering kegs. Mr. Morris promptly notified the company secretary of his condition and sought medical evaluation and treatment on his own. The employer did not file a timely report of injury with its worker's compensation insurer. Mr. Morris' personal doctor referred Mr. Morris for physical therapy and released Mr. Morris to return to work with a 25-pound lifting restriction. With the lifting restriction, Mr. Morris was no longer able to deliver kegs

of beer, but was able to perform his other duties. Mr. Papageorgiou assigned another employee to accompany Mr. Morris on his delivery route to deliver the kegs. This continued until April 4, 2018. On April 2, Mr. Papageorgiou reported Mr. Morris' injury to the employer's insurer. The insurer denied the claim in light of the employer's delayed report to the insurance company. Mr. Papageorgiou decided to eliminate the expense associated with having two employees work the same delivery route. Mr. Papageorgiou decided to have Mr. Morris go off work until he could return to work without restrictions and communicated this decision to Mr. Morris on or about April 2, 2018. April 5, 2018 was to be Mr. Morris' last day of work before his commenced the indefinite and involuntary absence from the workplace.

In anticipation of Mr. Morris going off work, Mr. Papageorgiou assigned delivery driver Brandon Randolf to accompany Mr. Morris on the Des Moines delivery route for the purpose of learning the route duties so that Mr. Randolf could take over the route. During that two days when Mr. Randolf accompanied Mr. Morris on the Des Moines route, Mr. Morris in several instances and in several ways exhibited behavior that deeply troubled Mr. Randolf. Mr. Morris was belligerent when Mr. Randolf asked questions about product or delivery stops. Mr. Morris told Mr. Randolf that he did not need to know the information. Mr. Morris asked Mr. Randolph, "Why the fuck are you asking me that?" When Mr. Morris asked questions, Mr. Morris told Mr. Randolf that Mr. Randolf was "being stupid," that Mr. Randolf was "asking stupid questions," that Mr. Randolf was "too dumb," "to shut the fuck up," "don't fucking worry about the product" and other similar comments. When Mr. Randolf checked the global position system (G.P.S.) to find the most direct route to the next stop, Mr. Morris instructed Mr. Randolph to take an alternative route that added 10 minutes to the travel time. At various service stops, Mr. Morris made loud, vulgar, sexual comments about female employees and female customers concerning what he would like to do to the women. Mr. Morris also directed obnoxious, confrontational comments to males he encountered at service stops. While Mr. Randolf was operating the delivery van, Mr. Morris reached from the passenger seat, honked the horn to attract the attention of female pedestrians, and then made lewd gestures to those women. Mr. Morris told Mr. Randolf that he had a prostitute he frequented in Des Moines and asked Mr. Randolf if he wanted to stop to get a prostitute. While Mr. Morris and Mr. Randolf were servicing the Ankeny Hy-Vee, Mr. Morris bought a bottle of vodka and placed it in the cab of the delivery truck. Though the lunch break was supposed to be 30 minutes, Mr. Morris had Mr. Randolf stop at Tanger Outlet near Williamsburg for an hour-long lunch so that Mr. Morris could do some shopping. Mr. Randolf was so troubled by Mr. Morris' conduct that he reported the details of the conduct to Mr. Papageorgiou on April 4 and asked Mr. Papageorgiou if he could just do the route by himself on April 5, 2018. Mr. Papageorgiou granted that request. Mr. Papageorgiou elected not to discuss the concerns with Mr. Morris prior to placing him off work. Once Mr. Morris was away from the Des Moines route, some customers on the route asked that he not be returned to the route.

On April 26, 2018, Mr. Morris attempted to return to work with the full medical release the employer required of him. At that time, Mr. Papageorgiou told Mr. Morris that he could not return him to the Des Moines route, that he had received several customer complaints about Mr. Morris, and that Mr. Morris' sexually harassing conduct exposed the employer to a potential law suit. Mr. Papageorgiou also brought up Mr. Morris' on-duty purchase of vodka. Mr. Papageorgiou did not provide additional work to Mr. Morris.

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:
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> 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.
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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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

The weight of the evidence in the record establishes a discharge that was effective April 5, 2018, not April 26, 2018. In *Wills v. Employment Appeal Board*, the Supreme Court of Iowa held that a pregnant certified nursing assistant did not voluntarily separate from employment where she presented a limited medical release that restricted her from performing significant lifting and the employer precluded the employee from working so long as the medical restriction

continued in place. *Wills v. Employment Appeal Board*, 447 N.W.2d 137 (Iowa 1989). In *Wills*, the Court concluded that the employer's actions were tantamount to a discharge. The *Wills* decision is controlling in this matter. Mr. Morris is actually in a stronger position than the employee in the *Wills* case. In the present case, the employer elected to indefinitely suspend Mr. Morris based on a work-related back and leg concern and a work-related 25-pound lifting restriction. An employer has an obligation to provide the claimant with reasonable accommodations that would allow her to continue in the work. See *Sierra v. Employment Appeal Board*, 508 N.W. 2d 719 (Iowa 1993). In this case, the employer demonstrated the ability to reasonably accommodate Mr. Morris' 25-pound lifting restriction by doing so from mid-February 2018 until April 4, 2018. Mr. Morris was discharged for no disqualifying reason effective April 5, 2018. Accordingly, Mr. Morris is eligible for unemployment insurance benefits provided he meets all other eligibility requirements. The employer's account may be charged.

The employer asserts an alternative basis for discharging Mr. Morris from the employment and asserts that the discharge occurred on April 26, 2018. The conduct that the employer cites as the basis for the purported April 26, 2018 separation had come to the employer's attention on April 4, 2018, before the employer sent Mr. Morris off work for other reasons. The employer elected not to discuss the conduct concerns with Mr. Morris prior to placing him off work on April 5. Mr. Morris' involuntary absence from the employment for the period of April 5 to April 26 was entirely attributable to the employer. Mr. Morris was available during that period. There was no reasonable basis for the employer to delay discussion of the conduct issues to April 26, 2018. When the employer raised the issues on April 26, the conduct in question could no longer be deemed current acts. Accordingly, a purported discharge on April 26, 2018 would not disqualify the claimant for benefits or relieve the employer's account of liability for benefits.

DECISION:

The May 30, 2018, reference 02, decision is affirmed. The claimant was discharged for no disqualifying reason. The discharge was effective April 5, 2018. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs