IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAVID J MEEK
Claimant

CITY OF DES MOINES PAYROLL DEPT-B
Employer

APPEAL NO. 14A-UI-01979-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/19/14
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 February 11, 2014, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on March 13, 2014. Claimant David Meek participated. Deputy City Attorney Carol Moser represented the employer and presented testimony through Pat Kozitza. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Employer's Exhibits A through I 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: David Meek was employed by the City of Des Moines as a full-time laborer in the Public Works department from 1995 until January 16, 2014, when the employer discharged him for attendance. Mr. Meek's regular work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. Mr. Meek also assisted as needed with the employer's overnight snow removal.

If Mr. Meek needed to be absent from work, the employer's written policy required that he telephone his immediate supervisor no later than 15 minutes prior to the scheduled start of his shift. The policy is contained in the collective bargaining agreement that governed Mr. Meek's employment and Mr. Meek was aware of the policy. Mr. Meek's immediate supervisor was Tony Chido, Public Works Section Supervisor. Patrick Kozitza is Public Works Director.

The final absence that triggered the discharge occurred on January 7, 2014. Mr. Meek was scheduled to start work at 7:00 a.m. Shortly after the shift began, Mr. Meek telephoned Mr. Chido to advise that he had overslept and would be late. Mr. Chido told Mr. Meek that the employer was sending workers home that morning so that they could assist with the overnight snow removal later in the day. At the time Mr. Meek overslept he was on a prescription

anti-anxiety medication and on a prescription pain medication for a hip disease. Mr. Meek returned to work the next day. On January 11, 2014, Mr. Meek had himself voluntarily committed for alcohol dependence/abuse. Mr. Meek was released from the voluntary commitment on January 14, 2014. On January 16, 2014, the employer met with Mr. Meek for pre-disciplinary hearing. In connection with that meeting, the employer notified Mr. Meek that he was discharged for attendance.

In making the decision to discharge Mr. Meek from the employment, the employer considered absences dating back to 2009. The next most recent absence that factored in the discharge occurred on April 25, 2013, when Mr. Meek again overslept and called in late. Mr. Meek went to work that day, but arrived late. On May 2, 2013, Mr. Kozitza met with Mr. Meek to discuss the absence. At that time, Mr. Kozitza had Mr. Meek write a resignation letter. Mr. Meek had no intention to resign. Rather, the employer wished to have the undated resignation letter on hand in the event that the employer subsequently decided to terminate the employment. On May 31, 2013, Mr. Kozitza issued a formal reprimand and warned Mr. Meek that his employment would be terminated in the event he subsequently failed to fulfill his duties. The most recent conduct that factored in the May 31 reprimand was the April 25 absence. The employer had issued other reprimands for attendance earlier in the employment.

The next most recent absences that factored in the discharge occurred in 2012. On April 18, 2012, Mr. Meek was late to work due to car problems. Mr. Meek provided timely notice of his need to be late. On December 26, 2012, Mr. Meek was late for work because he had set his alarm for the wrong time and overslept.

The next most recent absence that factored in the discharge occurred on April 22, 2010, when Mr. Meek was late for work. The employer does not know why Mr. Meek was late that day and Mr. Meek cannot recall the incident.

The next most recent absence that factored in the discharge occurred from September 29 to October 2, 2009. Neither the employer nor Mr. Meek can recall the particulars.

The employer, through Allison Lambert, participated in the fact-finding interview that led to the February 11, 2014, reference 01, decision that allowed benefits.

REASONING AND CONCLUSIONS OF LAW:

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.
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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.

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).

The evidence does establish a current act based on the January 7, 2014 absence. The employer notified Mr. Meek of the discharge on January 16, just nine days later. The collective bargaining agreement called for a pre-disciplinary hearing. The pre-disciplinary hearing was delayed by Mr. Meek's short-term voluntary commitment.

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 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.

Mr. Meek's unexcused absences were not excessive and did not rise to the level of misconduct in connection with the employment. The administrative law judge notes that testimony from Mr. Chido was conspicuously absent from the hearing. The evidence in the record establishes an unexcused absence on January 7, 2014, when Mr. Meek overslept and called in late. The employer presented insufficient evidence to rebut Mr. Meek's testimony that he called and spoke with Mr. Chido shortly after his shift was to start on January 7, 2014. The evidence establishes mitigating circumstances in connection with that absence. The next most recent unexcused absence occurred in April 2013, more than *eight* months earlier. The next most recent unexcused absence occurred *four* months earlier, in December 2012. The next most recent unexcused absence occurred *eight* months earlier, in April 2012. The employer has presented insufficient evidence to establish any additional unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Meek was discharged for no disqualifying reason. Accordingly, Mr. Meek is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Claims Deputy's February 11, 2014, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. 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

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