

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ANDREW A MANLEY
Claimant

APPEAL NO. 20A-UI-00027-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**VERMEER MANUFACTURING COMPANY
INC**
Employer

OC: 12/01/19
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Admin. Cod r. 871-24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Andrew Manley filed a timely appeal from the December 18, 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 Mr. Manley was discharged on December 2, 2019 for misconduct in connection with the employment. After due notice was issued, a hearing was held on February 6, 2020. Mr. Manley participated personally and was represented by attorney Joanie Grife. Attorney Espnola Cartmill represented the employer and presented testimony through Jill Anderson. Exhibits 1 through 5 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.

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Andrew Manley was employed by Vermeer Manufacturing as a full-time welder from May 2018 until December 2, 2019, when the employer discharged him from the employment.

On May 15, 2018, Mr. Manley completed a Vermeer Corporation Job Placement Medical History Questionnaire. The questionnaire included the following heading:

To be Filled Out by Applicant as an Integral part of Vermeer's job placement process and safety program. Misrepresentation or omission of facts is grounds for termination regardless when discovered.

The questionnaire included a question regarding whether Mr. Manley had ever had asthma. Mr. Manley checked a box to answer no to the question. The questionnaire included a question regarding whether Mr. Manley had ever had bronchitis. Mr. Manley checked a box to answer no

to the question. Mr. Manley did indeed have a history of asthma. Mr. Manley signed the document to authorize use and disclosure of the protected health information contained in the document for the purpose of a Post Offer, Pre-work Screen evaluation.

Mr. Manley performed his full-time welding duties without incident until October 2019, when the employer moved Mr. Manley to a different area of the production plant.

On October 16, 2019, Mr. Manley met with Lisa Balducchi, R.N., Occupational Health Manager, in the Vermeer Occupational Health Department. During that meeting, Mr. Manley stated that he had been experiencing intermittent difficulty with breathing that he felt was related to his welding activities.

On October 21, 2019, Mr. Manley met with Nurse Balducchi regarding a work related shoulder issue. During that meeting, Mr. Manley again stated that he had been experiencing intermittent difficulty with breathing that he felt was related to his welding activities. Mr. Manley reported to Nurse Balducchi that he was currently prescribed an Albuterol inhaler to use as needed and that he had most recently used the inhaler in the spring of 2019. Mr. Manley reported that on October 17, 2019 he had told his supervisor that he was experiencing breathing difficulty that he believed was related to welding activities and the use of nickel. Mr. Manley told Nurse Balducchi that he was subsequently evaluated by his personal doctor, who recommended that he wear a respiratory mask to deal with metal dust when he performed sanding work. Mr. Manley told Nurse Balducchi that he had originally worked in Vermeer plant 5, but had become uncomfortable due to fumes once he moved to Vermeer plant 3. Mr. Manley told Nurse Balducchi that he had commenced using an N95 mas as needed when performing his welding duties. Mr. Manley told Nurse Balducchi that he had been diagnosed with exercise-induced asthma as a child and that he could not remain outside while burning leaves because it caused him to be short of breath. Mr. Manley told Nurse Balducchi that he felt he could not take a full breath. Nurse Balducchi had Mr. Manley execute a medical release that allowed the Vermeer Occupational Health Department to obtain Mr. Manley's personal medical records for the preceding five years. Nurse Balducchi also arranged for Mr. Manley to be evaluated by Dr. Matthew Doty, M.D. of Vermeer Health Services Center.

On or about October 21, 2019, Mr. Manley completed a Respiratory Medical Questionnaire in connection with the employment. The questionnaire asked whether Mr. Manley had "ever had any of the following pulmonary or lung problems?" Amongst the listed conditions were asthma and chronic bronchitis. Regarding both conditions, Mr. Manley checked a box to indicate yes, that he had suffered from the named condition.

Mr. Manley was evaluated by Dr. Doty on October 23, 2019. Mr. Manley told Dr. Doty that he was short of breath, and that he would cough after performing sanding and after performing some welding activities. At an earlier appointment, Mr. Manley had told Dr. Doty that he had been wearing a respirator mask and had noted significant improvement in his breathing symptoms when he wore the mask. Mr. Manley told Dr. Doty that he had a history of asthma, but had not used his inhaler for at least a year. Mr. Manley told Dr. Doty that he mainly needed his inhaler prior to exercise, but had not been on an active exercise routine. Dr. Doty noted that Mr. Manley's lungs were clear and that Mr. Manley had normal respiratory effort. Dr. Doty diagnosed Mr. Manley with dyspnea with possible work irritant and reactive airway disease.

Dr. Doty documented the plan of treatment of as follows:

The patient on chest x-ray does show some sign of peribronchial cuffing. I feel he is likely having some reactive airway to weld fumes or sanding particulate. Since wearing

a P95 mask, he does not significant improvement. In order for the patient to wear a P95 or N95, he would need to shave his beard and be properly fitted and he is not wanting to do that and so I am going to restrict him to wearing either a P95/N95 if he shaves his beard or PAPR and he at this time at least wants to go with a PAPR option. I am going to treat the patient with a Z-Pak as directed. He was also prescribed a Xopenex inhaler to use as directed and a prednisone burst and tape as directed. I will plan eventually to repeat a chest x-ray in approximately 4 to 6 weeks as well as repeating pulmonary function testing.

On October 28, 2019, Vermeer Occupational Health Department received Mr. Manley's personal medical records. Nurse Balducchi and Ron Stanhope, Senior Environmental Health and Safety Manager, subsequently reviewed the medical records. Both were out of the office during the period of November 1-11, 2019. On November 26, 2019, Nurse Balducchi and/or Mr. Stanhope referred the matter to the human resources personnel and legal personnel.

On December 2, 2019, the employer met with Mr. Manley for the purpose of discharging him from the employment. It was during that meeting that the employer first advised Mr. Manley that the employer's October 21, 2019 discovery that he had failed to disclose his history of asthma on the Job Placement Medical History Questionnaire could and would trigger his discharge from the employment.

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).

Iowa Admin. Code r. 871-24.32(6) provides:

Discharge for misconduct.

(6) False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer.

The evidence in the record fails to establish a current act basis for the discharge. The employer knew as of October 21, 2019 that Mr. Manley had a history of asthma that he had failed to disclose on the May 15, 2018 Job Placement Medical History Questionnaire. The employer requested Mr. Manley's personal medical records and received those medical records on October 28, 2019. Jill Anderson, Human Resources Manager, testified at the appeal hearing that the personal medical records were unnecessary for misconduct determination in light of the admissions Mr. Manley made during his contact with Vermeer's Occupational Health Department personnel during the period of October 21-23, 2019. Upon review of the record of October 21-23 contact, the administrative law judge agrees. In other words, the employer had everything it needed on or before October 23, 2019 to conclude that Mr. Manley had indeed intentionally omitted reference to his history of asthma in the Job Placement Medical History Questionnaire. The evidence indicates that Mr. Manley's willful and deliberate falsification could have endangered his health and safety, as indicated by his need to commence a course of treatment in October 2019. Mr. Manley's willful and deliberate falsification could have exposed the employer to potential legal liability in connection with his breathing issues. However, the employer engaged in unreasonable delay by waiting until December 2, 2019, to discuss with

Mr. Manley the potential disciplinary consequences of the October 21, 2019 discovery of the May 15, 2018 misrepresentation. In the absence of a current act, there can be no disqualification for unemployment insurance benefits. Because there was no current act, the administrative law judge need not rule on whether the misrepresentation constituted misconduct in connection with the employment. Mr. Manley is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The December 18, 2019, reference 01, decision is reversed. The claimant was discharged on December 2, 2019 for no disqualifying reason. The discharge was not based on a current act. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn