IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEFFREY C JOHNSON
Claimant

MIDWEST BASEMENT SYSTEMS INC
Employer

APPEAL NO. 09A-UI-16443-H2

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 09-13-09
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 20, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 19, 2010 in Des Moines, Iowa. Claimant did participate. Employer did participate through (representative) Rodney Fox, Sales Manager; Charles Heady, Vice President; Jason Lincoln, Production Coordinator; Brian Holdeman, Shop Manager; and Santos Orellana, Foreman.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a production coordinator, full-time, beginning June 16, 2008, through September 19, 2009, when he was discharged.

The claimant was discharged for making an error on the Gavin jobsite when he instructed the foreman to remove interior walls and to replace the floors. The customer had not agreed to replace the walls or the floor, so the employer had to absorb the cost of the claimant's error. The claimant could have simply reviewed the contract to determine whether the interior walls and floors were to be replaced, but he did not do so. The error eventually cost the employer around twelve thousand dollars. The claimant's error was known to the employer in July or August 2009. The employer did not make the decision to discharge the claimant at that time, but instead Mr. Heady determined that he would go out with the claimant on some of his jobs and that he would personally double check the claimant's work.

Mr. Heady went along with the claimant on the Morrow job, where he discovered that the claimant had measured incorrectly. The mistake was caught by Mr. Heady in time that it did not cost the employer any lost income.

Even after discovering the error on the Gavin and Morrow jobs, Mr. Heady did not discharge the claimant. The claimant was not performing his job in a manner that was meeting Mr. Heady's

expectation. The claimant had been trained on how to properly perform the job, but was sloppy with his measuring and careless. He could have avoided the Gavin error, by merely checking the contract, but he did not do so.

The claimant was discharged on September 19. No particular event or act led to his discharge, Mr. Heady just decided that based upon the errors in the Gavin and Morrow jobs, that the claimant needed to be replaced. After the claimant was discharged, Mr. Heady discovered that the claimant had not been completing all of his duties, but that information was not available to Mr. Heady until after the claimant had already been discharged.

Prior to his discharge, the claimant had not been given any written warnings that his job was in jeopardy, nor had there been any written documentation of any verbal warnings. The claimant was never given a final warning that his job was in jeopardy if his job performance did not improve.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

The employer knew about the errors on both the Gavin and the Morrow jobs at least one month prior to the claimant's discharge. While the claimant clearly did make the errors on both of those jobs, they cannot be considered "current acts" of misconduct on which a disqualification could be based, as the employer knew about them so long before the discharge.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or negligently. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written) and reasonable notice should be given. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The October 20, 2009, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/kjw