IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DILLON J HILSABECK
Claimant

CROSSROAD ENTERPRISES INC
Employer

APPEAL NO. 11A-UI-11728-SW

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/31/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated August 25, 2011, reference 01, that concluded he was discharged for work-connected misconduct. An in-person hearing was held on October 10, 2011. The parties were properly notified about the hearing. The claimant participated in the hearing with a witness, Ashley Hilsabeck. Travis Berger participated in the hearing on behalf of the employer. Exhibits One through Seven were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time in the employer's window cleaning business from March 15, 2010, to August 4, 2011. Travis Berger is the owner of the business. The claimant was a crew leader for most of his employment, until July 28, 2011, when Berger demoted him to the crew point position.

In May 2011, the employer instituted a new drug-testing policy and presented it to the employees. The claimant angrily disagreed with the drug-testing policy and told Berger that he would not sign the list that said that he understood and accepted the change. He told Berger that he occasionally smoked marijuana outside of work and believed he would test positive for marijuana if tested at that time. He also objected to the part of the policy that personal vehicles could be searched.

Two other employees did not want to sign the list and also told Berger that they did not think they could pass a drug test at that time. Berger decided not to push the issue at that time.

At the end of July 2011, the employer instituted an updated drug-testing policy, which included a consequence for not signing the required forms of (1) no pay increases, (2) demotion from a crew lead to a crew point position, and (3) no position advancement. The revised policy provided for a warning and then termination for hostile conduct and deemed a failure to submit

to a drug test as the same as a positive drug test result. It also limited searches to company vehicles.

At the end of the day on July 25, Berger asked the claimant if he intended to sign the updated policy. When the claimant asked if anything had changed in the policy and Berger said no, the claimant said he was not going to sign it. The claimant and Berger argued about the policy, and the claimant became upset when Berger told the claimant that he did not want his children to be around someone like the claimant. The claimant then left the building but returned and angrily told Berger that he was a better worker who put forth more effort and time than his coworkers. He said that he might as well not put in the extra effort that he did. Berger told him that he would be getting the update the next day and would have to sign it or there would be consequences.

On July 26, the drug-policy update was distributed to employees at a meeting. After the meeting, Berger met with the claimant and another employee. The claimant and Berger argued again about the policy, but in the end, the claimant said while he still was not 100 percent agreeing to the policy, he would sign the acknowledgment, which he did. The claimant worked this shift for the rest of the day.

On July 27, the claimant asked to meet with Berger. He told Berger that he believed the work he did that required the use of rope descent was dangerous and deserved a higher rate of pay. Berger responded that he would be paid his regular rate for the rope descent work and if he failed to do the job, he would be terminated. The claimant replied that it was fine, and he would do the work for the same pay because he could not afford to lose his job. While the claimant was leaving to go back to work, Berger told him that he better start looking for another job. The claimant replied that it was going to be hard to find a business owner who was not greedy and deceitful. Berger sent the claimant home for the rest of the day based on the comments and attitude.

When the claimant reported to work on July 28, Berger presented him with a written warning for suggesting Berger was greedy and deceitful, arguing about company policies, displaying hostility, complaining about other employees, and requesting more pay for the rope descent work. Berger demoted him to the crew point position and gave him a final warning about his conduct, attitude, and choice of words.

The claimant worked on July 28 and 29 and on August 1, 2, and 3 without any further problems. On August 3, Berger distributed a change in the employer's paid time off (PTO) policy. Under the new policy, PTO as a general practice was only authorized for requested days off and approval for PTO had to be requested at least six business days in advance. Approval for PTO requested less than six days in advance would be approved at the discretion of the crew chief. However, PTO was to be used in eight-hour increments and was not to be used to make up for a short week of work, except with approval of the crew chief. PTO could not be used for any sick day if the employee already had used PTO for two prior days in a 30-day period. Employees who quit or were fired were not entitled to be paid for unused PTO. These were all changes in the PTO policy from how it was administered before.

The claimant had accrued about 21 hours of PTO as of the beginning of August. On August 4, the claimant met with Berger. He first asked Berger to change the effective date of the policy to August 3 because that was when it was given to employees, but Berger said he would not change the date. He then told Berger that he would happily sign the acknowledgement of the policy change but believed he should be paid for the 21 hours of PTO accrued before the policy changed. He would agree to the new policy going forward. Berger told him that could not do

that. The claimant then asked for and was given permission to be excused to make a phone call. He called his mother to ask her opinion. His mother said that she did not think the employer could deny him the PTO he had earned. He went back to Berger and told him that he had talked to someone who did not think he could deny him his PTO. The claimant told Berger that he would sign for the policy and would understand that he would not accrue anymore since he was looking for another job anyway, but he was requesting his accrued PTO. Berger told the claimant "that's not going to happen and you're terminated." The claimant did not raise his voice in speaking with Berger and did not use any inappropriate language. His demeanor was not aggressive in talking to Berger because he understood that he could be fired for displaying hostility.

The employer discharged the claimant for violating the warning he had received by being insubordinate and arguing about the PTO policy.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for a current act of work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The unemployment insurance rules further state that: "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. 871 IAC 24.32(8).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000). "The focus is on deliberate, intentional or culpable acts by the employee." *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. I believe the claimant's testimony that he was not hostile, did not raise his voice, and used no inappropriate language in speaking with Berger on August 4, 2011.

The final act that triggered the claimant's discharge was expressing disagreement with Berger about getting paid for this accrued PTO because the requirements for taking the PTO had changed. But the claimant actually had a legal point. The conditions in place when the claimant earned the PTO should have controlled the taking of the leave. The requirements for taking PTO were in fact substantially different than what the employer had followed previously. There is no question that the claimant was a difficult employee to manage and often questioned the employer's policies. But the courts have also emphasized that "employees are not expected to be entirely docile and well-mannered at all times." *Carpenter v. Iowa Department of Job Service*, 401 N.W.2d 242, 246 (Iowa Ct. App. 1986). I conclude the claimant's conduct on August 4 was not insubordinate.

While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established. No current act of willful and substantial misconduct has been shown, even when his prior conduct and warnings are considered.

DECISION:

The unemployment insurance decision dated August 25, 2011, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

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