IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KEVIN CAREY
Claimant

BODENSTEINER IMPLEMENT COMPANY
Employer

APPEAL NO: 19A-UI-01282-TN-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/13/19
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge
IAC 71-24.22(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

Bodensteiner Implement Company, the employer, filed a timely appeal from a representative's unemployment insurance decision dated February 8, 2019, (reference 01) which held claimant eligible for unemployment insurance benefits, finding that the claimant was dismissed from work on January 11, 2019 but finding that the claimant's dismissal was not for a current act of misconduct. After due notice was provided, a telephone hearing was held on February 27, 2019. Claimant participated. Employer participated by Mr. Riley McDermott, General Service Manager. Agency Exhibit D-1 and Employer's Exhibits 1 through 5 were admitted into the hearing record.

ISSUE:

The issue is whether the claimant was discharged for a current act of work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Kevin Carey was employed by Bodensteiner Implement Company from November 1, 2016 until January 11, 2019, when he was discharged from employment. Mr. Carey was employed as a full-time service technician and was paid by the hour. His last immediate supervisor was Mr. Kurt Krull. Mr. Carey was discharged when he failed to meet the employer's expectations with respect to documenting service work, following company procedures and protocol, and because he was not as productive as the employer expected, based upon his previous experience and training.

Mr. Carey had been hired to work as a general service technician by the company in part because of his previous experience with a line of agricultural sprayers that was now affiliated with John Deere, one of the company's service brands. Although Mr. Carey was experienced with the particular sprayer service requirements, he lacked experience in some of the general service work assignments that were given to him by the company. Bodensteiner Implement Company uses an electronic punch system to record hours employees are performing service

work on job assignments. Mr. Carey initially had some difficulty adapting to the company's electronic punch systems.

As time progressed the company also believed that Mr. Carey was not devoting his full efforts to repair jobs, based upon the number of work hours Mr. Carey had entered as work time that he punched in on some assignments. Other technicians had made similar complaints about Mr. Carey to the employer. At times, there were instances where Mr. Carey had claimed an excessive number of hours, and the company had to make substantial adjustments in billing to customers. Mr. Carey was counseled by the company to be "accountable for the work hours he was attributing to job assignments."

On December 10, 2018, Mr. Carey was issued a warning for using profanity with a service clerk in an incident that had taken place during the summer. The claimant also was warned for not following part ordering protocols. At the time that the company issued Mr. Carey the December 10, 2018 warning, the company was aware Mr. Carey had initially claimed excessive work hours for replacing "legs" on warranty work. The hours claimed far exceeded labor time that the company would be paid for by the manufacturer on the warranty work.

The company was also aware that on another service ticket that Mr. Carey had added approximately 30 hours labor to the ticket that had neither been authorized by the customer or specifically approved by the company's service manager, as required by company policy.

On that job, Mr. Carey had also taken it upon himself to replace hoses that were not covered under the warranty agreement. Mr. Carey was aware that the service manager had not signed off for the additional work and that the customer had not agreed to it. Although he was aware that the customer's approval or the service manager's approval was necessary before the work could be done, he did not obtain either. Mr. Carey "assumed" that because the service manager had observed him performing some of the work, the service manager "must not have objected to it." Mr. Carey, however, recognized that his conduct was contrary to policy and might result in a warning.

The employer did not act to either warn or discharge Mr. Carey in mid-December 2018 when the company was aware of his conduct. Bodensteiner Implement Company elected to wait until January 11, 2019, approximately one month later, to discharge the claimant for his previous conduct.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes the claimant was discharged for a current act of work-connected misconduct sufficient to warrant the denial of job insurance benefits. It does not.

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).

Iowa Admin. Code r. 871-24.32(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 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 work violation was known by the employer and the date on which the employer acted. See *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Although the employer was aware in mid-December 2018, that Mr. Carey had knowingly billed additional work hours and parts on customer's machine that had not been authorized by the customer, or by the company service manager, the company did not act at that time to either discharge or warn Mr. Carey for violating the company's rule that requires authorization for

additional work. The company elected to wait until approximately one month before discharging the claimant. The hearing record does not disclose any later acts of misconduct on the part of the claimant until his discharge. The claimant's discharge on January 11, 2019 was not for a current act of work-connected misconduct. Accordingly, benefits are allowed, provided that the claimant meets all other eligibility requirements of Iowa law.

During the hearing, the employer asserted its concern that Mr. Carey is employed and receiving unemployment insurance benefits. Employer was advised that the administrative law judge does not have the jurisdiction to make a decision on that issue at this time, as the issue is not properly before the administrative law judge. The employer was therefore advised to inform Iowa Workforce Development of the concern so that the claimant's qualification for benefits can be determined.

DECISION:

The representative's unemployment insurance decision dated February 8, 2019, reference 01 is affirmed. Claimant was dismissed from work on January 11, 2019. His discharge was not for a current act of misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

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Terry P. Nice
Administrative Law Judge

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Decision Dated and Mailed

tn/scn