IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DANIEL K KEMBOI
Claimant

TRI CITY ELECTRIC CO OF IOWA
Employer

APPEAL NO. 15A-UI-03980-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/08/15
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 25, 2015, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on an Agency conclusion that the claimant was discharged on March 12, 2015 for excessive unexcused absenteeism. After due notice was issued, a hearing was held on May 6, 2015. Claimant Daniel Kemboi participated personally and was represented by paralegal Jon Geyer. Natalie Polich represented the employer and presented additional testimony through Anthony Mayer. Exhibits One through Eight were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time data apprentice from October 2014 until March 12, 2015, when the employer discharged him for attendance. The claimant's usual work hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. During the last week or so of the employment, claimant's immediate supervisor was foreman, Travis Briggs.

On Friday afternoon, November 21, 2014, claimant suffered injury in the course of the employment. The claimant was performing work for the employer at Mary Greeley Medical Center in Ames. Claimant was hit in the back the back of the head and neck by a ladder. The ladder belonged to another contractor working at the same jobsite. The blow to the back of the head and neck knocked the claimant down and may have knocked the claimant out. Claimant also suffered injury to his wrist in connection with his fall. When the claimant came to his senses, he immediately notified his job site supervisor. The claimant told the supervisor that he

was in pain and was feeling lightheaded. Even though Mary Greeley Medical Center had its own emergency room that was immediately available, the supervisor gave the claimant a card with the number for the employer's safety department in Davenport and directed the claimant to contact the employer at that number.

On Monday morning, November 24, 2014, claimant attempted to contact the safety department as directed, but had to leave a message on the answering machine. The claimant reported to a jobsite on the campus of Iowa State University. The claimant told the jobsite supervisor about his injury and that he was in so much pain that he needed to see a doctor. The next day, the jobsite supervisor indicated that he was playing phone tag with Travis Briggs.

On Friday, November 28, 2014, the claimant sought evaluation at Broadlawns Medical Center. The medical provider prescribed a muscle relaxer and pain reliever. The medical provider warned the claimant that the medication could make the claimant drowsy. A week later, the claimant went to the emergency room at a Methodist hospital facility in West Des Moines. That provider x-rayed the claimant's neck, prescribed additional muscle relaxers and painkillers, and gave the claimant the same warning that the medication could make the claimant drowsy. That provider took the claimant off work for two days and told the claimant to follow up with his primary care doctor if he had one.

The claimant received no additional evaluation or treatment until December 29, 2014, when the employer sent the claimant for an evaluation at a Unity Point facility in Ankeny. A week earlier, the employer had changed the claimant's work assignment to light duty. The Unity Point provider x-rayed the claimant's neck and wrist and promised to immediately follow up with the claimant regarding the results. The claimant did not hear anything further from the provider until January 8, at which time the provider said there was a problem with a lack of curvature in the claimant's neck. The provider referred the claimant for physical therapy for his neck and wrist. The provider prescribed additional muscle relaxers and painkillers. The provider placed the claimant on a 15 to 20 pound lifting restriction and restricted the claimant from rotating his neck. The claimant commenced a four-week course of physical therapy on or about January 20, 2015. After completing the course of physical therapy, the claimant continued to experience increased pain. The Unity Point doctor referred the claimant to an orthopedic specialist.

The claimant first saw the orthopedist on March 3, 2015 and underwent an MRI. The claimant met with the specialist at 7:30 a.m. and at 9:30 a.m. The claimant had previously made arrangements with a jobsite supervisor to be absent from work on March 3, 2015. On March 6, Supervisor Travis Briggs later asserted to the employer in an email that he had directed the claimant to contact him after his medical appointment and that the claimant had not done so. Mr. Briggs had in the same email commented on the claimant's difficulty staying away and on the claimant's alleged lack of motivation. On March 3, the provider told the claimant the he had a bulging vertebral disc at C5 and a broken disc at C6, both related to the November 21, 2014 workplace injury. The orthopedist also told the claimant there was a problem with a ligament or tendon in his left wrist. The orthopedist told the claimant that he would need to be referred for a neurology consult. The claimant was still waiting for the employer's insurance carrier to approve the neurology consult at the time the employer discharged the claimant from the employment.

On Wednesday, March 4, claimant was absent due to illness and properly notified the employer. The claimant notified supervisor Travis Briggs that he would be absent from work because he and his children were ill with strep throat. The claimant told Mr. Briggs that he might not be able to return to work that week. Claimant was absent on March 5, but did not contact the employer. The claimant returned to work on Friday, March 6. On that day, Mr. Briggs issued a reprimand to the claimant for not making contact with the employer on March 5. On that day, Mr. Briggs

provided the claimant with a performance evaluation that included a conclusion that the claimant had a poor attitude and referenced the claimant sleeping during breaks.

On March 12, employer issued an additional reprimand to the claimant for allegedly being absent without notice on March 11 and for sleeping on the job. The claimant had told Mr. Briggs on March 10 about a medical appointment set to start at 11:00 a.m. on March 11. The claimant had advised Mr. Briggs that he did not what time the appointment would be done. The claimant was done with the appointment at 2:30 p.m. on March 11 and at that point would have made it back to Ames from Des Moines just in time for the end of his scheduled shift. The claimant did not sleep outside of breaks. The employer's work rules prohibited sleeping on the job.

Claimant had also been absent on November 14 due to illness and had properly reported absence to the employer.

REASONING AND CONCLUSIONS OF LAW:

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.

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). 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).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See Hurtado v. IDJS, 393 N.W.2d 309 (Iowa 1986). In Hurtado, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

The employer does not come to this matter with clean hands. The evidence is remarkable for the manner in which the employer delayed essential evaluation and treatment to a seriously injured employee and the manner in which the employer took an unreasonable and heavy-handed approach with the claimant while the claimant was still dealing with the serious injury. The allegation that the claimant violated work rules by sleeping on the job is without merit. The allegations that the claimant was absent without proper notice on March 3, 5, and 11 are without merit. The claimant had provided the employer with appropriate advance notice in connection with each of the absences, two of which were based on the need to attend medical appointments related to the serious work injury. The administrative law judge notes the conspicuous absence of testimony from Mr. Briggs and the employer's failure to present sufficient evidence to rebut the claimant's compelling and credible testimony.

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

DECISION:

The March 25, 2015, reference 01, decision is reversed. 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

jet/pjs