IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

STEVE R GUDMUNSON
Claimant

GRAY TRANSPORTATION INC
Employer

APPEAL NO. 12A-UI-12057-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/09/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 3, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 31, 2012. Claimant Steve Gudmunson participated. Darrin Gray represented the employer and presented additional testimony through Matt Flemming. Exhibits A, B and C 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.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Steve Gudmunson started his most recent period of employment with Gray Transportation, Inc., in March 2012 and last performed work for the employer on Friday, August 31, 2012. The employer has a contract with John Deere to haul materials between two John Deere facilities in the Waterloo-Cedar Falls area. Mr. Gudmunson worked as a full-time local truck driver. Mr. Gudmunson's regular work hours were 11:00 a.m. to 11:00 p.m., Monday through Friday and some Saturdays. Mr. Gudmunson's immediate supervisor was Matt Flemming, Account Manager for the John Deere account. Mike Thorton was another driver assigned to the John Deere account.

On August 31, Mr. Gudmunson ended the workday with a load of John Deere materials in his assigned trailer. Mr. Gudmunson had intended to deliver the load on Saturday, September 1, but then learned that the John Deere facility was closed that Saturday for the Labor Day weekend. The earliest the materials could be delivered to John Deere would be Tuesday, September 4, the day after Labor Day. A supervisor directed Mr. Gudmunson to secure the trailer and leave the tractor-trailer in Gray Transportation's yard. Mr. Gudmunson used his personal padlock to secure the back door of the trailer holding John Deere's freight. Mr. Gudmunson knew the employer did not have a key to the padlock. After Mr. Gudmunson worked on Friday, August 31, he was next scheduled to work on Tuesday, September 4.

On Monday, September 3, around 6:00 p.m., Mr. Gudmunson telephoned Mr. Flemming on Mr. Flemming's work cell phone. Mr. Gudmunson told Mr. Flemming that he had injured his ankle. Mr. Gudmunson rambled and slurred his speech, which led Mr. Flemming to conclude that Mr. Gudmunson had been drinking. Mr. Flemming directed Mr. Gudmunson to call him back the next morning.

Mr. Gudmunson did not call Mr. Flemming the next morning. Instead, Mr. Gudmunson was absent from work and failed to notify the employer that he would be absent from work. The employer had a written attendance policy set forth in an employee handbook. If Mr. Gudmunson needed to be absent from work, the policy required that Mr. Gudmunson telephone and speak directly to Mr. Flemming prior to the start of his shift. While Mr. Gudmunson did not get a handbook in connection with the most recent period of employment, he had received one in connection with a prior period of employment and was aware of the absence reporting policy.

Mr. Flemming needed Mr. Gudmunson at work, or at least available, on Tuesday, September 4, because John Deere wanted its materials. If Mr. Flemming made attempts to reach Mr. Gudmunson by telephone on September 4, none of the calls was received by Mr. Gudmunson's cell phone or documented on the cell phone record pertaining to that phone. Mr. Gudmunson had misplaced his work cell phone, but located it the evening of September 4, 2012. The phone bore no indication of missed calls from the employer when Mr. Gudmunson located it.

On Wednesday, September 5, Mr. Gudmunson was again absent from work without notifying Mr. Flemming prior to the start of the shift.

On September 5, Mr. Gudmunson sought medical evaluation and treatment for his injured ankle at the VA Outpatient Clinic in Waterloo. At that time, he was diagnosed with a left ankle "strain." The clinic provided Mr. Gudmunson with a medical excuse that took him off work from September 5 through 9 and that released him to return to work on September 10.

On the afternoon of September 5, the employer had another driver called Mr. Gudmunson's phone and Mr. Gudmunson answered his work cell phone. The driver told Mr. Gudmunson that he needed to call Mr. Flemming. At about 2:00 p.m. on September 5, Mr. Gudmunson telephoned Mr. Flemming and Mr. Flemming told Mr. Gudmunson to appear for a meeting the next morning.

During the meeting on the morning of September 6, Mr. Gudmunson showed Mr. Flemming his injured ankle. Mr. Gudmunson provided his medical excuse. Mr. Flemming issued a verbal reprimand for delaying delivery of the John Deere freight. Mr. Flemming then sent Mr. Gudmunson home pending his release to return to work on Monday, September 10.

At 11:30 p.m. on Sunday, September 9, Mr. Gudmunson telephoned driver Mike Thorton on Mr. Thorton's work cell phone to discuss his belief that he was about to be discharged from the employment. Mr. Gudmunson's call woke Mr. Thorton up. Mr. Thorton told Mr. Gudmunson not to worry and to go to bed. Mr. Thorton later told Mr. Flemming that he had *assumed* Mr. Gudmunson had been intoxicated when he called.

On Monday, September 10, Mr. Flemming and Darrin Gray, Safety Compliance Officer and President, discharged Mr. Gudmunson from the employment. The purported trigger for the discharge was the late night call to Mr. Thorton.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The weight of the evidence establishes two unexcused absences on Tuesday, September 4, and Wednesday, September 5. In each instance, Mr. Gudmunson failed to contact the employer prior to the scheduled start of the shift as required by the written attendance policy. In addition. Mr. Flemming had directed Mr. Gudmunson to call him on the morning of September 4 when he spoke to Mr. Gudmunson on the evening of September 3. Mr. Flemming's failure to properly report the absence on September 4 also interfered with timely delivery of the load of John Deere materials that was locked inside Mr. Gudmunson's trailer.

The weight of the evidence establishes no-call/no-show absences on September 4 and 5. The evidence indicates that Mr. Gudmunson was aware of his obligation to contact the employer prior to the scheduled start of his shift if he needed to be absent. Mr. Gudmunson's telephone call on September 3 was not sufficient to provide proper notice to the employer that Mr. Gudmunson would be absent from work on either day. The weight of the evidence does not support the employer's assertion that Mr. Gudmunson was intoxicated on September 3 or 9. In any event, Mr. Gudmunson's decision to imbibe alcohol while he was off duty would not constitute misconduct in connection with the employment absent some clear impact on the employment, such as loss of Mr. Gudmunson's driving privileges due to an OWI. That is not the case here. The administrative law judge noted during the hearing that Mr. Gudmunson lacks clear diction and has a tendency to ramble and this observation casts further doubt on the employer's assertion that Mr. Gudmunson was intoxicated during either call. The weight of the evidence fails to establish that Mr. Flemming gave Mr. Gudmunson some clear directive that would have put Mr. Gudmunson on notice not to call his Mr. Thorton. Though the call to Mr. Thorton might have been a nuisance, it was not misconduct in connection with the employment.

Thus, we have two consecutive no-call/no-show absences. At least the first of those occurred in the context of the employer's need to fulfill a freight delivery contract with John Deere and Mr. Gudmunson's knowledge that he had a load of John Deere freight locked in his trailer with the employer not having a key. The administrative law judge concludes that the two consecutive no-call, no-show absences were sufficient to constitute misconduct in connection with the employment. Accordingly, Mr. Gudmunson is disqualified for benefits until he has

worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's October 3, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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