IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAMES R DARROW
Claimant

RUAN TRANSPORT CORP
Employer

APPEAL NO. 09A-UI-08715-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/10/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 10, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 2, 2009. Claimant James Darrow participated. Tim Laffoon, Terminal Manager, represented the employer. Exhibits One, Two and Three 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: James Darrow was employed by Ruan Transport Corporation on a full-time basis from November 2004 until May 6, 2009, when Tim Laffoon, Terminal Manager, discharged him from the employment.

The final incident that triggered the discharge was Mr. Darrow's no-call, no-show absence on May 4, 2009 and Mr. Darrow's associated failure to pick up a load that had been assigned to him on May 3, 2009. Mr. Darrow did not appear for work on May 4 and did not pick up the assigned load on that day because he was upset that the employer had removed him from a "shagging" position and placed him back in an over-the-road trucking driving position. The shagging position involved moving trailers around at a facility in Marshalltown. The hours for the shagging work were 6:00 a.m. to 2:00 p.m. The over-the-road driving work would require Mr. Darrow to get up late at night and work until the following afternoon. Mr. Darrow had minor children at home and this made it difficult for Mr. Darrow to sleep during the day.

Mr. Darrow had started with the employer as a regional over-the-road driver. Mr. Darrow subsequently moved to a "floater" position, and then moved into a shagging position. Mr. Darrow returned to the over-the-road driving position to make more money. Eight months before the employment came to an end, the employer gave Mr. Darrow the opportunity to move back into a shagging position while another employee was off on medical leave. A week or two before the employment came to an end, the employer notified Mr. Darrow that the other

employee would be returning and Mr. Darrow would need to go back to the over-the-road driving position. Mr. Darrow was upset by this news.

On May 3, Mr. Darrow was assigned his first load back in the over-the-road driving position. Mr. Darrow accepted the load and then failed to appear on May 4 to collect or deliver the load. Instead, Mr. Darrow stayed home and stewed. On May 5, Mr. Darrow had his wife take the paperwork associated with the load to the employer. On May 5, a dispatcher notified Mr. Darrow that he needed to appear for a meeting on May 6. Mr. Darrow appeared for the meeting and was discharged from the employment.

In making the decision to discharge Mr. Darrow, Mr. Laffoon considered prior reprimands that had been issued to Mr. Darrow for similar issues. On September 13, 2005, Mr. Laffoon's predecessor reprimanded Mr. Darrow being tardy and delivering two loads late on that day. On April 17, 2007, Mr. Laffoon reprimanded Mr. Darrow for leaving late to make a scheduled delivery. On June 5, 2008, Mr. Laffoon reprimanded Mr. Darrow for being tardy to work and delivering a load late.

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).

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).

The weight of the evidence indicates that discharge was triggered by Mr. Darrow's unexcused absence on May 4 and Mr. Darrow's negligence in failing to deliver an assigned load on that date. The weight of the evidence indicates that the next most recent unexcused absence/tardiness was in June 2008. The evidence in the record is insufficient to establish excessive unexcused absences. The evidence in the record is also insufficient to establish a pattern of negligence/carelessness so recurrent as to indicate willful or wanton disregard of the employer's interests. During the last eight months of the employment, the shagging position and associated work hours had become the established conditions of Mr. Darrow's employment. The employer's decision to reassign Mr. Darrow back to the over-the-road driving constitute a significant change in the conditions of the employment.

871 IAC 24.26(1) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

"Change in the contract of hire" means a substantial change in the terms or conditions of employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986). Generally, a substantial reduction in hours or pay will give an employee good cause for quitting. See Dehmel v. Employment Appeal Board, 433 N.W.2d 700 (Iowa 1988). In analyzing such cases, the Iowa Courts look at the impact on the claimant, rather than the employer's motivation. Id. An employee acquiesces in a change in the conditions of employment if he or she does not resign in a timely manner. See Olson v. Employment Appeal Board, 460 N.W.2d 865 (Iowa Ct. App. 1990).

Had Mr. Darrow quit in response to the reassignment to the over-the-road driving position, the quit would be deemed for good cause attributable to the employer. This is regardless of the

employer's good intentions to bring the other employee back to his shagging position. With the change in conditions of employment in mind, the administrative law judge concludes that Mr. Darrow's final absence and missed delivery did not constitute misconduct in connection with the employment that would disqualify him for unemployment insurance benefits. Mr. Darrow is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Darrow.

DECISION:

The Agency representative's June 10, 2009, reference 01, decision is affirmed. 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