IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHAD L FERGUSON
Claimant

MORTON BUILDINGS INC
Employer

APPEAL NO. 12A-UI-07954-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/03/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 27, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 24, 2012. Claimant Chad Ferguson participated. Bill Fisher, construction center manager, represented the employer.

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: Chad Ferguson worked for Morton Buildings, Inc., in Jefferson during two distinct periods. The most recent period of employment began in 2007 and ended on June 8, 2012, when Roger Bauer, Northern Plains regional construction supervisor, and Dan Kahlstorf, area construction supervisor, discharged him from the employment. Mr. Kahlstorf was Mr. Ferguson's immediate supervisor. Mr. Kahlstorf and Bill Fisher, construction center manager, notified Mr. Ferguson of the discharge.

Mr. Ferguson was a crew foreman. Mr. Ferguson was in charge of the building process and supervised three other crew members. Mr. Ferguson's work hours began at 6:30 a.m., Monday through Friday. Mr. Ferguson generally worked 10-hour work days and sometimes worked on Saturdays as needed. Summer was the busy season for constructing Morton pole buildings.

On June 7, Mr. Ferguson was absent from work without notifying the employer so that he could work as the general contractor on construction of a pole building as part of a moonlighting project not disclosed to the employer. The project was for hire and not a volunteer, work-for-free venture. Another member of Mr. Ferguson's Morton Buildings construction crew also assisted with the moonlighting project. The pole building was for a neighbor of Bill Fisher, Morton Buildings construction center manager. Mr. Fisher had earlier bid a Morton Building for the neighbor, but the neighbor had not gone forward with the Morton Building project. Mr. Ferguson's moonlighting construction project on the neighbor's property was in lieu of the

Morton Building project. In other words, the construction project was in direct competition with the employer's business.

On June 7, when Mr. Ferguson failed to appear for work or call in, Mr. Fisher telephoned Mr. Ferguson at Mr. Ferguson's company cell phone. Mr. Ferguson said he forgot to call, was not coming in, and was going to take the day off. The employer had ample work for Mr. Ferguson to perform at the time. Mr. Fisher had heard that Mr. Ferguson was assisting with construction of a non-Morton Buildings pole building. That afternoon, Mr. Fisher drove by the construction site on his neighbor's property and observed Mr. Ferguson and the other Morton Buildings crew member working on the pole building project. Mr. Fisher stopped and spoke to the two men. Mr. Fisher then reported the matter to Mr. Kahlstorf.

The employer had a written policy regarding outside employment. The policy was contained in an employee handbook. Mr. Ferguson received and signed for a copy of the handbook. Mr. Ferguson was aware of the policy. The policy required that employees not engage in outside projects that would interfere with the employment or give rise to a conflict of interest. The policy required that the employee disclose any outside project that was similar to or related to the employer's pole building construction business. The policy indicated that if an employee was uncertain whether an outside project would create a conflict of interest, the employee was to ask the employer.

The employer also had an attendance policy that obligated Mr. Fisher to notify the employer prior to the start of his shift if he needed to be absent.

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).

Mr. Ferguson attempted to mislead the administrative law judge through his testimony and went to great effort to avoid providing a direct response to questions when a direct response would not be helpful to his case. The weight of the evidence indicates that Mr. Ferguson knowingly engaged in direct competition with his employer by working as a general contractor on a pole building construction project that he intentionally did not disclose to the employer. Mr. Ferguson was fully aware that his side project was in direct competition with the employer's business. Mr. Ferguson asserted the project was a weekends-only project, while the evidence clearly indicates otherwise. Mr. Ferguson asserted he was working for free, while the evidence clearly indicates otherwise. Not only did Mr. Ferguson engage in direct competition with his employer, but he took time away from work during the employer's busy season to do the side project. In addition, Mr. Ferguson enlisted another Morton Buildings employee in the project. The conduct was in willful and wanton disregard of the employer's interests.

While a disqualifying discharge for attendance usually requires *excessive unexcused* absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). In Sallis, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence.

Mr. Ferguson's no-call, no-show absence, to take time away from work to work on a side project that directly competed with the employer's business, was also misconduct in connection with the employer. The weight of the evidence indicates that Mr. Ferguson was dishonest with the employer when he told Mr. Fisher merely that he had decided not to come in. Mr. Ferguson had decided not to come in so that he could work on the outside project.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Ferguson was discharged for misconduct. Accordingly, Mr. Ferguson 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 for benefits paid to Mr. Ferguson.

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 June 27, 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

jet/kjw