IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KENNETH D BARGER
Claimant

SAWMILL MANAGEMENT INC
Employer

APPEAL NO. 07A-UI-03177-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/25/07 R: 04
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Sawmill Management filed a timely appeal from the March 23, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 20, 2006. Claimant Kenneth participated. Melodee Yaley, Office Manager and Personnel representative, represented the employer and presented additional testimony from Ted Batey, Operations Manager. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received employer's Exhibits One through Five into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kenneth Barger was employed by Sawmill Management as a full-time head saw blade filer from November 9, 2006 until February 28, 2007, when Operations Manager Ted Batey discharged him. Mr. Batey was Mr. Barger's immediate supervisor. Mr. Barger's regular hours of employment were 7:00 a.m. to 3:30 p.m., Monday through Friday, with occasional overtime hours. Mr. Barger's responsibilities involved handling 200-pound industrial saw blades with the assistance of a coworker.

On February 5, 2007, Mr. Barger was preparing to leave for work when he fell on ice outside his home and suffered injury to his back. Mr. Barger required assistance to get back to his house, but then promptly notified Operations Manager Ted Batey that he would be unable to appear for work. Mr. Batey has a history of back problems and was sympathetic to Mr. Barger's circumstances. Mr. Batey suggested that Mr. Barger soak and told Mr. Barger to keep him posted. That evening, Mr. Barger contacted Mr. Batey and told him that he was still sore and that he did not think he would be well enough the next day to report to work.

Mr. Barger did not go to work on February 6. Mr. Barger believed he had properly notified Mr. Batey of his absence during the previous evening's phone call and did not further notify the

employer of the need to be absent on February 6. The employer's attendance policy required Mr. Barger to notify his supervisor prior to the start of his shift and then call the office prior to 8:30 a.m. when he needed to be absent. Mr. Barger was aware of the policy and had received a reprimand in November for two "no-call, no-show" absences. On February 6, Mr. Batey contacted Mr. Barger and reminded him that he needed to notify the employer's office each day he was absent. Mr. Batey also told Mr. Barger that if he was absent two days he would need to provide the employer with a doctor's excuse. Mr. Batey asked Mr. Barger what he intended to do and Mr. Barger indicated that he did not yet know. Mr. Batey had previously shared with Mr. Barger that Mr. Batey received treatment from Kauffman Chiropractic for his back problems. On February 6, Mr. Barger met with Dr. Kauffman, who advised Mr. Barger that he had two lumbar vertebrae out of alignment and adjusted Mr. Barger's spine. Dr. Kauffman instructed Mr. Barger to rest and use ice on his back. Mr. Barger had subsequent appointments with Dr. Kauffman on February 8, 9, 12, 15, 17, 19, 21, 26 and 28.

Mr. Barger was absent on February 7, but again did not notify the employer. On February 7, Mr. Batey again contacted Mr. Barger. Mr. Barger notified Mr. Batey that Dr. Kauffman had instructed him to remain off work for the remainder of the week. Mr. Batey told Mr. Barger that the employer had him "covered." Mr. Batey told Mr. Barger that the employer would need a release before Mr. Barger would be allowed to return to work. Mr. Barger had previously discussed with Dr. Kauffman that his job duties involved handling 200-pound industrial saw blades and Dr. Kauffman had instructed Mr. Barger that he would not be able to perform his regular duties for two to three weeks. Dr. Kauffman advised Mr. Barger that he would be restricted to lifting no more than 20 pounds while his back healed. Dr. Kauffman was well familiar with Sawmill Management and had provided treatment to several people associated with that business. Dr. Kauffman told Mr. Barger that it was important that he not do anything to further aggravate his back condition during the healing process. Mr. Barger thereafter properly notified the employer of his absences.

On February 13, Dr. Kauffman's office faxed Sawmill Management a release. Mr. Barger did not receive a copy of the release. Dr. Kauffman provided the employer with a document that released Mr. Barger to return to work without restrictions on February 14, excused him from work on February 15, and returned him to work on February 16. Mr. Barger spoke to Mr. Batey after the employer had received the release from Dr. Kauffman. Mr. Batey told Mr. Barger that he would assign another employee to perform the more physically taxing aspects of Mr. Barger's duties and would limit Mr. Barger to operating the grinders that sharpened the saw blades for a week or two. Mr. Batey advised Mr. Barger that he understood that a back injury could take a while to heal and that he wanted to make certain Mr. Barger was fully recovered before he returned to his regular duties. Mr. Barger had not requested any work accommodations. Mr. Barger returned to work on February 14 and worked a full shift. At Mr. Batey's request, Mr. Barger worked on February 15 and worked until mid-morning when he left for a chiropractic appointment. Mr. Barger continued to appear for work as scheduled.

On February 21, Mr. Batey learned that Mr. Barger had discussed a 20-pound lifting restriction with a coworker. Mr. Batey summoned Mr. Barger to the office. At that time, Mr. Batey told Mr. Barger that the work release received on February 13 had said nothing about a lifting restriction and that Mr. Batey had understood that Mr. Barger had been released to return to his regular duties. Mr. Barger told Mr. Batey that he had expected Dr. Kauffman to provide the employer with a medical release that addressed the lifting restriction and other restrictions and that he had authorized Dr. Kauffman to discuss his health condition with the employer. Mr. Batey indicated that he had spoken with his sister, who was also involved in managing the business, and that the employer had concluded its workers' compensation insurance would not cover Mr. Barger in the event that he reinjure his back. Mr. Batey told Mr. Barger that he could

not return to work until he had fully recovered. After this discussion, Mr. Barger obtained a release that restricted him to light duty and a 20-pounding lifting limit. The release indicated that these restrictions would remain in place until March 5.

On February 22, Mr. Barger provided the employer with the release and attempted to return to the employment. Mr. Batey reiterated that Mr. Barger would not be allowed to return until he had been granted a full release. Mr. Barger further indicated a desire to return to work and asked whether there was any other work the employer would allow him to perform. Mr. Batey said Mr. Barger could not return because of the problem with workers' compensation coverage and/or liability. Mr. Batey asked Mr. Barger to keep him posted on his recovery. Mr. Barger continued thereafter to contact the employer and express a desire to return to the employment.

On February 28, Mr. Batey notified Mr. Barger that the employer was terminating the employment relationship because Mr. Barger had not yet been granted a full release and his health condition presented an unacceptable liability. Mr. Batey and his sister had previously drawn the conclusion that Mr. Barger had misled the employer about his work abilities during the period of February 14 through 21.

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:
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> 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.
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> 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 Department of Job Service, 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).

The greater weight of the evidence indicates that Mr. Barger did not intentionally mislead the employer about his health condition in connection with the initial release provided to the employer. The greater weight of the evidence indicates that Mr. Barger had not seen the release that was provided to the employer on February 13. The greater weight of the evidence indicates that Mr. Batey was aware that Mr. Barger was not "fully recovered" when he allowed him to return to work on February 14 and assigned him to light-duty work. The greater weight of the evidence indicates that the employer continued to be aware that Mr. Barger required frequent chiropractic adjustment, an indication that Mr. Barger had not fully recovered. The evidence appears to indicate that Mr. Batey was willing to allow Mr. Barger to return to the employment absent full recovery, but that Mr. Batey's sister was not willing to allow the return, due to potential financial liability. The evidence indicates that the employer did not in fact discharge Mr. Barger because the employer thought Mr. Barger had misrepresented his health condition. This is confirmed by the employer's subsequent willingness to have him return to the employment with a full release. The greater weight of the evidence indicates that the employer discharged Mr. Barger because he could not meet the physical requirements of the employment. This would not constitute misconduct that would disqualify Mr. Barger for unemployment insurance benefits.

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

DECISION:

The claims representative's March 23, 2007, 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