IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHANNAKHONE SONGKHAMDET
Claimant

LENNOX INDUSTRIES INC
Employer

APPEAL NO. 17A-UI-06975-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/04/17
Claimant: Appellant (4)

Iowa Code Section 96.5(2)(a) – Disciplinary Suspension & Discharge

STATEMENT OF THE CASE:

Channakhone Songkhamdet filed a timely appeal from the July 6, 2017, reference 02, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Songkhamdet was suspended on June 5, 2017 for misconduct in connection with the employment. After due notice was issued, a hearing was held on July 27, 2017. Mr. Songkhamdet participated. Michele Hawkins of Equifax represented the employer and presented testimony through Brent McDowell. Exhibits A through F, K, L and 1 were received into evidence.

ISSUES:

Whether the claimant was temporary suspended in June 2017 for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

Whether the claimant was discharged in July 2017 for misconduct in 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: Channakhone Songkhamdet was employed by Lennox Industries, Inc. from 2010 until July 7, 2017, when the employer discharged him from the employment. On that day, the employer notified Mr. Songkhamdet that he was "indefinitely suspended pending review." As of the July 27, 2017 appeal hearing, the employer had not made further contact with Mr. Songkhamdet to recall him to the employment or otherwise.

At the start of the employment, the employer provided Mr. Songkhamdet with a copy of the employer's Code of Conduct Policy, a copy of the Factory Rules and Regulations, the Attendance Policy, and a copy of the Collective Bargaining Agreement between Lennox and UAW Local 893, Unit 11. Under the collective bargaining agreement, Mr. Songkhamdet was required to call the designated absence reporting number prior to the scheduled start of his shift if he needed to be absent or late. The employer's practice was to allow employees who were not habitually tardy to call up to 15 minutes after the scheduled start of the shift before the employer deemed the notice late.

The final incident that triggered the July 7, 2017 discharge occurred on July 3, 2017. On that day, Mr. Songkhamdet was five and a half hours late for work because he overslept. Mr. Songkhamdet was supposed to start his shift at 3:30 p.m., but reported for work at 9:00 p.m. Mr. Songkhamdet did not make any contact with the employer prior to reporting late for his shift.

The next most recent absence that factored in the discharge occurred on April 3, 2017. On that day, Mr. Songkhamdet was supposed to report for work at 11:00 a.m., but reported for work late for personal reasons at 12:25 p.m. Mr. Songkhamdet did not make contact with the employer prior to reporting for work late. The employer issued written warning to Mr. Songkhamdet on April 4, 2017.

On June 1, 2017, the employer had issued a written warning to Mr. Songkhamdet and imposed a three-day unpaid suspension. Mr. Songkhamdet served the suspension on June 5, 6 and 7, 2017 and returned to work on June 8, 2017. The June 1 reprimand and suspension were based on what the employer deemed a second violation of the work rule that prohibited loafing. On May 31, 2017, Mr. Songkhamdet had used his cell phone to read the news at his work station at a time when the production line was stopped. Mr. Songkhamdet was aware that he was not allowed to use his cell phone outside of his designated breaks. At the time of the incident, Mr. Songkhamdet was working the day shift, 7:00 a.m. to 3:30 p.m. Mr. Songkhamdet would receive a 15-minute break at 9:00 a.m. and a 30-minute lunch break at noon. In the written warning the employer issued to Mr. Songkhamdet on June 1, 2017, the employer wrote as follows:

> WR#5 Loafing, insufficient performance of duties, incompetence, or unauthorized leaving of Job assignment during working hours. This is your 2nd offense which calls for a 3 day unpaid suspension. NOTE: 4 warning tickets in a 14 month period calls for discharge.

Mr. Songkhamdet signed the document to acknowledge the written warning.

The prior warning for loafing has been issued by Production Supervisor Chris Olivier on March 2, 2017. On the date in question, Mr. Songkhamdet had stopped the production line 26 times to provide himself or other nearby production line workers more time in which to perform designated production line duties. The employer anticipated that employees might have to stop the line on occasion, but deemed Mr. Songkhamdet's line stops excessive. If Mr. Songkhamdet or two nearby production line workers needed to stop the line, they would need to have Mr. Songkhamdet use the line stop button at his work station. The employer noted that the incident was Mr. Songkhamdet's first offense and that a second offense would lead to a three-day unpaid suspension. Mr. Songkhamdet signed the document to acknowledge the written warning.

In response to the three-day suspension imposed on June 1, 2017, Mr. Songkhamdet established an original claim for unemployment insurance benefits that was deemed effective June 4, 2017. Mr. Songkhamdet discontinued his claim after the week that ended June 10, 2017, because he had returned to the employment. Mr. Songkhamdet reactivated his claim in response to the July 7, 2017 discharge. Workforce Development deemed the additional claim to be effective July 2, 2017. The July 6, 2017, reference 02, decision from which Mr. Songkhamdet appeals in this matter addressed a June 5, 2017, suspension, but did not address the July 7, 2017 separation.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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).

Iowa Administrative Code rule 871-24.32(9) provides as follows:

> Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

In *FDL Foods v. Employment Appeal Board*, 456 N.W.2d 233 (Iowa Ct. App. 1990), the Iowa Court of Appeals held that the 10-times weekly benefit amount disqualification set forth in Iowa Code section 96.5(2)(a) did not extend to disciplinary suspensions. Under the court's reasoning there would no basis for disqualifying a claimant for benefits in connection with a temporary disciplinary suspension beyond the period of the suspension and no basis for relieving the employer of liability for benefits in connection with a temporary disciplinary suspension beyond the period of the suspension.

The employer has the burden of proof in a disciplinary suspension or discharge 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 evidence in the record fails to establish misconduct in connection with the employment leading to the temporary suspension that Mr. Songkhamdet served on June 5, 6 and 7, 2017. The suspension was based on Mr. Songkhamdet's unauthorized use of his cell phone during a time when the production line was stopped. Mr. Songkhamdet committed an error in judgment when he decided to access his cell phone to kill time while the production line was down. The cell phone use, in context, did not demonstrate a willful and wanton disregard of the employer's interests. The employer presented insufficient evidence to establish a willful or wanton disregard of the employer's interest in connection with the prior purported loafing incident. Mr. Songkhamdet asserts that the line was stopped not only for him, but also for his nearby coworkers. The employer has not presented sufficient evidence to rebut that assertion. The weight of the evidence indicates that Mr. Songkhamdet performed his work duties to the level of his ability on March 2, 2017. The employer had the ability to present testimony from persons with personal knowledge of the incident, but elected not to present testimony from such individuals. The two purported loafing incidents, taken together, do not establish a pattern of carelessness or negligence indicating an intentional and substantial disregard of the employer's interests. Thus, Mr. Songkhamdet is not disqualified for benefits in connection with the June 2017 temporary disciplinary suspension. Mr. Songkhamdet is eligible for benefits for the week of the suspension, the benefit week that ended, June 10, 2017, provided he is otherwise eligible. The employer's account may be charged for the benefits for that week.

The weight of the evidence in the record establishes that Mr. Songkhamdet was discharged on July 7, 2017, when the employer "indefinitely suspended" him from the employment. The fact that the employer had taken no further action on the matter as of July 20, 2017, 20 days after the "indefinite suspension" supports the conclusion that Mr. Songkhamdet was in fact discharged effective July 7, 2017. The employer's decision to leave Mr. Songkhamdet in procedural limbo does not negate the fact that the employer separated Mr. Songkhamdet from his employment on July 7, 2017.

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 fails establish a discharge based on misconduct in connection with the employment. The incident that triggered the July 7, 2017 discharge was an absence on July 3, 2017, when Mr. Songkhamdet showed up for several hours late because he had overslept. That late arrival was an unexcused absence under the applicable law. The only prior absence that factored in the discharge was another late arrival for personal reasons on April 3, 2017. The absence was an unexcused absence under the applicable law. The two unexcused absences were insufficient to establish excessive unexcused absences. Accordingly, Mr. Songkhamdet's unexcused absences did not disqualify him for unemployment insurance benefits. The administrative law judge cannot follow the employer's lead and strap the attendance matters to the purported loafing incidents to transform a couple of unexcused absences separated by three months into misconduct in connection with the employment. In any event, the four incidents, taken together, do not demonstrate an intentional and substantial disregard of the employer's interests.

The claimant was discharged on July 7, 2017 for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The July 6, 2017, reference 02, decision is modified as follows. The claimant was temporarily suspended on June 5-7, 2017 for no disqualifying reason. The claimant is eligible for benefits for the week that ended June 10, 2017, provided he meets all other eligibility requirements. The employer's account may be charged for benefits for that week. The claimant was discharged on July 7, 2017 for no disqualifying reason. The claimant is eligible for benefits in connection with the separation, provided he meets all other eligibility requirements. The employer's account may be charged for benefits, based on the July 7, 2017 separation.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs