IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANDREW S GROTHER
Claimant

HY-VEE INC
Employer

APPEAL NO. 11A-UI-05856-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/27/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Andrew Grother filed a timely appeal from the April 26, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 26, 2011. Mr. Grother participated. John Fiorelli of Corporate Cost Control represented the employer and presented testimony through Bret Seuferer, Carla Heffron, Jeff Kent and Justin Warren. Exhibits One through Twelve 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: Andrew Grother was employed by Hy-Vee as a full-time receiver and unloader at the employer's distribution center in Chariton from 2006 until March 29, 2011, when Carla Heffron, Assistant Vice President for the Warehouse in Chariton, discharged him for attendance.

The employer has a written attendance policy that is set forth in an employee handbook. Mr. Grother received a copy of the handbook when he started the employment. Under the attendance policy, Mr. Grother was required to notify his supervisor at least one hour prior to the start of his shift if he needed to be absent or late. Mr. Grother was fully aware of the policy.

The final absence that triggered the discharge occurred on March 26, 2011. Mr. Grother was absent that day because he was incarcerated on an operating while intoxicated criminal charge. Mr. Grother's sister notified the employer of the absence. Mr. Grother returned to work on March 27 and completed shifts on that day and the next. On March 29, Mr. Grother was summoned to a meeting with Ms. Heffron, who reviewed the most recent attendance matters along with the final warning and then discharged Mr. Grother from the employment.

In making the decision to end Mr. Grother's employment, the employer considered absences dating back to July 12, 2010. On that date, Mr. Grother left work early due to illness properly

reported to the employer. On July 16, Mr. Grother again left work early due to illness properly reported to the employer. On August 16, Mr. Grother left work early for personal reasons. On August 17, Mr. Grother was absent for personal reasons and notified the employer less than one hour prior to the start of his shift. On August 21, 2010, Mr. Grother was late due to personal reasons. On November 20, Mr. Grother notified the employer less than an hour before the start of his shift that he would be absent because his furnace had gone out. On December 16, Mr. Grother was absent because he needed to care for his sick child and properly notified the employer. On January 10, 2011, Mr. Grother was absent because he become stuck in a ditch in Des Moines. Mr. Grother lived and worked in Chariton. Mr. Grother notified the employer of the absence less than an hour before the start of his shift. On January 25, Mr. Grother was absent due to illness and properly notified the employer. On January 29, Mr. Grother notified the employer less than an hour before the start of his shift that he would be absent because he was having furnace problems. On January 30, Mr. Grother again notified the employer he would be absent due to furnace problems, but provided proper notice.

The employer issued reprimands for attendance to Mr. Grother on January 22, 2010, April 7, 2010, June 23, 2010, August 26, 2010, and February 2, 2011. In connection with the August 26, 2010 reprimand, Mr. Grother was suspended for three days. Mr. Grother was again suspended for three days in connection with the February 2, 2011 reprimand. Also in connection with the February 2011 reprimand, Mr. Seuferer told Mr. Grother that if he had one more unplanned absence he would be terminated.

Toward the end of the employment, the employer was aware that Mr. Grother had an alcohol problem. The employer had offered to assist Mr. Grother in obtaining help for his problem. Mr. Grother denied that he had an alcohol problem and declined the offer of assistance.

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).

The weight of the evidence in the record establishes unexcused absences on August 16, 17, and 21, November 20, January 10, 29 and 30, and March 26. On those days, Mr. Grother was absent for personal reasons and/or failed to provide proper notice to the employer. The weight of the evidence establishes excused absences on July 12 and 16, December 16 and January 25. On those dates, Mr. Grother was absent due to personal illness or the illness of his minor child and properly reported the absence to the employer. All of the absences occurred on the context of multiple warnings for attendance. These include two suspensions and a final warning on February 8, that Mr. Grother would be discharged in connection with the next unplanned absence. That next absence occurred on March 26 and involved an arrest and incarceration. Mr. Grother's unexcused absences were excessive and constituted misconduct in connection with the employment. Mr. Grother 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. Grother.

DECISION:

The Agency representative's April 26, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and 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.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/css