IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RONALD J HANSEN
Claimant

AMVC EMPLOYEE SERVICES LLC
Employer

APPEAL NO. 07A-UI-08487-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/05/07 R: 01
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Ronald Hansen filed a timely appeal from the August 27, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 19, 2007. Mr. Hansen participated. Noele Tyson, Human Resources Representative, represented the employer and presented additional testimony through Dan Weber, Unit Manager.

ISSUE:

Whether the claimant was discharged 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: Ronald Hansen was employed by AMVC Employee Services as a full-time herdsman in a hog farrowing operation from June 5, 2006 until August 4, 2007, when Unit Manager Dan Weber discharged him for attendance. Mr. Weber was Mr. Hansen's immediate supervisor. The final absence occurred on August 4, but followed events on August 2-3.

On August 2, Mr. Hansen had come up on a sow that had its head lodged under a farrowing crate. Mr. Weber had previously instructed Mr. Hansen not to attempt to resolve such a situation unassisted. Mr. Hansen went to find a coworker, saw that the coworker was engaged in other work, and decided not to interrupt the coworker. Before Mr. Hansen had taken effective steps to dislodge the sow, Mr. Weber and the farrowing manager discovered the sow. In discussing the situation, Mr. Weber asked Mr. Hansen how he thought he should address Mr. Hansen's failure to take appropriate steps to dislodge the sow and asked whether Mr. Hansen thought it would be appropriate for Mr. Weber to issue a written reprimand. Mr. Hansen responded that if Mr. Weber issued a written reprimand it would be the first and last. Mr. Hansen then walked away.

In the early morning hours of August 3, Mr. Hansen received word that his 95-year-old mother had taken a turn for the worse. Mr. Hansen spent August 3 traveling to central Iowa with his sister to investigate a possible nursing home placement for his mother.

On August 3, Mr. Hansen called prior to his shift and left a voice message for Mr. Weber. Mr. Weber indicated that he would not be at work, but did not provide a reason for the absence. Mr. Hansen

knew that the employer's policy required him to speak directly with Mr. Weber to report an absence. Mr. Weber had provided employees with his personal cell phone number for this purpose. When Mr. Hansen failed to appear for work, Mr. Weber contacted Mr. Hansen's home and spoke with Mr. Hansen's wife. Mr. Hansen's wife was unaware that Mr. Hansen was not at work. Mr. Hansen's wife told Mr. Weber that Mr. Hansen had been upset about an incident that occurred at the workplace on Thursday, August 2.

On Saturday, August 4, Mr. Hansen was scheduled to start work at 6:00 a.m. At 6:10 a.m., Mr. Hansen contacted Mr. Weber and advised that he would not be coming to work because he had things he needed to think about. Mr. Weber told Mr. Hansen that the employer was short-staffed and that, pursuant to the employer's weekend attendance policy, Mr. Hansen would need to find someone to switch weekends and cover his shift. Mr. Hansen told Mr. Weber that he was not going to switch with anyone. Mr. Weber asked Mr. Hansen whether Mr. Hansen thought his decision not to come to work or comply with the attendance policy was fair to the other employees at the workplace who were working short-staffed. Mr. Hansen said he did not know. Mr. Weber told Mr. Hansen not to return to the employment. Mr. Hansen then terminated the call.

The employer has a written attendance policy. Under the policy, Mr. Hansen was required to make a written request for time off at least three days in advance. If Mr. Hansen complied with the notice requirement, if he had accrued earned time off (ETO), and if the employer was able to spare him, Mr. Weber would grant the request for time off. Otherwise, Mr. Hansen was expected to appear for work. Mr. Hansen had not complied with the policy with regard to his absences on August 3 and 4. Mr. Weber had established an additional attendance policy that required Mr. Hansen to directly contact Mr. Weber as soon as possible if he needed to be absent from work. Because the employer worked with a smaller crew on weekends, the employer required employees to find someone to cover their shift if they could not appear. Mr. Hansen was familiar with all of these policies.

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 that the final absence on August 4 was an unexcused absence. On that date, Mr. Hansen was absent for personal reasons. The weight of the evidence indicates that Mr. Hansen was also absent for personal reasons on August 3. The evidence indicates that Mr. Hansen failed to comply with the employer's attendance policy in connection with both absences. The two absences were unexcused absences under the applicable law. Though it was within the employer's discretion to terminate the employment, the administrative law judge concludes that these two unexcused absences in the context of a 14-month period of employment did not rise to the level of excessive unexcused absences or constitute substantial misconduct that would disqualify Mr. Hansen for unemployment insurance benefits.

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the

employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The evidence in the record fails to establish continued failure to follow reasonable instructions. The evidence establishes no failure to follow instructions in connection with the stuck sow. The evidence does establish an isolated incident of failure to follow instructions on August 4, when Mr. Hansen indicated a refusal to find a replacement to cover his shift. However, this isolated incident was not enough to establish ongoing insubordination that would disqualify Mr. Hansen for unemployment insurance benefits.

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

DECISION:

The claims representative's August 27, 2007, reference 01, decision is reversed. 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/kjw