IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAY D RYEN
Claimant

MIDWEST INDUSTRIES INC
Employer

APPEAL NO. 15A-UI-13588-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/08/15
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 30, 2015, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on November 3, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on January 4, 2016. Claimant Jay Ryen participated. Jeff Ogren represented the employer and presented additional testimony through Eric Wells. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits D-1, D-2, and D-3 into evidence.

ISSUES:

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

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jay Ryen was employed by Midwest Industries, Inc. as a full-time assembler from 1983 until November 3, 2015; when the employer discharged him for allegedly directing offensive and harassing conduct at coworkers. Mr. Ryen's immediate supervisor was Team Leader Eric Wells. Mr. Ryen's work hours toward the end of the employment were 6:00 a.m. to 2:30 p.m.

On October 29, 2015, Mr. Ryen was getting a drink at a water fountain when he spied Mr. Wells. Mr. Ryen caught Mr. Wells' attention and began ranting about his dissatisfaction with the work environment. Mr. Ryen told Mr. Well's "Just move me to fucking nights." Mr. Ryen told Mr. Wells that he had wanted to go to nights but that Jeff Ogren, Human Resources Manager, would not let him. Mr. Ryan ran through a list of complaints. These included that coworkers were not performing their duties, that Spanish coworkers were speaking Spanish, that the employer had bought the wrong forklift, that he was not getting raises, that supervisors and management did not know what they were doing, and that people were being greedy. Mr. Ryen

ended his rant with "Last I checked, this was America." When the contact ended, Mr. Ryen returned to his duties and Mr. Wells reported the incident to Mr. Ogren. Mr. Ryen completed his shift and went home. Later that day, Mr. Ogren left a message on Mr. Ryen's cell phone. Mr. Ogren directed Mr. Ryen not to report for work, that the employer would be conducting an investigation, and that Mr. Ogren would get back to Mr. Ryen on November 2. Mr. Ogren and Mr. Wells then contacted Mr. Ryen's coworkers and solicited allegations of misconduct concerning Mr. Ryen. The coworkers that the employer interviewed spoke of Mr. Ryen's disagreeable temperament and how they avoided him when he was in a bad mood. One coworker alleged that Mr. Ryen had referred to another coworker as a "motherfucker." Another coworker mentioned that Mr. Ryen had asked the coworker to speak to his doctor about getting a medication that would improve the coworker's memory. A Latino coworker asserted a belief that Mr. Ryen had taught another, non-Latino junior staff more than Mr. Ryen had taught the Latino coworker and that the Latino coworker thought the conduct discriminatory. One coworker spoke of Mr. Ryen asking another coworker "Where the fuck have you been?" This last incident had taken place on October 28, 2015. The employer did not interview Mr. Ryen in response to the allegations the employer collected through its investigation. None of the employees contacted as part of the investigation provided a written statement. The employees contacted in connection with investigation could not provide dates of alleged incidents.

The employer decided to discharge Mr. Ryen based on a conclusion that he had violated the employer's Ethical Responsibility Policy. The policy was contained on the employer's computer system. Mr. Ryen could have accessed the policy at any computer workstation but did not ask for assistance in doing so.

In July 2014, the employer had reprimanded Mr. Ryen for engaging in offensive conduct based on the ethnicity or country of origin of coworkers. Mr. Ryen had directed the conduct at one or more Latin American coworkers. The employer warned Mr. Ryen that future similar conduct would result in discharge from the employment. The employer also indicated in the reprimand that Mr. Ryen would be required to complete training that would be coordinated through the human resources department. The employer did not follow through on the harassment training.

Mr. Ryen established a claim for unemployment insurance benefits that was effective November 8, 2015 and received benefits. On November 25, 2015, a Workforce Development claims deputy held a fact-finding interview to address Mr. Ryen's separation from the employment. Mr. Ogren and Mr. Wells participated in the fact-finding interview on behalf of the employer.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv., 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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

The weight of the evidence in the record fails to establish a current act of misconduct. The employer elected not to present testimony from any of the coworkers whom the employer interviewed as part of its investigation and on whose allegations the employer based the decision to discharge Mr. Ryen. The employer had the ability to present testimony from persons with purported firsthand personal knowledge of the alleged incidents. By failing to present such testimony, the weight of the evidence indicates that the employer omitted important evidence concerning the full context of Mr. Ryen's interactions with coworkers. The evidence does establish that Mr. Ryen vented his frustration with the working conditions when speaking to Mr. Wells on October 29, 2015. His expression of frustration on that day or the preceding day did not rise to the level of misconduct. The weight of the evidence indicates that Mr. Ryen's expression of frustration with the working conditions, including frustration with coworkers and supervisors, was what prompted the employer to solicit additional allegations and what was in fact the basis for the discharge. The fact that Mr. Ryen had engaged in misconduct in July 2014 was not proof that he had engaged in similar misconduct in October 2015.

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

DECISION:

The November 30, 2015, 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

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