IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LYNN W ANDERSON
Claimant

PRIORITY COURIER INC
Employer

APPEAL NO. 10A-UI-04114-JTT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 01/24/10
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 March 9, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 29, 2010. Claimant Lynn Anderson participated. John Jero, Terminal Manager, represented the employer.

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: Lynn Anderson was employed by Priority Courier as a full-time delivery driver from 2005 until January 29, 2010, when John Jero, Terminal Manager, discharged him for attendance. Mr. Jero was one of Mr. Anderson's immediate supervisors.

The final incident that prompted the discharge occurred on January 27, 2010, when Mr. Anderson did not appear for work because he believed he had reached the limit on hours he could legally drive under federal Department of Transportation regulations. Those regulations limited Mr. Anderson to driving no more than 14 hours in a 24-hour period. On January 25, Mr. Anderson had worked from 6:00 a.m. to 7:00 p.m. On January 26, Mr. Anderson had worked from 6:00 a.m. to 9:45 p.m. If Mr. Anderson was at the 14-hour driving limit, the D.O.T. regulations required that he be off-duty 10 hours before recommencing driving duties. Because Mr. Anderson was done driving at 9:45 p.m. on January 26, the 10-hour off-duty time would be done at 7:45 a.m. on January 27, 2010. This would leave Mr. Anderson available for most of his shift on January 27. When Mr. Anderson got back to the terminal on the evening of January 26, he spoke to the dispatcher/manager on duty regarding the D.O.T. limit and indicated he would not be in the next day. The employer's policy required that Mr. Anderson notify the employer at least an hour in advance of the start of his shift if he needed to be absent. When Mr. Anderson arrived for his shift on January 28, Mr. Jero spoke to Mr. Anderson regarding his absence on January 27 and Mr. Anderson told Mr. Jero about his conversation with the dispatcher/manager on January 26. Mr. Jero sent Mr. Anderson home with direction to appear the next day for a

meeting. Mr. Jero spoke to the night dispatcher/manager, who denied speaking with Mr. Anderson. The night dispatcher/manager is still with the employer, but did not participate in the appeal hearing.

In making the decision to discharge Mr. Anderson, Mr. Jero considered prior attendance matters. According to the employer, the most recent prior attendance matter occurred on November 2009, when Mr. Anderson was late to work. Mr. Anderson concurs that there was a day in November 2009 when he overslept. The employer was unable to provide the date of the tardiness or dates regarding any other absences.

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 indicates that Mr. Anderson was absence from work on January 27, 2010 for personal reasons. While the concern about the D.O.T. driving limits might have justified a late start to Mr. Anderson's work day, it did not explain or excuse a complete absence. Mr. Anderson would have missed no more than an hour and 45 minutes of his shift and would be legal to drive the rest of the shift. The weight of the evidence indicates that Mr. Anderson did speak with the night dispatcher/supervisor. The employer did not present testimony from the night dispatcher/supervisor to sufficiently rebut Mr. Anderson's assertion regarding that conversation. The administrative law judge concludes that the absence on January 27 was an unexcused absence. The evidence establishes only one unexcused tardiness, in November 2009. The evidence establishes no additional unexcused absences. Mr. Anderson's unexcused absences were not excessive and did not constitute misconduct in connection with the employment that would disqualify him for unemployment insurance benefits.

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

DECISION:

The Agency representative's March 9, 2010, 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/kjw