IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOHN P POTTER
Claimant

DUBUQUE STAMPING & MFG INC
Employer

APPEAL NO. 16A-UI-13616-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/13/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

John Potter filed a timely appeal from the December 13, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on a claims deputy's conclusion that Mr. Potter was discharged on November 15, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on January 17, 2017. Mr. Potter participated personally and was represented by attorney Emilie Roth Richardson. Matt Spahn represented the employer and presented additional testimony through Josh Smyth and Amy Weidenbacher. Exhibit 1 was 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: Dubuque Stamping & Manufacturing, Inc., produces metal stamped components for customers that include Caterpillar and John Deere. John Potter was employed by Dubuque Stamping & Manufacturing on a full-time basis from 1992 until November 15, 2016, when the employer discharged him from the employment. The management group that made the discharge decision included Matt Spahn, Production Manager, Josh Smyth, Maintenance Manager/Acting Forman, and Darold Vickerman, Controller. During the last several years of the employment, Mr. Potter was a die setter. During the last few months of the employment, the employer altered Mr. Potter's work duties to add working in the warehouse shipping and receiving area. The employer would page Mr. Potter as needed to have him assist with loading or unloading freight.

In May 2016, Mr. Smyth became Mr. Potter's immediate supervisor. At about that time, the employer changed Mr. Potter's start time from 7:00 a.m. to 5:00 a.m. and changed his end of shift time from 3:20 p.m. to 1:20 p.m. Mr. Potter was allowed a 10-minute paid break at 8:20 a.m. and a 20-minute unpaid break at 11:00 a.m. Mr. Potter was allowed to take restroom breaks outside of the scheduled break times, but was supposed to notify a supervisor upon his return from such restroom breaks.

The employer's decision to discharge Mr. Potter from the employment was based primarily on Mr. Spahn's belief that Mr. Potter had been dishonest about his whereabouts between 12:45 p.m. and 1:05 p.m. on November 4, 2016. The employer's decision to discharge Mr. Potter from the employment was secondarily based on the employer's belief that Mr. Potter had taken too long on November 3, 2016 to set up a machine for production and had failed to accurately record his time on the project. The employer also based its decision to discharge Mr. Potter on the employer's belief that Mr. Potter had taken took long on November 9 and 10 to set up a machine for production.

November 3, 2016 was Mr. Potter's first day back at work after an approved period of vacation. Early in the shift, another die setter spoke to Mr. Potter about the difficulty that die setter had been encountering in trying to set up project number RE516518 the previous day. Mr. Potter clocked into the die setting job number at 5:24 a.m. and clocked out of the job at 6:30 a.m. The employer expected machine set-up to take no longer than an hour unless there were extenuating circumstances that required additional set-up time. Mr. Potter was expected to remain clocked into a job while he was actively working on the set-up and was expected to sign out the job when he was no longer actively working on the set-up. The employer tracked the time associated with set-up and factored that time into the cost charged to the customer. The employer also tracked the time associated with set-up to identify and resolve any engineering or manufacturing inefficiencies. The active die set up included providing a manufactured part to the employer's quality assurance staff for testing. On November 3, 2016, Mr. Potter signed out of project number RE516518 after he submitted a part to be quality checked. Mr. Potter then clocked into another project number, but returned to RE516518 for the limited purpose of submitting additional parts for quality check at 7:10, 8:15 and 9:10 a.m. This additional work on RE516518 took less than 10 minutes per additional quality check. Pursuant to the employer's protocol, Mr. Potter was not required to clock out of the other project or clock into another project if his work on the latter project took less than 10 minutes. Mr. Potter had tracked his time on November 3 in keeping with his understanding of the time tracking protocol.

Pursuant to protocol, Mr. Potter's time tracking record for November 3 was not available for the employer's review until November 4, 2016. On the morning of November 4, 2016, Mr. Spahn spoke with Mr. Smyth and with Brian Sabers, Quality Manager, regarding the amount of time Mr. Potter had dedicated to project number RE516518 on November 3 and concluded that Mr. Potter had spent an inordinate amount of time working on the project without clocking in for the entire duration of his work on the set up project. Mr. Spahn and Mr. Smyth decided to meet with Mr. Potter at 1:00 p.m. that day to discuss Mr. Potter's work on the project, why it took so long, and why he did not remain clocked into the project until the final sample part was presented to quality control for testing.

At 12:45 p.m. on November 4, Mr. Smyth left the office and went looking for Mr. Potter and the union steward to collect them for the 1:00 p.m. meeting. Mr. Smyth looked for Mr. Potter in a middle room of the plant and then went to the die room, but did not find Mr. Potter in either location. Mr. Smyth then looked for Mr. Potter in a back area of the building. Mr. Smyth then looked for Mr. Potter in the front production area. Mr. Smyth did not find Mr. Potter in those areas because Mr. Potter had gone to the men's room. At 1:00 p.m., Mr. Smyth paged Mr. Potter. Mr. Potter heard his name in the page, but did not hear the full page. Mr. Potter asked a utility operator, Bonny Cook, the content of the page. Bonny asked Mr. Potter for assistance with a machine. Mr. Potter then heard a second page and reported to the office by 1:05 p.m. The meeting was to take place in the office of Amy Weidenbacher, Human Resources Manager. When Mr. Potter met up with Mr. Smyth, the pair made the 10-second walk to Ms. Weidenbacher's office. During that 10-second walk, Mr. Smyth told Mr. Potter that he had been looking for him. Mr. Potter told Mr. Smyth that he had been with Bonny at machine number 319. Mr. Smyth did not ask Mr. Potter during that brief exchange where Mr. Potter had been during the entire period of 12:45 p.m. to 1:05 p.m. and Mr. Potter was unaware that Mr. Smyth had been looking for him for that length of time. During the meeting with

Ms. Weidenbacher, Ms. Weidenbacher asked where Mr. Potter had been since 12:45 p.m. and Mr. Potter truthfully told her that he had visited the restroom, had stopped at the foreman's office because he thought the meeting might be there, and had stopped at machine 319.

During the meeting with Ms. Weidenbacher, Mr. Smyth asked Mr. Potter why Mr. Potter's work on project number RE516518 had taken about three hours from submission of the part for quality testing and the final submission for quality checking. Mr. Potter explained that the additional time on the project had been necessitated by the need for shimming. The employer's production protocol calls for employees to complete "labor notes" if they run into a problem and a foreman is not immediately available. During the meeting, Mr. Potter asked Mr. Smyth if Mr. Smyth had checked the labor notes. Mr. Potter did not say that he had completed labor notes in connection with the project. Mr. Potter had in fact not completed any labor notes in connection with the project. During the meeting on November 4, neither Mr. Smyth nor Ms. Weidenbacher inquired about the other set-up that Mr. Potter had clocked into and worked on subsequent to clocking out of project number RE516518 at 6:30 a.m. on November 3.

After the meeting on November 4, Mr. Potter returned to his work duties and continued to perform his regular work duties until November 10, 2016.

On November 10, Mr. Spahn and Ms. Weidenbacher elected to re-interview Mr. Potter concerning the November 3 set-up and about his whereabouts immediately prior to the November 4 meeting. Between the November 4 meeting and the November 10 meeting, Mr. Smyth spoke with utility operator Bonny Cook, who allegedly asserted that Mr. Potter had only paused at machine 319 on November 4 to inquire about the content of the overhead page. While the employer asserts a second interview was necessitated by inconsistencies in Mr. Potter's statements on November 4, the weight of the evidence fails to support the employer's assertion that there had been inconsistencies. The weight of the evidence establishes instead that the November 10 meeting was scheduled to provide Mr. Spahn an opportunity to question Mr. Potter regarding the November 3 set-up and Mr. Potter's whereabouts immediately before the November 4 meeting. Mr. Smith did not participate in the November 10 meeting. At the end of the meeting on November 10, Mr. Spahn told Mr. Potter that he was suspended from the employment.

On November 15, 2016, Ms. Weidenbacher notified Mr. Potter by telephone that he was discharged from the employment and read the termination notice the employer had prepared. The employer included reference in the termination notice to die setting work that Mr. Potter performed on project number 9W-6466 on the afternoon of November 9 and morning of November 10. On November 9, Mr. Potter was clocked into that set-up project from 1:06 p.m. to 3:13 p.m. On November 10, Mr. Potter was again clocked into that set-up project from 5:07 a.m. to 5:40 a.m. The project required the additional time because Mr. Potter encountered difficulties in the set-up. Mr. Potter worked for other projects during those times for intervals of less than 10 minutes and, therefore, did not clock out from 9W-6466.

The employer also included reference in the termination notice to an incident on April 15, 2016 that followed a meeting with Mr. Potter on that same day. After the meeting April 15, Mr. Spahn encountered Mr. Potter at a vending machine five minutes before the scheduled start of his lunch break.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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:
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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).

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).

The weight of the evidence in the record fails to establish misconduct in connection with the employment. The weight of the evidence in the record establishes that Mr. Potter performed the November 3 set-up work in good faith and in accordance with his understanding of the employer's time tracking protocol. The weight of the evidence fails to support the employer's assertion that Mr. Potter was insubordinate in connection his performance of those work duties. The weight of the evidence fails to support the employer's assertion that Mr. Potter was dishonest with the employer on November 4, 2016 in the course of discussing his work on November 3 or in the course of discussing his whereabouts immediately before that meeting. Mr. Potter's need to use the restroom for 10 minutes on November 4 was not misconduct. The employer failed to present sufficient evidence to rebut Mr. Potter's testimony regarding his whereabouts between 11:45 a.m. and 1:05 p.m. on November 4. The employer elected not to have Bonny Cook testify, though the employer asserts that Ms. Cook had personal knowledge of that matter that differed from Mr. Potter's statements on that matter. The weight of the evidence strongly suggests that the employer did not discuss with Mr. Potter the November 9-10 work on project 9W-6466. However, the weight of the evidence establishes that Mr. Potter tracked his time on that project in a manner that indicated an attempt to respond to the employer's complaint about the November 3 set up. The evidence does not establish any pattern of unreasonable refusal to follow reasonable directives and, therefore, does not establish insubordination.

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

DECISION:

The December 13, 2016, reference 01, decision is reversed. The claimant was discharged on November 15, 2016 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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