IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TROY A MCGREW
Claimant

DYBALL ACOUSTICAL INC
Employer

APPEAL NO. 08A-UI-07701-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/20/08 R: 03
Claimant: Respondent (1-R)

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

STATEMENT OF THE CASE:

Dyball Acoustical filed a timely appeal from the August 18, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 9, 2008. Claimant Troy McGrew participated. Ron Dyball, President and sole shareholder of Dyball Acoustical, Inc., represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

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: Troy McGrew was employed by Dyball Acoustical, Inc., as a full-time ceiling installer from 1991 until July 18, 2008, when Ron Dyball, President and sole shareholder of Dyball Acoustical, Inc., discharged him.

The employer is a ceiling installation company. The employer contracts with general contractors to perform work on commercial construction projects within a 60-mile radius of Waterloo. Mr. McGrew worked for the employer for many years and acquired many contractor contacts through the employment. Toward the end of Mr. McGrew's employment Ron Dyball was in the process of turning his business over to his son and son-in-law. The transaction was structured so that Dyball Acoustical would sell its business assets to a newly formed company, Artisan Ceiling Systems, to be run by Casey Dyball and Matt Rowenhorst. On June 2, 2008, Dyball Acoustical notified its employees that Artisan Ceiling Systems was purchasing Dyball Acoustical's assets and taking over all contracts on which Dyball Acoustical had not already commenced work. The sale of business assets and transfer of contracts was effective immediately. Dyball Acoustical notified employees that Dyball Acoustical would be drastically scaling back its business activity. The employer notified employees that most or all would eventually be laid off from Dyball Acoustical and that most would be given the opportunity to apply for positions with the new employer.

On June 9 or 10, Mr. McGrew told Ron Dyball that he would not be going to work for Artisan Ceiling Systems, but would instead be getting bonded and insured so that he could start his own business venture. This communication occurred as part of a casual, brief conversation. Mr. McGrew did not become an employee of Artisan Ceiling Systems. Mr. McGrew did not work on any Artisan Ceiling System projects. Mr. McGrew continued to perform full-time work for Dyball Acoustical.

On June 13, Mr. McGrew registered his own company, Crew Acoustics, L.L.C., with the Iowa Secretary of State. At some point prior to July 18, Mr. McGrew purchased equipment he would need for his business. Mr. McGrew also sent a letter soliciting business to 25 general contractors in the Waterloo area and as far away as Fort Dodge and Dubuque. Several of the contractors Mr. McGrew contacted were contractors for whom Mr. McGrew had performed work as a Dyball Acoustic employee. In the solicitation letter, Mr. McGrew indicated that he had worked for a commercial ceiling contractor, but did not identify Dyball Acoustic as his employer. Prior to the discharge, Mr. McGrew did not bid on any projects for which Dyball Acoustics or Artisan Ceiling Systems had formally bid. Mr. McGrew did not formally bid on any projects until after he was discharged from Dyball Acoustics.

On July 12, another Dyball Acoustic employee, Kenny Bergman, told Ron Dyball that Mr. McGrew has spoken to him about joining his new business venture. On July 14, a representative of Peters Construction notified Ron Dyball that the general contracting firm had received a business card and solicitation letter from Crew Acoustics.

On July 18, Ron Dyball and Matt Rowenhorst went to speak with Mr. McGrew at a jobsite where Mr. McGrew was performing work for Dyball Acoustical. Mr. Dyball asserted that Mr. McGrew was competing with Dyball Acoustical, asserted that Mr. McGrew's business venture was in violation of a conflict of interest policy in the employee handbook, and told Mr. McGrew that he could not allow him to continue performing work for Dyball Acoustical unless Mr. McGrew entered into an exclusive subcontracting agreement with Dyball Acoustical and/or Artisan Ceiling Systems. Under the proposed agreement, Mr. McGrew's ability to perform his trade and generate income would be entirely dependent upon the will of Casey Dyball and Matt Rowenhorst. Mr. Dyball suspended Mr. McGrew unless and until an agreement was reached. Despite the employer's written policy regarding conflicts of interest, Mr. Dyball had a history of allowing employees to moonlight and asked only that employees make Mr. Dyball aware of the work they were performing outside their employment with Dyball Acoustical. At the time of the July 18 meeting, Mr. Dyball and Mr. McGrew agreed to meet again on July 21.

On July 21, Mr. Dyball, Mr. McGrew and Mr. Rowenhorst met to further discuss Mr. Dyball's proposal that Mr. McGrew enter into a subcontracting agreement. Mr. Dyball told Mr. McGrew that if he wished to enter into subcontracting agreement, he would be required to draft a letter to all of the contractors he had previously contacted and outline the subcontracting arrangement in that letter. In addition, Mr. Dyball told Mr. McGrew that he would be required to execute a non-compete agreement. Mr. McGrew advised that he had already made an investment in his business venture. Mr. McGrew agreed to provide Mr. Dyball with a decision the following day. On July 22, Mr. McGrew notified Mr. Dyball that he had decided to move forward with his own company. Mr. Rowenhorst directed Mr. McGrew to return any of the employer's equipment that he had in his possession and Mr. McGrew returned the equipment.

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).

The evidence in the record fails to establish misconduct. The evidence in the record fails to establish that Mr. McGrew competed against Dyball Acoustical. Dyball Acoustical had ceased soliciting contracts prior to the beginning of Mr. McGrew's business venture. Mr. McGrew was under no obligation to become an employee of Artisan Ceiling Systems or to refrain from competing with Artisan Ceiling Systems.

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

The employer's appeal letter and the evidence in the record raise the issue of whether Mr. McGrew's self-employment prevents him from meeting the work availability requirements of Iowa Code section 96.4(3). This matter will be remanded so that that issue may be addressed.

DECISION:

The Agency representative's August 18, 2008, 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. This matter will be remanded to address whether the claimant's self-employment prevents him from meeting the work availability requirements of Iowa Code section 96.4(3).

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs