IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KEVIN J SIEGWARTH
Claimant

MIDWEST AMBUCARE INC
Employer

APPEAL NO. 15A-UI-10346-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/16/15
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Kevin Siegwarth filed a timely appeal from the September 2, 2015, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Mr. Siegwarth had been discharged on August 14, 2015 for misconduct in connection with the employment. After due notice was issued, a hearing was held on September 29, 2015. Mr. Siegwarth participated. Josh Chapman, Chief Financial Officer, 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: Kevin Siegwarth was employed by Midwest Ambucare, Inc., as a full-time service technician from 2011 until August 14, 2015, when Kim Chapman, President, discharged him from the employment due to motorist complaints that Mr. Siegwarth was operating the employer's van in an erratic and unsafe manner. Mr. Siegwarth was based out of his home in Clinton. Mr. Siegwarth's duties involved driving the employer's work van to medical facilities throughout eastern Iowa, western Illinois and southern Wisconsin to repair medical equipment. Kim Chapman was Mr. Siegwarth's supervisor. Mr. Chapman's office is in Des Moines.

The final absence that triggered the discharge occurred on August 12, 2015. On that day a retired state trooper telephoned Josh Chapman, Chief Financial Officer, to complain about Mr. Siegwarth's driving. The caller indicated that while he was following Mr. Siegwarth, Mr. Siegwarth had driving the employer's van off the pavement and onto the gravel shoulder five times. As the caller was on the phone speaking with Josh Chapman, the caller reported twice that Mr. Siegwarth had just left the paved highway. The caller also communicated with a Department of Transportation Motor Vehicle Enforcement Officer, who stopped Mr. Siegwarth on the outskirts of Cedar Rapids. The employer was concerned that Mr. Siegwarth might have been using his employer-issued cell phone to send text messages while he was driving. The

employer reviewed the cell phone records and determined that Mr. Siegwarth had indeed been text messaging with his girlfriend. The employer policy prohibited texting while driving. The employer had reviewed the policy with Mr. Siegwarth at the time of hire. Mr. Siegwarth was in the habit of text messaging with his girlfriend while driving. Mr. Siegwarth thought his particular manner of sending messages through dictation mitigated the knowing violation of the employer's policy. Mr. Siegwarth would have to take his eyes off the road to read his girlfriend's messages to him. The employer also reviewed the global positioning system (GPS) for the van and noted hard cornering documented by the GPS system at a time when Mr. Siegwarth was supposed to be driving down a straight road.

The final incident followed similar motorist complaints of erratic driving and additional similar text messaging while driving incidents. In December 2014, the employer had reprimanded Mr. Siegwarth for erratic driving and texting while driving. After that, Mr. Siegwarth's driving improved for several months. However, in July 2015, there were two incidents wherein motorists called the employer with concerns that Mr. Siegwarth driving erratically and likely text messaging. The employer confirmed text messaging and hard cornering in connection with at least one of the incidents.

Mr. Siegwarth attributes his erratic operation of the employer's van to problems with the alignment and tire wear. Mr. Siegwarth had brought concerns about the alignment to the employer's concerns in July, but the employer discounted the concerns.

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:
>
> 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.
>
> 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).

Regardless of whether the employer's van needed an alignment, the evidence in the record establishes that Mr. Siegwarth knowingly and repeatedly violated the employer's texting while driving policy. The evidence also establishes that Mr. Siegwarth repeatedly operated the employer's vehicle in an erratic manner, prompted complaints from multiple concerned motorists. Mr. Siegwarth's assertion that he dictated his text messages does nothing to mitigate the dangerousness of the conduct or the knowing violation of the employer's policy. Mr. Siegwarth would still have to take his eyes off the road to read his girlfriend's messages. The weight of the evidence fails to support Mr. Siegwarth's assertion that poor alignment and tire wear caused him to leave the travel portion of the roadway. The administrative law judge notes that Mr. Siegwarth apparently believed the vehicle was sufficiently roadworthy to continue driving it great distances on a regular basis. Mr. Siegwarth's erratic operation of the employer's vehicle while text messaging unnecessarily exposed the employer to liability for potential property damage and personal injury. It demonstrated a willful disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Siegwarth was discharged for misconduct. Accordingly, Mr. Siegwarth is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The September 2, 2015, reference 01, decision is affirmed. The claimant was discharged on August 14, 2015 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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