IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

CLAYTON T COOK
Claimant

POLARIS INDUSTRIES INC
Employer

APPEAL NO. 18A-UI-02389-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/17/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Clayton Cook filed a timely appeal from the February 14, 2018, reference 02, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Cook was discharged on January 20, 2018 for excessive unexcused absenteeism and tardiness after being warned. After due notice was issued, a hearing was held on March 19, 2018. Mr. Cook participated. Abby Orrtel represented the employer. Exhibits 1 through 5 and A were 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: Clayton Cook was employed by Polaris Industries, Inc. as a full-time group lead from 2014 until January 23, 2018, when Abby Orrtel, Human Resources Generalist, and Brad Jones, Human Resources Manager, discharged from the employment for failing to give proper notice of his need to be late for work on four occasions between April 2017 and January 2018. If Mr. Cook needed to be absent from work, the employer's written attendance policy required that Mr. Cook notify his supervisor prior to the scheduled start of his shift. The employer reviewed the attendance policy with Mr. Cook at the start of his employment and provided Mr. Cook with a copy of the policy. Mr. Cook's regular work hours were 5:30 a.m. to 3:00 p.m., or later. The employer sometimes scheduled Mr. Cook to start at 6:00 a.m. As a group lead, Mr. Cook supervised approximately 90 employees. In the event Mr. Cook was late for work, his subordinates would be without the guidance they needed to begin their work duties.

The final absence that triggered the discharge occurred on January 20, 2018, when Mr. Cook overslept. Mr. Cook was supposed to start work at 5:30 a.m., but clocked in at 6:00 a.m. When Mr. Cook did not appear at 5:30 a.m., his supervisor called him at 5:40 and 5:43 a.m. to prompt him to report for work. Mr. Cook called back at 5:43 a.m. to indicate he would be late.

The final absence followed earlier absences and associated progressive reprimands. On April 6, 2017, Mr. Cook was scheduled to start work at 6:00 a.m., but overslept and did not report on time for work. At 6:10 a.m., Mr. Cook contacted his supervisor. Mr. Cook then reported for work at 6:28 a.m. On April 12, 2017, the employer issued a written "verbal" warning to Mr. Cook in connection with the absence. The reprimand warned that "Continued instances may lead to further disciplinary action up to and including termination." On September 27, 2017, Mr. Cook was again scheduled to start work at 6:00 a.m., but overslept and did not report on time for work. At 6:09 a.m., Mr. Cook contacted the supervisor. Mr. Cook then reported for work at 6:28 a.m. On October 4, 2017, the employer issued a written reprimand to Mr. Cook in connection with the absence. The reprimand contained the same warning about further disciplinary action including the potential for discharge. On December 5, 2017, Mr. Cook was scheduled to start work at 5:30 a.m., but overslept and did not appear on time for work. At 6:01 a.m., Mr. Cook contacted the employer. Mr. Cook then reported for work at 6:27 a.m. On December 13, 2017, the employer issued a "Final" written warning to Mr. Cook in connection with the absence. The reprimand contained the same warning regarding further discipline including discharge.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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).

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). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The evidence in the record establishes a discharge based on excessive unexcused tardiness that occurred in the context of repeated, progressive warnings that were prompted by Mr. Cook's failure to provide timely notice of his need to be late. Each of the absences that factored in the discharge occurred due to Mr. Cook oversleeping. Each of the four similar instances, between April 6, 2017 and January 20, 2018 was an unexcused absence under the applicable law. Through the progressive discipline, the employer put Mr. Cook on notice that his employment was in jeopardy. The repeated tardiness in the context of Mr. Cook's group lead duties and the repeated, progress discipline demonstrates a willful and substantial disregard of the employer's interests.

During the hearing, Mr. Cook raised a concern that no human resources personnel was present for the final warning. That concern had no impact on whether the unexcused tardiness was

excessive. Mr. Cook also raised concern that some supervisors have a five-minute grace rule, but acknowledged it would have no impact on the absences that factored in his discharge. Mr. Cook also alleged favoritism as a factor in his discharge, but the evidence fails to establish that favoritism factored in the discharge decision.

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

DECISION:

The February 14, 2018, reference 02, decision is affirmed. The claimant was discharged on for misconduct in connection with the employment. The discharge date was January 23, 2018. 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 amount and must meet all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs