IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GUY H MUNKELWITZ
Claimant

MJA INC
Employer

APPEAL NO. 16A-UI-12716-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/23/16
Claimant: Appellant (2R)

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

STATEMENT OF THE CASE:

Guy Munkelwitz filed a timely appeal from the November 17, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Munkelwitz had been discharged on October 24, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on December 15, 2016. Mr. Munkelwitz participated. Kelly Ayers and Michael Ayers appeared on behalf of the employer.

ISSUE:

Whether Mr. Munkelwitz 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: MJA, Inc. does business as Roy's Towing and Recovery. Michael Ayers and Kelly Ayers, husband and wife, own and operate the business. Guy Munkelwitz was employed by Ayers as a full-time tow truck driver/operator during two distinct periods that were separated by an eight-month time span. While neither party can name the start date of the most recent period of employment, the parties agree that the most recent period of employment lasted about a year. Michael Ayers and Kelly Ayers each exercised supervisory authority over Mr. Munkelwitz's work. In addition, the employer's shop supervisor, Jeff, has limited supervisory authority over Mr. Munkelwitz's work. Though Mr. Munkelwitz possessed a commercial driver's license, his work for the employer did not require a commercial driver's license. Mr. Munkelwitz's usual work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday and weekend on-call every third week. The weekend on-call duties would begin on Friday and run through Sunday.

Three years ago, Mr. Munkelwitz was diagnosed with a herniated disc and degenerative disc disease. Mr. Munkelwitz discussed this diagnosis with the Michael Ayers prior to the first period of employment. During the most recent period of employment, Mr. Munkelwitz was able to perform his work duties despite his ongoing back condition.

Mr. Munkelwitz last performed work for the employer on October 19, 2016. Weeks earlier, Mr. Munkelwitz told Mr. Ayers that the physical demands of the work, especially the on-call work, was becoming too much and that he needed to give his two-week notice. Mr. Ayers told Mr. Munkelwitz that was fine, that he wanted Mr. Munkelwitz to be happy, that they were friends, but that the company needed employees who could perform the duties. Mr. Ayers was not concerned with Mr. Munkelwitz's work performance. Mr. Munkelwitz had continued to perform his duties. Later, Mr. Munkelwitz told Mr. Ayers that he was not having any luck in his search for new employment. Mr. Ayers told Mr. Munkelwitz that he was welcome to remain in the employment. Mr. Ayers offered to provide a positive reference and any needed advice. Mr. Ayers asked Mr. Munkelwitz to keep him posted. Mr. Munkelwitz took Mr. Ayers' statements at face value and, thereafter, both parties acted in a manner that indicated the quit notice was rescinded by agreement.

On October 19, 2016, Mr. Munkelwitz was experiencing back pain while at work that prompted him to contact his physician to obtain a prescription for the narcotic pain medication hydrocodone. Mr. Munkelwitz left at early at 4:00 p.m. with approval so that he could see the doctor. Mr. Munkelwitz obtained a prescription for nine hydrocodone pills and filled the prescription. Mr. Munkelwitz knew that under the employer's work rules he could not perform his work duties until 36 hours after he had last taken the narcotic medication. The employer had told Mr. Munkelwitz that this was a Department of Transportation requirement.

Mr. Munkelwitz was absent from work with proper notice to the employer on Thursday, October 20, and Friday, October 21, 2016 due to his back issues. Mr. Munkelwitz was then absent from his Friday-Sunday on-call assignment with proper notice for the same reasons.

The employer and Mr. Munkelwitz had a mutual understanding that Mr. Munkelwitz would be returning to work on Monday October 24, 2016. During the absence, Kelly Ayers told Mr. Munkelwitz that she would require a medical release from the prescribing physician upon Mr. Munkelwitz's return to work.

When Mr. Munkelwitz appeared for work on Monday, October 24, 2016, he did not bring a medical release and the employer did not provide him with work. At 8:31 a.m., Ms. Ayers called Mr. Munkelwitz and told him that he needed to get a note from the prescribing doctor that released him to perform work. Mr. Munkelwitz replied, "No problem." At 9:55 a.m., Mr. Munkelwitz sent a text message to Ms. Ayers. The text message contained a photocopy of a medical note from Mr. Munkelwitz's doctor. The note said that Mr. Munkelwitz had missed work on Thursday, October 20 for back pain and on Friday, October 21 so that he could see a back specialist. Most of the note was written by a nurse at the doctor's office, but the note was signed by the doctor. Ms. Ayers erroneously suspected the note was drafted by Mr. Munkelwitz's common law wife. The note had indeed come from the doctor's office at UnityPoint Methodist Hospital. Mr. Munkelwitz's wife works at UnityPoint Methodist Hospital in the records department. Mr. Munkelwitz's wife had assisted Mr. Munkelwitz in transmitting the note to the Ms. Ayers. The note contained a misspelling of Mr. Munkelwitz's name.

At 9:55 a.m. on October 24, Ms. Ayers called Mr. Munkelwitz in response to the note he had provided. Ms. Ayers told Mr. Munkelwitz that the note was not in fact a release to return to work. Rather than direct Mr. Munkelwitz to return to the doctor to obtain a different note, Ms. Ayers told Mr. Munkelwitz that she was ending the employment.

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.
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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).

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 employer asserts that the discharge was based on Mr. Munkelwitz being dishonest with the employer and on his failure to provide a medical release as directed. The employer asserts that the discharge decision was not based on attendance. The weight of the evidence establishes that Mr. Munkelwitz had properly notified the employer of his need to be absence during the period of October 19-23, 2016 and that the absences during that period were excused absences under the applicable law. Accordingly, the absences do not provide a basis for a finding of misconduct. The weight of the evidence fails to establish misconduct based on purported dishonesty. There is no indication in the evidence that Mr. Munkelwitz appeared for work on October 24 under the influence of a controlled substance. Absent any indication that Mr. Munkelwitz was under the influence of a controlled substance on October 24, the discussion about when he last took the medication is moot. The employer asserts dishonesty in connection with preparation of the medical note that was provided. The weight of the evidence fails to support that assertion. The employer has not presented the medical note for the administrative law judge's review and there is no indication that Ms. Ayers is a qualified handwriting expert. Mere suspicion does not establish misconduct. The fact that Mr. Munkelwitz's spouse worked at the same large hospital complex as Mr. Munkelwitz's doctor does not establish that she manufactured the note. Nor does the fact that she assisted Mr. Munkelwitz in transmitting the note indicate that she manufactured the note. On the contrary, the misspelling of Mr. Munkelwitz's name and the potential consequences to Mr. Munkelwitz's wife's employment point to the document being generated by the doctor's office, not Mr. Munkelwitz's spouse.

This case really boils down to Ms. Ayers' impatience with Mr. Munkelwitz's failure to provide the requested medical release in response to Ms. Ayers' initial directive. In light of the

circumstances of the absence, the employer's request for a medical release was not unreasonable. The weight of the evidence does not establish a refusal to comply. Rather, the evidence establishes an initial insufficient response. The situation called for an opportunity for Mr. Munkelwitz to remedy the response by returning to the doctor's office to obtain a second note. Ms. Ayers unreasonably declined to provide that opportunity and elected instead to terminate the employment. The evidence fails to establish a pattern of unreasonable refusal to comply with reasonable directives and, therefore, fails to establish misconduct in connection with the employment that would disqualify Mr. Munkelwitz for unemployment insurance benefits.

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

DECISION:

The November 17, 2016, reference 01, decision is reversed. The claimant was discharged on October 24, 2016 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Benefits Bureau for a ruling on whether the claimant has been able to work and available for work within the meaning of the law since the claim for benefits was established.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs