IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JESUS TORRES
Claimant

EXEL INC
Employer

APPEAL NO. 13A-UI-09798-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/21/13
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 20, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 30, 2013. Claimant Jesus Torres participated. Maria Valler represented the employer and presented additional testimony through Jeff Fegter and Brian Smith. Spanish-English interpreter Ike Rocha assisted with the hearing. Exhibits Four through 14, 17 and 20 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: Jesus Torres was employed by Exel, Inc., as a full-time forklift operator from 1999 until July 17, 2013, when Brian Smith, General Manager, discharged him from the employment for repeated violations of the employer's break policy. Mr. Torres' supervisor was Jeff Fegter, Operations Manager. Mr. Torres' work hours were 7:00 a.m. to 3:00 p.m., Monday through Friday. Mr. Torres received a 10-minute paid break at 9:15 a.m. and a 20-minute paid lunch break. Mr. Torres was allowed to take a restroom break or get a drink of water as needed, but was not authorized to take any other breaks. Mr. Torres was required to document when he started his break and when he returned from break. To document the start of the break, Mr. Torres had to enter a code on the computer on his forklift. To document his return from break, Mr. Torres again had to enter a code on the computer on his forklift. Once Mr. Torres parked his forklift, he would have to walk at least 75 feet to get to a break area.

The final break policy violation that triggered the discharge occurred on July 15, 2013 at a time when Mr. Fegter was monitoring Mr. Torres' conduct. Mr. Torres documented the start of his lunch break via the computer on his forklift. Twenty minutes later, Mr. Torres returned to his forklift entered the code to indicate that he was back from break. Mr. Torres then returned to the break room to tidy the area where he had eaten his lunch. Mr. Torres took an additional

seven minutes over the 20-minute authorized break. There were no other documented violations of the break policy or reprimands for violations of the break policy in 2013.

The employer had documented and issued reprimands to Mr. Torres in 2012 in connection with additional violations of the break policy. Prior to the July 2013 violation, the next most recent violation had been on December 3, 2012, when Mr. Torres took an extra five minutes for break. On November 20, 2012, the employer had issued a reprimand after Mr. Torres took two minutes to set up his break area before returning to his forklift to document the start of his 10-minute morning break. On August 12, 2012, Mr. Torres added four minutes to his 20-minute lunch break. The employer alleges a violation on July 12, 2012, but does not know the particulars. On February 28, 2012, May 3, 2012 and on June 21, 2012, Mr. Torres added four minutes to his 10 minute break. On April 4, 2012, Mr. Torres added four minutes to his lunch break.

The employer had issued reprimands to Mr. Torres in connection with each of the documented break time violations. Mr. Torres is a Spanish-speaking person and the employer used an interpreter to discuss the reprimands with Mr. Torres. Three of the reprimands indicated that future similar conduct could result in discharge from the employment. The employer did not provide Mr. Torres with a copy of the reprimands and had a policy of only providing an employee with a copy of the reprimand if the employee specifically requested a copy. Mr. Torres signed each reprimand.

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 is sufficient to establish seven violations of the employer's break policy in 2012 and one violation of the policy seven and half months into 2013. There is insufficient evidence to establish a violation on July 12, 2012, the incident for which the employer could not provide any information concerning the particulars. The final violation on July 15, 2013 involved dishonesty on the part of Mr. Torres, in that Mr. Torres documented a timely return from break when he in fact returned seven minutes later. The administrative law judge notes that Mr. Torres did not gain any additional pay by the conduct, since the break was a paid break to begin with. Another factor that is more difficult to weigh is the employer's ungenerous break policy. The stingy break policy invited violations from employees, like Mr. Torres, who apparently just wanted a reasonable amount of time to eat lunch or otherwise regroup while on break. The administrative law judge notes that Mr. Torres' forklift operator job was one that would require focus in order to perform it satisfactorily. The administrative law judge finds credible Mr. Torres' assertion that other employees routinely engaged in similar or worse disregard of the break policy. After weighing all factors, the administrative law judge finds there to have been misconduct in connection with the employment, but not *substantial* misconduct sufficient to disqualify Mr. Torres for unemployment insurance benefits.

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

DECISION:

The agency representative's August 20, 2013, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs