IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KEVIN L OBERMEIER
Claimant

MANATT'S INC
Employer

APPEAL NO. 12A-UI-08847-JT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/21/10
Claimant: Respondent (5)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 19, 2012, reference 02, decision that allowed benefits. After due notice was issued, an in-person hearing was held in Creston on November 13, 2012. The hearing in this matter was consolidated with the hearing in Appeal Number 12A-UI-08926-JT concerning claimant Michael Obermeier. Both claimants participated. Dan Boyer, director of human resources, represented the employer and presented additional testimony through Superintendant Mark Adair and Grade Foreman Lawayne Luers. Exhibits One, Two, and Three were received into evidence.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kevin and Mike Obermeier are brothers who live in the Osceola area. Both worked for Manatt's as part of a three-person grading crew headed by Grade Foreman Lawayne Luers. Mr. Luers reported to Superintendants Mark Adair and Larry Adair. At the time the Obermeiers separated from the employment, they were assigned to a road extension project in Ankeny. The commute from the Osceola area to the jobsite was about one and a half hours. The brothers met at Osceola and would take turns driving to the job site. The usual start time for work on the project was 7:00 a.m., Monday through Saturday.

On June 22, 2012, Kevin and Mike Obermeier worked their last day for Manatt's. On that day, they worked until about 7:30 p.m. and then left for home. They had stayed late to re-do work they had performed that day after a cement truck drove through an area they had prepared for paving. While the Obermeiers were on their way home, Kevin Obermeier received a telephone call from Mr. Luers. Mr. Luers told Kevin Obermeier that the employer wanted him at the jobsite at 5:30 a.m. the next morning. Kevin Obermeier told Mr. Luers that he and his brother drove a long distance to get to work and could not be there at 5:30 a.m. In response to that statement, Mr. Luers said he would call Kevin Obermeier back. The Obermeiers and Mr. Luers had

performed all the work needed to prepare for the next day's paving. Only if there was further damage to the work they had performed, would there be need for them to do further work before the paving began. A short while after the first call, Mr. Luers called Kevin Obermeier back. Mr. Luers told Kevin Obermeier that he was just the messenger, but that he had spoken with Mark and Larry Adair and that the message he was to convey to the Obermeiers was that they needed to be at work at 5:30 a.m. the next day or they did not need to be there at all. In other words, they either showed at 5:30 a.m. or they were without a job. Kevin Obermeier told Mr. Luers it was nice working with him. There was no further contact between the employer and the Obermeiers.

The next most recent time the employer had asked the Obermeiers to appear at work before 7:00 a.m. was late in 2011. The Obermeiers raised at that time the issue of how far they had to drive to get to the jobsite. In connection with that incident, Larry Adair told the Obermeiers that so long as their prep work was done, he did not see a need for them to be at the jobsite prior to 7:00 a.m. Kevin Obermeier has a small farming operation and had 35 to 40 minutes of farm chores to do in the morning before he left work for work. This involved feeding several calves. The lateness of the notice concerning the need to be at work at 5:30 a.m. the next day prevented Kevin Obermeier from hiring someone to do his farm chores for him. If he did not feed his calves and horses in the morning, they would most likely be outside their enclosures when he got home in the evening.

Neither Kevin Obermeier nor Mike Obermeier had received any reprimands.

REASONING AND CONCLUSIONS OF LAW:

The weight of the evidence in the record establishes that the employer initiated the separation from the employment through issuance of the ultimatum. The weight of the evidence establishes a discharge.

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).

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 Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The evidence in the record establishes that the employer had a reasonable basis for wanting Mike and Kevin Obermeier, and other employees, at the jobsite early on June 23, 2012. The goal was to get started with paving early and to be prepared for any unforeseen circumstances.

The evidence also indicates that Kevin Obermeier and Mike Obermeier each had a reasonable basis for objecting to the early start. They had left the jobsite around 7:30 p.m. They would get home around 9:00 p.m. at the earliest. To get to work by 5:30 a.m., they would have to leave home no later than 4:00 a.m. That provided them with seven hours to have dinner, bathe, sleep, have breakfast, do chores, and take care of whatever else. Though the employer had a reasonable basis for directing the Obermeiers to appear for work an hour and a half early, the notice the employer provided to the Obermeiers was not reasonable notice. In addition, the employer's heavy-handed approach in the matter was not reasonable. The evidence fails to establish that either Obermeier had a pattern of refusing to follow reasonable directives.

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.

The administrative law judge notes that the outcome of the case would have been the same even if the administrative law judge had concluded the separation was based on a voluntary quit. This is because the change in start time was a substantial change in the established conditions of the employment. See Iowa Code section 96.5(1) and Iowa Administrative Code section 871 IAC 24.26(1).

DECISION:

The Agency representative's July 19, 2012, reference 02, decision is modified as follows. 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/kjw