IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRIAN J HAGER
Claimant

MENARD INC
Employer

APPEAL NO. 17A-UI-10920-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/01/17
Claimant: Respondent (4)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Administrative Code rule 871-24.32(9) – Disciplinary Suspension

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 18, 2017, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant was discharged from the employment on October 5, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on November 13, 2017. Claimant Brian Hager did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Paul Hammel, Store Counsel, represented the employer and presented testimony through Doug Yeoman and Kevin Plym. Exhibits 1 and 2 and Department Exhibits D-1 and D-2 were received into evidence. The administrative law judge took official notice of the October 18, 2017, reference 03, decision that denied Mr. Hager's request for retroactive benefits for the two-week period of October 1-14, 2017. The administrative law judge took official notice of the fact-finding materials

ISSUES:

Whether the claimant was suspended and/or discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brian Hager commenced his employment with Menard, Inc. in 2015 and continues to work for the employer as a part-time employee at the employer's Ottumwa store. Doug Yeoman is General Manager of the Ottumwa store. Kevin Plym is Second Assistant Manager at the Ottumwa store.

On September 28, 2017, Mr. Plym directed Mr. Hager to cease using the family restroom at the Ottumwa store and to thereafter use the men's restroom. The family restroom was the only single-user, private restroom in the Ottumwa store. Mr. Hager and Mr. Plym were at Mr. Plym's desk in the back office area when Mr. Plym issued the directive to Mr. Hager. Other employees were in the vicinity. Mr. Plym told Mr. Hager that the family restroom was for guests and that

Mr. Hager's use of the family restroom was a guest services issue. Mr. Plym told Mr. Hager that it did not look good for the store if a guest had to wait for the family restroom because an employee was using the family restroom. Mr. Plym told Mr. Hager that the only time he was allowed to use the family restroom was if the men's restroom was full or was being cleaned. Mr. Hager replied that he intended to continue to use the family restroom and further stated that if that was not an option, he would clock out and go home to the restroom when necessary. Mr. Plym repeated the directive a few times and Mr. Hager repeated the refusal an equal number of times. As Mr. Hager walked away at the end of the conversation, he told Mr. Plym that he would bring a doctor's note the next day.

When Mr. Hager arrived for work on September 29, 2017, Doug Yeoman issued a written reprimand to Mr. Hager based on the September 28 verbal exchange between Mr. Plym and Mr. Hager. During the disciplinary meeting, Mr. Hager first mentioned that he needed to use to family restroom because he needed to take medication for strep throat. Mr. Hager presented Mr. Yeoman with a medical notice regarding his strep throat diagnosis. During the disciplinary meeting, Mr. Hager also mentioned that he needed to use the family restroom due to anxiety. Mr. Hager did not at that time present a medical notice concerning anxiety. Mr. Yeoman placed Mr. Hager on a three-day disciplinary suspension. The suspension dates were to be on September 29, September 30 and October 2, 2017. Subsequent to the disciplinary meeting, Mr. Hager returned to the workplace with a doctor's that indicated he suffers from anxiety and should be allowed to use the family restroom as needed. Mr. Hager returned to the employment on October 3, 2017, following the three-day suspension.

In response to the three-day suspension, Mr. Hagar established an original claim for unemployment insurance benefits that was deemed effective October 1, 2017. Mr. Hager did not make timely weekly claims in connection with the claim. Workforce Development denied Mr. Hager's request for retroactive benefits for the period of the suspension. The employer is a base period employer, but has not been charged for benefits in connection with the suspension.

REASONING AND CONCLUSIONS OF LAW:

Iowa Administrative Code rule 871-24.32(9) provides as follows:

> Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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).

In *FDL Foods v. Employment Appeal Board*, 456 N.W.2d 233 (Iowa Ct. App. 1990), the Iowa Court of Appeals held that the 10-times weekly benefit amount disqualification set forth in Iowa Code section 96.5(2)(a) did not extend to disciplinary suspensions. Under the court's reasoning there would no basis for disqualifying a claimant for benefits in connection with a temporary disciplinary suspension beyond the period of the suspension and no basis for relieving the employer of liability for benefits in connection with a temporary disciplinary suspension beyond the period of the suspension.

The employer has the burden of proof in a disciplinary suspension or discharge 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).

The evidence in the record establishes a claim for unemployment insurance benefits that was prompted by the brief disciplinary suspension, rather than a discharge from the employment. The evidence in the record establishes that the brief suspension was not based on misconduct in connection with the employment within the meaning of the law. While the employer had a reasonable basis for directing Mr. Hager to discontinue his use of the family restroom, Mr. Hager had a more pressing reasonable basis for refusing to comply with the directive, regardless of the number of times the employer uttered the directive. The evidence in the record establishes that Mr. Hager had a bona fide medical need to use the only restroom in the store that offered privacy and that accommodated his anxiety diagnosis. The evidence also establishes that it was Mr. Plym, not Mr. Hager, who elected to broach the sensitive personal issue in a non-private area and in the vicinity of other staff. Mr. Plym made an error in judgment and provoked Mr. Hager's response on the sensitive topic. Mr. Hager's response, in the forum chosen by Mr. Plym, did not involve misconduct on the part of Mr. Hager.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Hager was suspended during the period of September 29, 2017 through October 2, 2017 for no disqualifying reason. Accordingly, Mr. Hager would be eligible for benefits for that period, provided he was otherwise eligible. The employer's account would be subject to charge for such benefits. The lower decision is hereby modified to acknowledge the circumstances of the claim as a brief suspension, rather than a discharge. Beyond that, the matter has been rendered moot through Mr. Hager's failure to make a weekly claim for the one benefit week affected by the suspension period.

DECISION:

The October 18, 2017, reference 02, decision is modified as follows. The claimant was suspended for the period of September 29 through October 2, 2017 for no disqualifying reason. The claimant would be eligible for benefits for the benefit weeks affected by the suspension, if he met all other eligibility requirements. The employer's account would be subject to charge for such benefits. The matter, as it relates to the suspension period, has been rendered moot through the claimant's failure to make a weekly claim for one benefit week affected by the suspension period.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs