IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CRAIG L FETTERS
Claimant

CENTRAL IOWA INSURANCE SERVICES INC
TODD ISLEY
Employer

APPEAL NO. 11A-UI-07546-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/24/11
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 2, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 5, 2011. The hearing in this matter was consolidated with the hearing in Appeal Numbers 11A-UI-07586-JTT and 11A-UI-07585-JTT. Attorney Hugh Cain represented the claimant and presented testimony through Jon Schuttinga, Craig Fetters, and Juanita Yutzy. Attorney Robert represented the employer and presented testimony through Todd Isley. Exhibits One, Two and Three 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: Craig Fetters was employed by Central Iowa Insurance Services as a full-time licensed agent/producer from September 2009 until April 29, 2011, when Todd Isley, Manager, discharged him from the employment based on his refusal to sign his acknowledgment of an Employee Manual and an Information Security Policy. Mr. Fetters had not been provided with an employee manual at the start of the employment and had not been asked to sign an employee manual prior to April 2011. The Employee Manual the employer wanted Mr. Fetters to sign contained the following provision:

> Outside employment
>
> Our Agency has a non-compete agreement with all of our licensed agents. If a part-time job is obtained through another insurance agency or insurance company, the full-time agent from our agency will not be allowed to sell or solicit any type of insurance through any of our competitors.

Prior to the employer's request in April 2011 that Mr. Fetters sign his acknowledgment of receipt of the Employee Manual, the employer did not have a non-compete agreement with Mr. Fetters. Mr. Fetters was not willing to acquiesce in changes in the conditions of his employment that would include adding a non-compete agreement.

The Employee Manual that the employer wanted Mr. Fetters to acknowledge also contained reference to an Information Security Plan to be implemented by the employer and indicated that, "Violation of the security plan may result in immediate dismissal." The separate Information Security Policy document the employer wanted Mr. Fetters to sign indicated that all correspondence created, sent, or received over the Internet were the employer's property and that there would be no employee expectation of privacy. The Information Security Policy also prohibited use of personal cell phones during business hours. Prior to the employer's request in April 2011 that Mr. Fetters sign his acknowledgment of the Information Security Policy, the employer did not have any such policies. Mr. Fetters was not willing to acquiesce in changes in the conditions of his employment that would add these as conditions of his employment. Mr. Fetters had brought 150-200 clients with him when he had joined the employer. The employer's proposed policy changes would have made all information pertaining to those clients the sole property of the employer.

The employer first presented employees with the proposed Employee Manual and Information Security Agreement as part of staff meetings the employer conducted on April 4 and 5, 2011. These written policies were presented as part of a bound volume that also contained a Producer Agreement. The Producer Agreement appeared first in the collection of documents. The Producer Agreement contained a confidentiality provision that required the agent to acknowledge and agree that "lists of insured customers, information regarding habits and insurance needs of customers and prospects, personal information as to customers and prospects, locations and descriptions of insurer properties or properties proposed to be insured, expiration date of insured policies, insurance daily reports, and other information which is not generally or easily obtainable" were all the exclusive property of the Agency. The Producer Agreement also contained a $25,000.00 liquidated damages provision as well as a provision that the offending employee reimburse the employer for its enforcement expenses.

As part of the meetings on April 4 and 5, the employer directed employees to sign and return the acknowledgment forms for the Employee Manual and the Information Security Policy. On April 14, 2011, the employer sent a broadcast e-mail reminding employees that they needed to sign and return the two forms. Mr. Fetters did not sign or return the forms. On April 21, the employer sent an e-mail to Mr. Fetters directing him to sign and return the forms by April 25. By April 25, Mr. Fetters had consulted with an attorney. On April 25, Mr. Fetters sent an e-mail response to the employer, indicating that he was unable to sign the documents pursuant to advice received from his attorney. On April 26, Mr. Isley sent an e-mail to Mr. Fetters directing him to sign and return the requested forms by April 28 or he would be deemed to have resigned from the employment. Mr. Fetters did not sign or return the documents, but continued to perform his regular duties. Mr. Fetters said nothing to the employer, and did nothing, to indicate that he intended to resign from the employment.

When Mr. Fetters arrived for work on April 29, 2011, he discovered that the employer had already revoked his access to the employer's computer system. Shortly thereafter, Mr. Isley arrived and presented a termination letter. As Mr. Fetters raised his concerns about the non-compete agreement referenced in the Employee Manual, Mr. Isley asserted that he did not know anything about such concerns. Mr. Fetters found this odd, given that he was one of at least five employees who had refused to signal acquiescence to the new policies.

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).

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 weight of the evidence in the record fails to establish misconduct in connection with the employment. The employer reasonably desired to tighten up its practices to protect the employer's interests by imposition of new written policies. But Mr. Fetters reasonably concluded that by signing and returning the two forms, he would be acknowledging and agreeing to be bound by the new Employee Manual and new Information Security Policy. Those documents contained provisions that amounted to substantial changes in the conditions of the employment. Mr. Fetters stood to lose any and all rights that he had to the 150-200 clients he had brought with him to the employment. That the employer intended substantial changes in the conditions of the employment was confirmed by the employer's inclusion of the Producer Agreement in the bound materials provided to the employees on April 4 and 5. Mr. Fetters reasonably concluded that the Producer Agreement, or something similar to it, would also become new conditions of his employment in the immediate future.

It is worth noting that an employee who *quits* employment in response to substantial changes in the conditions of employment, rather than acquiesce in those changes, is deemed to have quit *for good cause attributable to the employer.* See 871 IAC 24.26(1). In analyzing such issues, the Iowa Courts look at the impact on the claimant, rather than the employer's motivation. See Dehmel v. Employment Appeal Board, 433 N.W.2d 700 (Iowa 1988). Regardless of the employer's motivation, Mr. Fetters had good cause for refusing to signal acquiescence in the proposed substantial changes in the conditions of his employment by refusing to sign and return the two forms. Mr. Fetters' refusal to sign and return the two acknowledgment forms did not constitute insubordination and did not constitute misconduct in connection with the employment.

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 paid to the claimant.

DECISION:

The Agency representative's June 2, 2011, reference 01, decision is reversed. 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