

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVEN P JONES

Claimant

APPEAL NO. 14A-UI-11969-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLIEDBARTON SECURITY SERVICES LLC

Employer

OC: 10/19/14

Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

AlliedBarton Security Services LLC filed a timely appeal from a representative's decision dated November 10, 2014, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held and on December 22, 2014, an administrative law judge decision was entered reversing the adjudicator's determination finding the claimant had been discharged for misconduct in connection with his work and finding the claimant had been overpaid unemployment insurance benefits in the amount of \$2,593.00. (See appeal number 14A-UI-11969-BT). After the December 10, 2014, telephone hearing but before the December 22, 2014 date when the administrative law judge decision was entered, Mr. Jones requested that the hearing record be reopened for submission of evidence that would have a material impact on the case. On December 31, 2014, an administrative law judge decision was entered. The decision found good cause to set aside the December 22, 2014 decision and reopen the matter. The administrative law judge ordered that another telephone hearing be conducted following notice to the parties. (See appeal number 14A-UI-11969-S2T).

In compliance with the order to set the previous administrative law judge decision aside and to reopen and consider the matter anew, a hearing was scheduled for and held on February 16, 2015 following notice to both the employer and the claimant of the issues to be considered.

Mr. Jones participated personally. A potential witness, Robert Steinbech was not available at the telephone number provided by the claimant. The employer participated by Mr. Nicholas Ellringer and Mr. Patrick Lant. Karen Cimino appeared as a witness for the representative company regarding only the employer's participation in the fact-finding. Employer's Exhibits A, B, C, D, E, F, G, and H were admitted into evidence. Claimant's Exhibits One and Two were admitted into evidence.

ISSUE:

At issue is whether the evidence in the record establishes the claimant was discharged for a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Steven Jones was employed by AlliedBarton Security Services LLC from October 25, 2012 until October 22, 2014 when he was discharged by the company. Mr. Jones was hired as a full-time security guard assigned to work at a John Deere facility. The claimant recently had been promoted to a full-time shift supervisor.

A decision was made to terminate Mr. Jones from his employment with AlliedBarton Security Services LLC when it was determined that Mr. Jones had been convicted of an OWI offense in June 2013 that had affected his driving record. On October 10, 2014, the employer received a compliance warning from their system resulting in Motor Vehicle Record check on Mr. Jones. Based upon the information that was available to management on October 22, 2014, the employer concluded that Mr. Jones had violated company policy because of the conviction and because of his failure to maintain an acceptable motor vehicle driving record."

Company stated policy requires that an employee maintain a current valid motor vehicle driver's license, personal insurance on personal vehicles, and maintain an acceptable motor vehicle driving record. The Company handbook makes reference that there may be additional requirements related to an acceptable motor vehicle record. In the claimant's discharge statement the employer references the requirement that an employee must have a acceptable driving record for at least three consecutive years and pass an MVR check.

At the time that Mr. Jones was charged with the OWI offense in June 2013, Mr. Jones informed his immediate supervisor, Mr. Lant, about his arrest for OWI. Prior to the temporary two-week license provided to Mr. Jones at the time of his arrest expiring, the claimant had applied for and obtained a special restriction license that allowed him to drive and from his employment at AlliedBarton Security Services LLC. Mr. Jones was assisted in the application process to obtain the special restriction license by his supervisor, Mr. Lant, who verified on the application that Mr. Jones was employed by the company and that the claimant's statements on the application about his employment at AlliedBarton Security Services LLC were true and correct. (See Claimant's Exhibit Two).

Mr. Jones was allowed to continue to perform his regular duties at the client location by his immediate supervisor. The claimant's duties included at times operating a "gator" on behalf of the company. Although company policy requires that the motor vehicle record of all employees be checked annually by the company, no check of the claimant's motor vehicle record took place until October 13, 2014 when a general audit of all driver's licenses of employees took place. Mr. Jones had been recently promoted to a supervisory position and allowed to continue working by his supervisor and the company until October 22, 2014 when company management above Patrick Lant became aware of Mr. Jones' previous June 2013 OWI conviction and the claimant's motor vehicle record.

Mr. Lant, the claimant's supervisor, denies being aware of the claimant's June 2013 OWI conviction and does not "recall" signing a verification on behalf of the company confirming the claimant's employment and need to obtain a temporary restricted license.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes a current act of misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

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).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful

wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). Past acts and warnings can be used to determine the magnitude of a current act of misconduct, however, a discharge for misconduct cannot be based upon past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

In the case at hand the claimant was discharged after upper management learned on or about October 22, 2014 that the claimant had been convicted of an OWI in June 2013 which violated company policies and negatively impacted the claimant's motor vehicle record. Company policy provides that employees must maintain a current driver's license, personal insurance and an acceptable motor vehicle record. Company policy provides that employees who operate a company vehicle for company business are subject to being discharged if they fail to meet any of the criteria. Company policy also prohibits management from knowingly permitting an employee from operating any vehicles on behalf of the company if they fail to meet company standards.

The administrative law judge finds the claimant to be credible in his testimony that he had informed his supervisor in June 2013 of his OWI arrest. By providing that information to his supervisor, the claimant also put the company on notice of the OWI. Implicit in that information is that his MVR would be affected.

The employer, through the claimant's supervisor, elected not to discharge Mr. Jones at that time either for the OWI offense or its implicit consequences on the claimant's driving record. The employer elected, through the claimant's supervisor, not only to keep Mr. Jones employed, but also, to assist Mr. Jones in getting a temporary restricted driver's license. (See Claimant's Exhibit Two). By allowing the claimant to continue working, after notice of the violation the company decided through Mr. Lant's decision that the claimant's conduct at the time was not sufficient to discharge Mr. Lant, and authorized the claimant to continue to operate a vehicle (the Gator) on behalf of the company.

In determining whether the conduct that prompted the discharge constitutes a "current act," the date on which the conduct that caused the claimant to be discharged came to the attention of the employee must be considered. The date on which the employer notified the claimant that his previous conduct subjected the claimant to discharge also must be considered. See Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988).

In this case, Mr. Jones testified with specificity that he had immediately informed his immediate supervisor, Patrick Lant, in June 2013 that he had been arrested for OWI and testified with specificity that Mr. Lant had allowed him not only to continue working but also had assisted Mr. Jones in obtaining a temporary restricted driver's license so that the claimant was able to maintain a currently valid driver's license throughout his employment. Because the company knew of the conviction, they were aware it would have an effect on his Driving Record. In contrast, Mr. Lant stated a general denial of being aware of the OWI issue and testified only that he did not "recall" assisting Mr. Jones in applying for a temporary restricted license and signing the application. The administrative law judge concludes that the sworn testimony of Mr. Jones supported by Claimant's Exhibit Two be given more weight than can be given to the general denials and lapses of memory stated by Mr. Lant.

The administrative law judge, therefore, concludes that although the employer became aware in June 2013 of the claimant's driving infraction and its inevitable effect on his driving record, the employer chose not to discharge Mr. Jones from his employment but to retain him as an employee until October 22, 2014 when the claimant was discharged from employment. The

evidence in the record does not establish any intervening acts of misconduct on the part of the claimant sufficient to warrant a denial of unemployment insurance benefits.

Because the claimant was not discharged for a current act of misconduct sufficient to warrant the denial of unemployment insurance benefits, the administrative law judge concludes that the claimant was discharged under non disqualifying conditions and is eligible to receive unemployment insurance benefits, providing that he is otherwise eligible.

DECISION:

The representative's decision dated November 10, 2014, reference 01, finding that the claimant was discharged under non disqualifying conditions is affirmed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs