

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMIE D MCINTYRE
Claimant

APPEAL NO. 13A-UI-10796-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SIOUX CITY FOUNDRY CO
Employer

OC: 08/25/13
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 September 18, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 16, 2013. Claimant Jamie McIntyre participated. Valerie Corbin represented the employer. Exhibits Three through Five and A 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: Jamie McIntyre was employed by Sioux City Foundry Company as a full-time shearer operator from 2011 until August 27, 2013, when the employer discharged him for violating three written policies. Mr. McIntyre's duties involved using a remote control device to operate an overhead crane. On August 26, 2013, the wireless remote control device that Mr. McIntyre usually used for his work was not functioning properly and the employer provided as a replacement an old cumbersome remote control device that slowed the speed of Mr. McIntyre's work. On August 26, 2013, while he was on duty, Mr. McIntyre used his cell phone to take a photo of substitute remote control device. A short while later, while he was on restroom break, Mr. McIntyre used his cell phone to post the photo of the substitute remote control device to his Facebook page. Mr. McIntyre added a caption: "My remote broke Friday and I am now forced to use THIS? Really? Where do I work now, Jurassic Park?" A coworker brought the Facebook post to the attention of Curt Havlicek, Shop Superintendent, on August 27, 2013. Mr. Havlicek then reported the matter to Valerie Corbin, Director of Human Resources. When the employer interviewed Mr. McIntyre about the matter, Mr. McIntyre stated that he was just trying to make light of a bad situation. Ms. Corbin and Mr. Havlicek subsequently discharged Mr. McIntyre from the employment. Mr. McIntyre had been a valuable employee.

The employer had written policies prohibiting use of cell phones and cameras at work. The employer had a written policy prohibiting posts to social networks if those posts reflect

negatively on the employer. The policies were contained in the employee handbook that had most recently been provided to Mr. McIntyre in October 2012.

Mr. McIntyre was in the habit of taking photographs with his cell phone in the workplace as a means of documenting production problems so that he could share them with his supervisor. Mr. McIntyre had not been counseled not to take such photos.

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 weight of the evidence in the record establishes that Mr. McIntyre did indeed violate three of the employer's policies in connection with taking the photo of the remote control and posting the photo to Facebook. The photo of the remote control device was not taken as a means to document a workplace problem for the supervisor. It was instead taken as a means to document a work equipment issue so that Mr. McIntyre could share the photo with people outside the workplace and that is what he did with it. The weight of the evidence establishes that Mr. McIntyre's conduct resulted from a lapse in judgment, not from an intent to disregard the interests of the employer. While the evidence establishes misconduct, the administrative law judge concludes that the isolated incident does not rise to the level of substantial misconduct that would disqualify the claimant for unemployment insurance benefits.

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

DECISION:

The agency representative's September 18, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css