

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**FINK, TERANCE, L**  
Claimant

**APPEAL NO. 12A-UI-09810-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FIVE STAR COOPERATIVE**  
Employer

**OC: 07/15/12  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Mr. Fink filed a timely appeal from the August 9, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 6, 2012. At the time set for the hearing, Mr. Fink was not available at that number he had provided for the hearing and did not participate. Margaret Nuehring, Location Manager, represented the employer.

**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: Mr. Fink was employed by Five Star Cooperative as a semi tractor-trailer driver from 2010 until July 17, 2012, when Margaret Nuehring, Location Manager, discharged him from the employment. The final incident that triggered the discharge occurred on July 16, when Mr. Fink duct-taped a 3' X 3' sign bearing the name of the coworker on the side of the coworker's trailer. In December 2011, Mr. Fink had placed a sign in the window of his semi tractor that advertized another business. Ms. Nuehring directed Mr. Fink to take the sign out and Mr. Fink begrudgingly complied. In connection with that incident, Ms. Nuehring told Mr. Fink that the only signage that should appear on the employer's equipment was the employer's logo. On April 23, 2012, Ms. Nuehring discovered that Mr. Fink had put the same sign back in the window of his semi tractor and again directed him to take it out of the window. The final incident on February 16 was a prank directed by Mr. Fink toward a coworker and occurred in the context of these two prior warnings about unauthorized signage on the employer's equipment.

In making the decision to end the employment, the employer also considered an incident from January 2012, when Mr. Fink cut in line at a facility where he was delivering grain and got into a verbal dispute with another driver over the matter. The employer has a policy that subjects employees to discharge from the employment if they receive three written reprimands. Mr. Fink received his third written reprimand on July 17, 2012.

## 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).

There is sufficient evidence in the record to establish insubordination in connection with the employment. In December 2011, the employer directed the claimant to remove unauthorized signage from the employer's semi tractor. The claimant initially complied, but subsequently put the same signage back in the vehicle. In April 2012, the employer again directed the claimant to remove unauthorized signage from the employer's vehicle. In July 2012, the claimant again put unauthorized signage on the employer's vehicle. The claimant's continued unreasonable refusal to follow the employer's reasonable directives to refrain from putting unauthorized signage on the employer's vehicle constituted insubordination and 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 misconduct. Accordingly, the claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged.

**DECISION:**

The Agency representative's August 9, 2012, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employers account will not be charged.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/css