

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RICHARD D MOORE**  
Claimant

**APPEAL NO. 11A-UI-06760-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BE & K CONSTRUCTION COMPANY**  
Employer

**OC: 04/24/11  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from a representative's decision dated May 17, 2011, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on June 16, 2011. The claimant participated personally. The employer participated by Ms. Cheryl Clark, office manager, and Mr. Tom Zuidema, superintendent.

**ISSUE:**

At issue is whether the claimant was discharged for 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: Richard Moore was employed by BE & K Construction from June 6, 2005, until April 26, 2011, when he was discharged from employment. Mr. Moore worked as a full-time maintenance mechanic and was paid by the hour. His immediate supervisor was Mike Cappa.

Mr. Moore was discharged based upon an incident that took place on or about April 26, 2011. At that time, the claimant was utilizing a standup forklift that had been provided for use in the work area where Mr. Moore was to perform his duties at an ADM facility. Mr. Moore and other employees had been authorized by the company's previous safety director to utilize the standup forklift; and the training and licensing requirements for the temporary, occasional use of that machine had been waived by the previous safety manager. The claimant's immediate supervisor was aware that company employees were using the standup forklift and had indicated no objection.

On or about April 26, 2011, while operating the standup forklift, the weight transferred as the forklift was backed off a service elevator, causing the safety gate on the elevator to lower and to strike the forklift, which caused minor damage to the gate. The gate had been damaged in a similar way on numerous occasions in the past by employees of the company as well as employees of ADM. Because it was determined that the claimant had not been willing to take

training on a Model 5000 forklift that was also used at the facility, the employer determined that Mr. Moore was not in compliance with company policy and the claimant was discharged. The claimant had not been previously warned or counseled about any infractions of company policy.

### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance. It does not.

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 insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the 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 App. 1992).

In this matter, the employer made a business decision to terminate Mr. Moore based upon its perception that the claimant had refused forklift training in the past and was not licensed to

operate a forklift for the company on the ADM premises where he was assigned to perform his duties. The claimant had caused minor damage to an elevator safety gate when the weight shifted while he was utilizing a standup forklift, causing the gate to unexpectedly descend.

Mr. Moore testified under oath that he and other employees had been given a waiver of the training and licensing requirement on the standup forklift by the company's previous safety director. The claimant further testified that his immediate supervisor was aware that the claimant and other workers routinely used the standup forklift in the performance of their duties when necessary. The administrative law judge concludes that the claimant reasonably believed that he was authorized to use this piece of equipment without violating company policies or the company's expectations.

The question before the administrative law judge is not whether the employer has a right to discharge Mr. Moore for these reasons, but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the decision to terminate Mr. Moore may have been a sound decision from a management viewpoint, the evidence does not establish intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. The claimant believed that he was authorized to use the equipment and the claimant's supervisor did not object to the claimant's use of the equipment in the past. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated May 17, 2011, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

kjw/kjw