

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GEORGE A FRY
Claimant

DENVER FINDLEY & SON INC
Employer

APPEAL 19A-UI-02318-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/13/19
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the March 14, 2019, (reference 03) unemployment insurance decision that allowed benefits based upon a determination that claimant was not discharged for a current act of misconduct and therefore he was qualified for benefits. The parties were properly notified of the hearing. A telephonic hearing was held on April 2, 2019. The claimant, George A. Fry, participated. The employer, Denver Findley & Son, Inc., participated through Glenda Warner, Office Manager; Jack Findley, Owner; and Cody Findley, Laborer. Employer's Exhibits 1 through 4 were received and admitted into the record without objection. The administrative law judge took official notice of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time, most recently as a truck driver, from November 15, 2018, until January 11, 2019, when he was discharged. Claimant last reported to work on January 11, 2019. On the evening of January 10, Warner called claimant and instructed him to report to work the following day. Warner told claimant that he was not permitted to haul muck from the worksite. The following day, claimant reported to work in the morning and spoke to Cody Findley, who again told claimant not to haul muck, as his truck was not equipped to handle muck.

Later in the day, claimant hauled a load of muck after being specifically instructed not to haul muck. This muck spilled across Holcomb Avenue and Second Avenue, causing a mess and affecting traffic. Claimant left work sometime in the late morning to go to a doctor's

appointment. He never reported back to work after that date. The employer decided not to allow claimant to return back to work because the client they hauled the muck for would not allow claimant to return to their worksite. During the fact-finding interview, the employer witnesses reported that it was not until after their first appeal hearing on February 27, 2019, that the decision was made to formally discharge claimant. The employer never told claimant that he was discharged from employment. They simply never called him for work again.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,290.00, since filing a claim with an effective date of January 13, 2019, for the ten weeks ending March 30, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal. Warner and both Jack Findley and Cody Findley participated in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was not discharged from employment for a current act of misconduct. Benefits are allowed.

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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

In this case, the employer waited approximately one and one-half months between the final incident on January 11 and making the decision to discharge claimant, sometime on or after February 27. The employer never notified claimant that his job was in jeopardy or told him he could be discharged for the incident on January 11. It instead chose to never call him back to work without notifying him that he was discharged. Based on the evidence presented during the hearing, the employer has not established that claimant was discharged for a current act of misconduct. Therefore, benefits are allowed. As claimant's discharge from employment is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The March 14, 2019, (reference 03) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn