

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL D GOGG
Claimant

APPEAL NO. 11A-UI-07887-H2

**ADMINISTRATIVE LAW JUDGE
DECISION**

DURHAM D & M LLC
Employer

OC: 05-23-10
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 7, 2011, reference 04, decision that denied benefits. After due notice was issued, a hearing was held on August 15, 2011 in Des Moines, Iowa. The claimant did participate and was represented by Katie Naset, attorney at law. . The employer did not participate. Claimant's Exhibit A was entered and received into the record.

ISSUE:

Was the claimant discharged due to job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a substitute bus driver, full-time, beginning December 2, 2010, through April 28, 2011, when he was discharged. On April 27 the claimant was driving a school bus when he inadvertently passed another bus that had the stop sign arm on the side of the bus extended. The claimant stopped his bus to drop off children. He saw that the other school bus facing him in the opposite direction was stopped but had neither the lights flashing nor its stop arm extended. After he finished dropping off some of the children on his bus, he proceeded forward but was distracted by a child sitting behind him asking him for a pencil. He handed the child the pencil and then noticed as he was passing the other bus that its lights were now on and the stop arm was now extended. He returned to the bus depot and tried to tell his supervisor what had occurred but his supervisor was on the telephone and unable to speak with him. When he reported for work on April 28, he was told by his supervisor that he was being discharged for a safety violation when he passed another school bus with its stop arm extended. The claimant contends that the other bus driver should have started his lights flashing at least 200 to 300 feet before he made the stop. The other driver's failure to have his lights flashing led to the claimant concluding that no children were getting off and the stop arm would not be extended. The claimant had no history of prior warnings for any safety violations and had no idea that one safety violation, which he admits did occur, would lead to his discharge.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs

potential liability for unemployment insurance benefits related to that separation. The conduct for which claimant was discharged was merely an isolated incident of poor judgment in assuming that the other bus was not going to extend its stop arm; and inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The June 7, 2011 (reference 04) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw