

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEVI M LANGE
Claimant

APPEAL NO. 14A-UI-03599-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

OC: 03/09/14
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 March 26, 2014, reference 01, decision that allowed benefits to the claimant provided the claimant was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on April 25, 2014. Claimant Levi Lange participated. Richelle Owen represented the employer. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the documents submitted for and generated in connection with the fact-finding interview, but did so only for the purpose of determining whether the employer participated in the fact-finding interview.

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: Levi Lange was employed by Kwik Trip, Inc., as a part-time clerk from September 2013 until March 9, 2014, when Kimberly Keil, District Leader, discharged him for alleged violation of work rules. On March 1, 2014, Mr. Lange and another employer were staffing the employer's truck stop location in Maquoketa. During the shift, a customer came into the store and initiated a conversation with Mr. Lange. The customer told Mr. Lange that he was staying at a local hotel and asked what there was to do in the area. Mr. Lange mentioned four-wheeling and hanging out with friends as the main pastimes. Later the conversation turned to beer consumption as a local pastime. Mr. Lange is 18 and not of legal age to purchase or consume alcohol, or to possess alcohol for the purpose of consuming it. The coworker, Duck Bakey, is in his mid-twenties. The customer asked Mr. Lange what beer he liked to drink. Mr. Lange told the customer Coors Light, Busch Light and Budweiser. The customer went to the beer cooler, collected a six-pack of Coors Light and purchased the beer from Mr. Bakey. The customer then told Mr. Lange, "This is for you two." The customer returned to the beer cooler and collected a bottle of Heineken. The customer then went to the counter and purchased the Heineken. The customer asked Mr. Lange whether Mr. Lange was going to take the beer out to his truck.

Mr. Lange said he could not. The customer confirmed with Mr. Lange which vehicle in the parking lot was his and the customer then placed the Coors Light in Mr. Lange's car before the customer left the premises.

As soon as the customer left the store, Mr. Bakey told Mr. Lange that Mr. Lange could not accept the beer. Mr. Lange said he knew that. The situation with the customer was awkward for Mr. Lange and Mr. Lange wanted the customer to leave before he retrieved the beer from his truck and brought it back to the store. Mr. Bakey again told Mr. Lange that he could not accept the beer. Mr. Lange went to his truck to retrieve the beer. Mr. Lange brought the beer back into the store. Mr. Bakey issued a refund of the beer amount and placed the proceeds in a charitable donation container. Mr. Lange cooperated with that process. The customer had also given Mr. Bakey a substantial tip, which Mr. Bakey had placed in the same charitable donation container.

On March 2, 2014, the employer reviewed video surveillance that included the March 1, 2014 interaction between Mr. Lange and the customer who purchased the beer. The employer has a policy that prohibits acceptance of gifts. The employer also has a policy that restricts sale of age restricted products to persons not of legal age to possess or consume them. Mr. Lange was aware of these policies and had received training in these policies.

In making the decision to discharge Mr. Lange from the employment, the employer considered an incident from November, when Ms. Keil saw Mr. Lange drinking from a brown bottle that she erroneously perceived to be a beer bottle. Mr. Lange had been drinking root beer. Mr. Lange was off-duty at the time and was in the employer's parking lot with friends. Mr. Lange had used some profanity at the time, which Ms. Keil also noted.

In making the decision to discharge Mr. Lange from the employment, the employer considered another incident from November wherein Mr. Lange vomited at work after a night out drinking with friends.

REASONING AND CONCLUSIONS OF LAW:

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).

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 evidence in the record fails to establish misconduct in connection with the final incident that triggered the discharge. Mr. Lange testified that he had no idea that the customer was purchasing the beer for him until after the purchase had been made and the customer set the beer on the counter. Mr. Lange asserts he had no intention of keeping the beer and intended to retrieve the beer from his car as soon as the customer departed. The employer has presented insufficient evidence to rebut Mr. Lange's testimony. The evidence indicates that Mr. Lange did indeed retrieve the beer from his car and did indeed cooperate with a refund of the beer amount and the proceeds being donated to charity. Perhaps Mr. Lange's actions to resolve the matter were influenced by Mr. Bakey. The evidence fails to establish an intent on the part of Mr. Lange to violate the employer's policies in connection with the final incident that triggered the discharge. Because the evidence does not establish misconduct in connection with the final incident, the administrative law judge need not further consider the earlier matters from November.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Lange was discharged for no disqualifying reason. Accordingly,

Mr. Lange is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claims deputy's March 26, 2014, 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/pjs