

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRACY, TIFFANY, L
Claimant

APPEAL NO. 11A-UI-00939-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BE & K CONSTRUCTION COMPANY
Employer

**OC: 05/02/10
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 January 13, 2011, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on February 23, 2011. Claimant participated. Cheryl Clark represented the employer and presented additional testimony through Josh Erickson and Scott Wheelington. Exhibits One through Six were received into evidence.

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: Tiffany Tracy was employed by BE & K Construction Company as a full-time scaffold crew helper from June 2010 until December 22, 2010, when Scott Wheelington, Site Superintendent, discharged her from the employment for alleged insubordination. Ms. Tracy's immediate supervisor was Ralph Thompson, Supervisor. Ms. Tracy also took direction from Robert Hubner, Lead Man on the scaffolding crew. On the morning of December 22, 2010, the scaffolding crew needed a retractable for the scaffold it had built. The retractable was a device to which a person ascending or descending from the scaffold could attach a safety harness. The scaffolding superintendent who kept the retractables in a locked box was not on the job site at that time. Mr. Hubner told Ms. Tracy to go get a retractable. Ms. Tracy went into a nearby building to warm up and then returned in five minutes without the retractable. Mr. Hubner was upset that she had not brought back the retractable. Ms. Tracy said she would get retractable, but added that she did not know where it was. Mr. Hubner got upset and yelled at Ms. Tracy to go get the retractable. Ms. Tracy went to look for the retractable and encountered Supervisor Ralph Thompson. Mr. Thompson had the retractable and gave it to Ms. Tracy. Ms. Tracy provided the retractable to Mr. Hubner. Mr. Hubner then told Ms. Tracy to go work in another area, but told her to stop and speak with Scott Wheelington. Mr. Thompson drove Ms. Tracy to meet with Mr. Wheelington. Ms. Tracy was upset and offered to quit. Mr. Wheelington dissuaded her from that. Mr. Wheelington spoke to Mr. Hubner, who gave a different version of events and to

another employee who had witnessed only a portion of the interaction and could not speak to the rest of the interaction.

In making the decision to discharge Ms. Tracy from employment, the employer considered an incident from the end of November 2010 concerning an argument between Ms. Tracy and another employee.

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).

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the final incident that triggered the discharge. The employer had the ability to present testimony from Mr. Hubner or others with personal knowledge of the incident in question, but elected not to present such testimony. The weight of the evidence fails to establish any refusal on the part of Ms. Tracy to follow the directive issued by Mr. Hubner. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to claimant.

DECISION:

The Agency representative's January 13, 2011, reference 02, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css