

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRY L BALES
Claimant

APPEAL NO. 16A-UI-09530-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VAN DIEST SUPPLY CO
Employer

OC: 07/31/16
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 August 18, 2016, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant had been discharged on July 28, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on September 19, 2016. Claimant Terry Bales participated. Attorney Espnola Cartmill represented the employer and presented testimony through Carolyn Cross and Lee Trask. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Department Exhibits D-1 through D-7 into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Terry Bales was employed by Van Diest Supply Company as a full-time liquid terminal operator from 2012 until July 28, 2016, when Bob Van Diest, Chief Executive Officer and Chairman, discharged him for bringing a hazardous and/or dangerous device onto the employer's property. Lee Trask, Vice President for Manufacturing, notified Mr. Bales of the discharge. Mr. Bales last performed work for the employer on June 21, 2016.

On June 21, 2016, Mr. Bales brought a small cooler to the workplace and placed it in his assigned locker. Mr. Bales brought the cooler to the workplace because a supervisor had agreed to provide Mr. Bales with homemade brat sausages. Mr. Bales intended to use the cooler to transport the sausages home. When Mr. Bales brought the cooler from home, the cooler contained an aerosol air horn canister. Mr. Bales did not know the air horn canister was in the cooler when he brought the cooler from home to the workplace. The aerosol air horn canister weights eight ounces. The aerosol air horn device is intended to be used as a boating

safety device. Mr. Bales had taken the cooler and the air horn with him when he and his wife had gone boating on Sunday, June 19, 2016. Mr. Bales' wife is disabled. When the couple goes boating, Mr. Bales keeps the air horn on hand in case of an emergency. The air horn directions for use include instructions not to sound the device near ears or in an enclosed space. Mr. Bales did not give anyone permission to access the locker or the cooler. Mr. Bales thought he had left his locker locked. The supervisor who was supposed to bring the homemade brats forgot to do so on June 21. Mr. Bales left the cooler undisturbed in his locker.

On June 22, 2016, Mr. Bales began a period of approved leave under the Family and Medical Leave Act. Mr. Bales' wife underwent surgery on June 23, 2016 to remove a portion of her stomach and intestines. The period of leave was based on Mrs. Bales' serious medical needs and her need for Mr. Bales' assistance following the surgery. Mr. Bales' expected return to work date was at the beginning of August 2016. While Mr. Bales was on leave, he was preoccupied with his wife's needs and did not give any thought to the cooler he had left in his locker at work.

On or about July 14, 2016, Terminal Team Leader Stephen Pruitt, discharged the air horn in the vicinity of Team Leader Justin Lickway's ears. The matter came to the employer's attention on July 26, 2016, when Mr. Lickway reported the incident to a supervisor in connection with requesting medical attention for his ear. Earl Vold, Logistics Director, conducted the employer's investigation into Mr. Pruitt's misconduct with the air horn. During the investigation, Mr. Pruitt allegedly asserted that he had obtained the air horn canister from on top of Mr. Bales' locker. The employer discharged Mr. Pruitt from the employment.

On July 27, 2016, a supervisor notified Mr. Bales that Lee Trask was trying to get ahold of Mr. Bales. Mr. Bales had continued to be preoccupied with his wife's medical needs. The supervisor provided Mr. Bales with a vague statement that Mr. Pruitt had been "monkeying" with the air horn canister from Mr. Bales' locker.

On July 28, Mr. Trask telephoned Mr. Bales and spoke to him briefly. Mr. Trask asked whether Mr. Bales had heard of the incident involving the air horn. Mr. Bales indicated he had. Mr. Trask asked whether the air horn belonged to Mr. Bales. Mr. Bales stated it did. Mr. Trask reminded Mr. Bales of the employer's policy prohibiting bringing dangerous materials into the facility. Mr. Trask told Mr. Bales that because he had admitted ownership of the air horn canister and because he had not had permission to bring it to the facility, the employer was terminating his employment. Mr. Trask did not ask Mr. Bales when, how, or why he had brought the air horn canister to the workplace, whether he had been aware that he had brought it, or where he had left it.

The employer's written personnel policies prohibit "Bringing or possessing firearms, weapons, or any other hazardous or dangerous devices on Company property." Mr. Bales received a copy of the personnel policies during the employment and was aware of the prohibition.

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 employment. While the evidence establishes that Mr. Bales brought the aerosol air horn device to the workplace, the evidence does not establish that the device was inherently hazardous and/or

dangerous or that Mr. Bales intentionally brought the device to the workplace. The evidence indicates that Mr. Bales was completely unaware that the air horn was in the cooler he had brought to the workplace. The weight of the evidence establishes that Mr. Bales had left the cooler in his locker undisturbed and had no reason to give the matter any further thought until the employer notified him of Mr. Pruitt's misconduct. Mr. Pruitt's decision to rummage through Mr. Bales' personal effects, retrieve the air horn, and use it to perpetrate an assault was not attributable to Mr. Bales. At worst, the evidence establishes an isolated incident of carelessness on the part of Mr. Bales through his failure to remove the device from the cooler before transporting the cooler to work. Mr. Bales had more pressing matters that occupied his attention. The evidence fails to establish any willful disregard of employer policies and any other willful and/or wanton disregard of the employer's interests on the part of Mr. Bales. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Bales was discharged for no disqualifying reason. Accordingly, Mr. Bales is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The August 18, 2016, 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