

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIJAL KUCKOVIC
Claimant

APPEAL NO. 09A-UI-18899-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ANNETT HOLDINGS INC
TMC TRANSPORTATION INC**
Employer

**OC: 11/15/09
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 December 7, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 2, 2010. Claimant Danijal Kuckovic participated. David Williams of Talx represented the employer and presented testimony through Todd Rover, Service Manager. Exhibits One through Five 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: Danijal Kuckovic was employed by TMC Transportation, Inc., as a full-time trailer technician from January 6, 2009 until November 12, 2009, when Todd Rover, Service Manager, discharged him from the employment. Mr. Rover was Mr. Kuckovic's immediate supervisor. Mr. Rover delegated shift manager responsibilities to a few Lead Techs.

The final incident that prompted the discharge came to Mr. Rover's attention by means of an e-mail message sent by Lead Tech Mike Stiles on November 11, 2009. Mr. Stiles is still with the employer. In the e-mail, Mr. Stiles told Mr. Rover that Mr. Kuckovic and another employee, Steve, had performed unnecessary work on a semi trailer, that it was Mr. Kuckovic's fault, and that Mr. Kuckovic had blamed Steve for the error. Mr. Kuckovic and Steve had in fact performed unnecessary work by mistake, but it had not been Mr. Kuckovic's fault. Mr. Kuckovic had relied upon information provided by Steve. Steve had told Mr. Kuckovic that he checked the employer's computer system to determine that the trailer in question was overdue for the maintenance work. The trailer was in fact not due for the maintenance work.

On November 12, 2009, Mr. Rover spoke to Mr. Kuckovic. Mr. Rover told Mr. Kuckovic that the employment was not working out. Mr. Rover discharged Mr. Kuckovic from the employment.

In making the decision to discharge Mr. Kuckovic from the employer, Mr. Rover considered prior incidents and reprimands. The employer had sent a broadcast e-mail that established a policy against personal cell phone use in the shop. Mr. Rover observed Mr. Kuckovic violating the policy in June or July, and told Mr. Kuckovic to put his phone away. On November 5, Lead Tech Dan Regnier observed Mr. Kuckovic taking a call on his personal cell phone. Mr. Regnier reported the incident to Mr. Rover on November 6. The call had been from Mr. Kuckovic's sister regarding Mr. Kuckovic's mother, who suffers from leukemia. The sister needed help with their mother. After the call, Mr. Kuckovic notified Mr. Regnier that he needed to leave to care for his mother. On November 6, Mr. Rover reminded Mr. Kuckovic of the cell phone policy and counseled Mr. Kuckovic that emergency calls should be routed through the work phone. Mr. Kuckovic agreed to do that.

The employer also considered an incident from late September. Mr. Kuckovic followed the instructions of a more senior employee when he greased some bearings. The end result was that the bearings were not properly greased and the work had to be redone.

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).

The employer 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 did not present testimony from Mr. Stiles or from the other employee, Steve, both of whom would have had personal knowledge concerning the unnecessary maintenance work and Mr. Kuckovic’s alleged ill treatment of Steve. The employer had the ability to present such testimony, but did not. The weight of the evidence concerning that incident indicates that Mr. Kuckovic reasonably relied on Steve’s representation that the maintenance work needed to be done. The weight of the evidence also fails to establish that Mr. Kuckovic mistreated Steve in any manner.

The cell phone use situation concerns possible insubordination. 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 had issued a reasonable directive against cell phone use. The evidence indicates that there were extenuated circumstances associated with Mr. Kuckovic’s cell phone use on November 6, 2009. Mr. Kuckovic’s mother has a serious medical condition and the telephone call concerned a request for help in dealing with the mother’s medical condition. The evidence fails to establish that the sister had another number by which to contact Mr. Kuckovic with the pressing concern regarding their mother’s condition. Under the circumstances, Mr. Kuckovic’s conduct was reasonable and did not amount to insubordination. Mr. Kuckovic engaged in further reasonable conduct by acquiescing in the employer’s request that such calls be routed through the business phone.

The evidence also fails to establish misconduct in connection with the bearing grease incident, where Mr. Kuckovic's unsatisfactory performance of the work was based on guidance provided by a more senior employee.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Kuckovic was discharged for no disqualifying reason. Accordingly, Mr. Kuckovic is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Kuckovic.

DECISION:

The Agency representative's December 7, 2009, 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