

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RANDY R DAVIS
Claimant

APPEAL NO. 10A-UI-13671-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BE & K CONSTRUCTION COMPANY
Employer

OC: 08/29/10
Claimant: Respondent (2-R)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 24, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 16, 2010. Claimant participated. Marlene Sartin represented the employer and presented testimony through Scott Wheelington and Randy Zeeryp. Exhibits 1 through 6, 8, 12, and 13 for 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: Randy Davis was employed as a full-time supervisor until September 3, 2010, when Scott Wheelington, Site Superintendent, discharged him for carelessness and/or negligence in the performance of his assigned work duties. Mr. Davis had started with the company in 2008 as a maintenance supervisor. In March 2009, Mr. Davis transferred to the Clinton, Iowa, ADM plant. The employer contracts with ADM to provide plant maintenance services. Mr. Davis initially worked as a general supervisor at the Clinton job site, but became a scaffolding supervisor in August 2009. Mr. Davis continued as a scaffolding supervisor until he was discharged on September 3, 2010. Superintendent Randy Zeeryp was Mr. Davis's immediate supervisor. Though Mr. Davis lacked a background in constructing scaffolds prior to becoming a scaffolding supervisor, the employer provided Mr. Davis with appropriate on-the-job training so that he would be able to effectively perform his duties as a scaffolding supervisor. Mr. Davis was indeed responsible for ensuring the proper construction of scaffolds instructed by the crew he supervised.

The final incident that triggered the discharge came to the employer's attention on September 1, 2010. Mr. Davis had supervised the construction of a scaffold that, when completed, did not meet OSHA standards. On one side of the scaffold, there was a ladder that was difficult to climb. A person climbing a ladder would be hit in the back by an electrical conduit. The device to which workers could attach a harness device to keep from falling a great distance if they fell off the scaffold had not been included in the scaffold construction. Toe boards that would keep materials or tools from falling off the scaffold and possibly injuring people below had not been included in the scaffold construction. Some of the floor planks had substantial gaps between them, such that a person could fall through

and injure a leg. The scaffold had been in place for three days. A worker had apparently tried to use the scaffold and had been injured.

In making the decision to discharge Mr. Davis from the employment, the employer considered prior similar incidents wherein Mr. Davis had failed to effectively supervise the construction of scaffolds. On January 13, Mr. Zeeryp included Mr. Davis in a reprimand issued to the crew after he inspected a scaffold with multiple deficiencies.

On April 30, a contractor alerted the employer to a scaffold that had been erected with one supporting leg positioned on top of some rocks, rather than on solid ground. When the employer pointed this out to Mr. Davis, Mr. Davis did not see a problem and asserted the rock was stable. Erecting the scaffold in the proper manner would have required the time and effort to get the appropriate permit and to move the rock. Mr. Davis knew the leg support did not meet OSHA standards and would not hold. Though the problem was addressed, at least in part, by adding additional support from above, Mr. Davis knew the leg either needed to be properly secured or removed, if unneeded, in order to meet OSHA standards, but Mr. Davis neglected to take any steps either way.

In July 2010, David Zimmerman, President, had issued a written notice to all employees that they were obligated to do everything in their power to work safely and assist others in working safely or would be at risk of termination from employment. Mr. Davis attended the July 28 meeting at which this written notice was reviewed with employees.

On July 30, the employer learned that an employee under Mr. Davis's supervision was taking unauthorized shortcuts in completing a scaffold. When the matter was brought to the attention of Mr. Davis, Mr. Davis's response was that the crew was building the scaffolds to the best of their ability.

On August 2, Site Safety Manager Tony Webster and Mr. Wheelington inspected several scaffolds and found multiple scaffolds with missing toe boards, gaps in the planking, lacks of gates on the scaffolding, sill plates missing, and ladder access areas missing appropriate safety equipment. Rather than construct the scaffolds correctly, the crew had simply marked them as incomplete, with the intention they would be used anyway. Mr. Davis was responsible for ensuring proper construction of those scaffolds.

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 weight of the evidence in the record establishes both carelessness and negligence with regard to each of the incidents described above. Mr. Davis describes his work responsibilities in a way that makes it appear as if he was nothing more than a payroll assistant. The weight of the evidence indicates otherwise. Mr. Davis provided testimony that was internally inconsistent. On the one hand, he minimized his responsibility for overseeing the crew he was assigned to supervise. On the other hand, he's able to address, point by point, each of the employer's concerns in a way that demonstrates expertise in scaffold construction. The weight of the evidence indicates that Mr. Davis had expertise other than scaffold construction prior to stepping into the role of scaffold supervisor in August 2009 and that it was this other expertise that prompted the employer to put him in the position of scaffold supervisor. The weight of the evidence indicates that while Mr. Davis was not a certified scaffold builder, the employer had provided Mr. Davis with sufficient on-the-job training so that he would be able to determine whether a scaffold met OSHA requirements and met the employer's own scaffolding construction requirements. Despite Mr. Davis's assertions to the contrary, the weight of the evidence indicates that he was indeed charged with the responsibility of making certain that the crew constructed scaffolds that met the appropriate requirements. In the each of the instances outlined above, Mr. Davis neglected to perform his duties in a responsible manner. This failure caused scaffolding to be erected in a way that was unsafe and left those who used it, or those who ventured into the vicinity of it while it was being used, at risk of injury. This, in turn, left the employer or ADM at risk of liability.

The weight of the evidence establishes a pattern of carelessness and/or negligence that indicated a willful and wanton disregard of the employer's interests. Mr. Davis was discharged for misconduct. Accordingly, Mr. Davis is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Davis.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's September 24, 2010, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw