

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DARREN J KIMBALL
Claimant

APPEAL NO. 13A-UI-07875-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEW COOPERATIVE INC
Employer

OC: 06/09/13
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 26.8(5) - Decision on the Record

STATEMENT OF THE CASE:

Darren Kimball filed a timely appeal from an unemployment insurance decision dated June 25, 2013, reference 02, that denied benefits based on an agency conclusion that he had been discharged for misconduct. A telephone hearing was scheduled for August 12, 2013. Mr. Kimball did not respond to the hearing notice instructions and did not participate in the hearing. The employer provided a telephone number for the hearing, but then was not available at that number at the time set for the hearing. Based on the parties' failure to participate in the hearing, the administrative file, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUE:

Decision on the record.

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal by notice mailed on July 16, 2013. The appellant, Darren Kimball, failed to provide a telephone number at which he could be reached for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. There is no evidence the hearing notice was returned by the postal service as undeliverable for any reason. On July 17, 2013, the employer responded to the hearing notice by naming two participants, Lynn Dreyer and Gary Fitzgerald, and by providing a telephone number where they could be reached for the hearing: 515-379-1754. At the time of the hearing, the administrative law judge telephoned the number the employer had provided and spoke with the receptionist, Jenny, who advised that Mr. Fitzgerald was out of the office, that Mr. Dreyer was not presently available at the number dialed, and that Mr. Dreyer could be reached at 515-955-9017. The administrative law judge made a second attempt to reach Mr. Dreyer using the number provided by the receptionist. The administrative law judge made contact with Mr. Dreyer's voicemail box and left an appropriate

message. Mr. Dreyer had not answered. Mr. Dreyer did not respond to the administrative law judge's message.

The administrative law judge has conducted a careful review of the administrative file to determine whether the unemployment insurance decision should be affirmed. The administrative file reflects that the employer submitted written notice to Workforce Development that it would not be participating in the June 21, 2013 fact-finding interview. Despite the absence of the employer, the fact-finder found that the claimant had been discharged for misconduct. The claimant had told the fact-finder of an accident a few days before the discharge and of another incident, months earlier, wherein, the claimant drove the employer's truck past a stopped vehicle that turned out to be an improperly marked SUV being used as a school bus.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 26.8(3), (4) and (5) provide:

Withdrawals and postponements.

(3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.

(4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.

(5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

The administrative law judge has carefully reviewed evidence in the record and concludes that the unemployment insurance decision previously entered in this case is incorrect and cannot be affirmed.

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 a discharge 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) alone. 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 did not make itself available for the appeal hearing. The employer waived its presence at the fact-finding interview that led to the lower decision. The Workforce Development representative could not have found in favor of the non-participating employer at the lower level without erroneously shifting the burden of proof to the claimant. The employer had presented no evidence whatsoever to support an allegation that the claimant was discharged for misconduct in connection with the employment. Misconduct cannot be established based on the claimant's statement to the fact-finder below.

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

Any party aggrieved by this decision must make a written request to the administrative law judge that the hearing be reopened within 15 days after the mailing date of this decision. The written request should be mailed to the administrative law judge at the address listed at the beginning of this decision and must explain the emergency or other good cause that prevented the appellant from participating in the hearing at its scheduled time.

DECISION:

The Agency representative's June 25, 2013, reference 02, decision is reversed. 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.

Any party aggrieved by this decision must make a written request to the administrative law judge that the hearing be reopened within 15 days after the mailing date of this decision. The written request should be mailed to the administrative law judge at the address listed at the beginning of this decision and must explain the emergency or other good cause that prevented the appellant from participating in the hearing at its scheduled time. The aggrieved party may otherwise exercise its appeal rights as set forth on the first page of the decision.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs