

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ALEN BAHIC**  
Claimant

**APPEAL NO. 11A-UI-10128-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MENARD INC**  
Employer

**OC: 06/26/11**  
**Claimant: Respondent (2-R)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the July 21, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 21, 2011. Claimant Alen Bahic participated personally and was represented by Nicholas Platt, attorney at law. Corporate Counsel Paul Hammel represented the employer and presented testimony through Mike Good. 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: Alen Bahic was employed by Menards on a full-time basis from 2008 until July 1, 2011, when Mike Good, general manager, discharged him from the employment for failing to disclose a felony conviction on application materials he completed in January 2008. At the time Mr. Bahic applied for work at Menards, he was on probation for a felony drug offense. As part of the application process, Mr. Bahic completed a "Pre-Employment Survey." The document contained the following question:

Have you been convicted of any felony within the last seven years? If yes, explain including dates, circumstances and location. (You are not required to disclose sealed or expunged records of convictions. A conviction will not necessarily disqualify you from employment. It will be considered only as it may relate to the job you are seeking pursuant to an applicable State or Federal Law.)

Though Mr. Bahic had in fact been convicted of a felony in 2006, and though Mr. Bahic continued on probation in connection with that felony until discharged from probation in August 2008, he knowingly and intentionally placed an "X" in the blank that indicated he had no such felony conviction. Though Mr. Bahic is a non-native English speaker, Mr. Bahic

understood the question on the survey and both knowingly and intentionally withheld information concerning the felony conviction from the employer.

The conviction came to light when the employer did a required criminal history check in connection with considering Mr. Bahic for a promotion to a commercial contractor sales position. Had Mr. Bahic received the promotion, he would have worked independently serving commercial contractor accounts and handling account payments as necessary. It was a position that required trustworthiness. Mr. Bahic had previously worked in the receiving department and in the building materials department. On June 28, 2011, Mr. Bahic signed a release form to allow the employer to do the criminal history check. Soon thereafter, Mr. Bahic notified Mr. Good about the prior felony conviction. This was the employer's first knowledge of the felony conviction. When the employer received the criminal history check information on July 1, it did indeed show the felony conviction along with prior misdemeanor convictions.

The employer had a written policy that specifically indicated that "falsifying a company document including, but not limited to, invoices, pre-employment questionnaires or surveys" could result in disciplinary action. Mr. Bahic signed his acknowledgment of the policy materials containing this provision at the time he started the employment.

## **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).

Iowa Administrative Code rule 871 IAC 24.32(6) provides as follows:

False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer.

The evidence in the record establishes misconduct in connection with the employment. Mr. Bahic knowingly falsified application materials to intentionally withhold information concerning a prior felony conviction. Given the nature of the employer's retail business, the employer reasonably expected and required that employees share information regarding prior felony convictions. Had the employer not required the criminal history check as part of the promotion process, Mr. Bahic would have been placed in a position of trust and responsibility that could expose the employer to the risk of financial loss, loss of reputation, or liability if Mr. Bahic violated that trust and/or if the employer were found to be negligent in promoting a convicted felon to the position.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Bahic was discharged for misconduct. Accordingly, Mr. Bahic 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. Bahic.

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. The misconduct constituted a current act for unemployment insurance purposes since the employer discharged Mr. Bahic within three days of learning of the felony conviction.

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 July 21, 2011, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw