

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN D SMITH

Claimant

APPEAL NO. 11A-UI-14787-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JORDAN'S MILLWRIGHT LLC

Employer

OC: 10/16/11

Claimant: Appellant (2)

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

Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Brian Smith filed a timely appeal from the November 9, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 7, 2011. Mr. Smith participated. Mike Jordan represented the employer. Exhibits One through Five and A through D were received into evidence.

The hearing was set for 2:00 p.m. At 2:52 p.m., the claimant disconnected from the hearing toward the end of his testimony and prior to the employer having the opportunity to cross-examine the claimant. The claimant did not answer his phone when the administrative law judge attempted to reconnect him to the hearing. The claimant did not respond to the messages the administrative law judge left for him. The employer waived cross-examination of the claimant and the record was closed at 3:17 p.m.

ISSUE:

Whether Mr. Smith separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

Whether Mr. Smith has been able to work and available for work since he established his claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brian Smith was employed by Jordan's Millwright, L.L.C., as a full-time millwright from 2007 until October 19, 2011, when owner Mike Jordan suspended him from the employment. On September 21, 2011, Mr. Smith and a couple coworkers performed work for the employer at the Cargill facility in Iowa Falls. The two coworkers were recent hires. The work that day involved changing a motor on a meal drier. When the coupler would not go back on, Mr. Smith and others used a block of wood and a hammer to try to force it on. Cargill Plant Manager Terry Krogh was displeased with the use of the hammer. He got another coupling to be used instead of the one Mr. Smith and the others had hammered. That evening, Mr. Krogh telephoned

Mr. Jordan to complain that Mr. Smith and/or the others had damaged the meal drier motor coupling with the hammer. Mr. Krogh told Mr. Jordan that he did not want Mr. Smith back at the Cargill site in Iowa Falls. The employer alleges that Mr. Krogh insisted that Mr. Smith personally pay for the damaged coupling. Mr. Krogh did tell Mr. Jordan that the cost of a replacement coupling would be deducted from payment due to Jordan Millwright. That same night, after normal work hours, Mr. Jordan attempted to reach Mr. Smith to discuss the matter, but Mr. Smith did not answer his phone. Mr. Jordan then decided not to further attempt to talk to Mr. Smith about the September 21 incident at Cargill.

Mr. Smith continued to perform work for the employer after the September 21 Cargill incident. Within a week of that incident, Mr. Jordan told Mr. Smith that he was no longer allowed at the Cargill site in Iowa Falls. At the time, Mr. Jordan had other projects for Mr. Smith to work on. When Mr. Smith's girlfriend picked up his check for him at the end of September/beginning of October, the employer had deducted wages to recover the cost of the damaged coupling. Nancy Jordan, who is married to Mike Jordan and who does clerical work for the employer, told Mr. Smith that she was removing \$124.00 from his check for the damage to the coupling. Mr. Smith contacted the Iowa Division of Labor for assistance in getting the rest of his pay from the employer. The employer had no policy that would put Mr. Smith on notice that his wages might be docked.

Mr. Smith continued to perform work for the employer until October 19. After that, the work crew was scheduled to return for an extended period to the Cargill plant in Iowa Falls. Mr. Jordan told Mr. Smith he would not be going and that the employer had no other work for him at that time. Mr. Smith called a couple times requesting additional work, but the employer had none for him. Mr. Jordan did not contact Mr. Smith to offer further work. Mr. Smith eventually found new, full-time work and started the new employment on November 7, 2011.

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 employment indicates that the employer discharged Mr. Smith from the employment effective October 19, 2011 in connection with an incident that occurred on September 21. The evidence fails to establish an intent on the part of Mr. Smith to act contrary to the interests of the employer on September 21. The evidence fails to establish a pattern of negligence or carelessness indicating a willful or wanton disregard of the employer's interests. The evidence fails to establish a current act of misconduct. The employer's decision not to offer work after October 19, 2011 had the effect of discharging Mr. Smith from the employment for no disqualifying reason. In connection with the discharge, Mr. Smith would be eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Smith.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The weight of the evidence establishes that Mr. Smith continued to be available for work, with this employer and otherwise, after the employer ceased making work available effective October 19, 2011. Mr. Smith continued to be able and available for work until he began the new full-time employment on November 7, 2011. Mr. Smith was able and available, and eligible for benefits, from October 16, 2011, the effective date of his claim, through the week that ended November 5, 2011, provided he was otherwise eligible.

DECISION:

The Agency representative's November 9, 2011, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason effective October 19, 2011. In connection with the discharge, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant. The claimant was able and available for work and eligible for benefits during the three-week period of October 16, 2011 through November 5, 2011, provided he was otherwise eligible. Benefits are denied effective November 6, 2011, at which point the claimant was re-employed and no longer met the availability requirement.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw