

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEREMY S BENTSON

Claimant

APPEAL NO. 13A-UI-02739-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GUNDERSON RAIL SERVICES LLC

Employer

OC: 01/20/13

Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 28, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 3, 2013. Claimant Jeremy Bentson did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Attorney Scott Hall represented the employer and presented testimony through Ed Mueller and Laurie Jobe. Exhibits One through 19 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: Jeremy Bentson was employed by Gunderson Rail Service, L.L.C., as a full-time production laborer from 2010 until January 24, 2013, when Ed Mueller, Plant Manager, discharged him from the employment. The incident that triggered the discharge occurred on January 24, 2013. On that day, Mr. Bentson yelled at coworker John Prudhome to summon Mr. Prudhome to Mr. Bentson's work area. At the time, Mr. Prudhome was engaged in a conversation with another coworker. Mr. Bentson yelled, "I'm not hollering your name for nothing." Mr. Bentson yelled, "Get the fuck over here now!" When Mr. Prudhome did not respond, Mr. Bentson started throwing objects at Mr. Prudhome. Mr. Bentson hit Mr. Prudhome in the stomach with an air chuck tool. Mr. Bentson then threw a 125-150 pound hydraulic cushioning cap on the floor and chipped the floor. The incident was witnessed by several coworkers. Mr. Prudhome reported the incident to the employer. The employer investigated the matter and collected written statements from several employees who had witnessed the incidents. The other witness statements corroborated Mr. Prudhome's statement and complaint regarding Mr. Bentson's conduct. The employer has a written policy in its handbook that prohibits violence in the workplace. Mr. Bentson had received a copy of the handbook.

In making the decision to discharge Mr. Bentson from the employment, the employer considered prior reprimands. In October 2012, the employer had issued a reprimand to Mr. Bentson for painting the hydraulic cushioning caps a different color than he was supposed to. In July 2011, the employer issued a reprimand to Mr. Bentson for harassing another employee by telling the employee that he could get him fired. This act followed a day after Mr. Bentson had participated in anti-harassment policy training.

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).

While it would have been better to present testimony from one or more of the actual witnesses to the incident that triggered the discharge, the employer had presented several written statements from persons with personal knowledge of the incident. Aside from the statement provided by Mr. Bentson, the statements are sufficiently consistent to establish that Mr. Bentson did indeed throw objects at Mr. Prodhon and did indeed throw a heavy piece of steel on the employer's floor, causing damage to the floor. Mr. Bentson's actions on January 24, 2013, were in violation of the employer's written policy and constituted misconduct in connection with the employment. Accordingly, Mr. Bentson 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. Bentson.

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 the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's February 28, 2013, 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 the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs