

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL STUBBS

Claimant

APPEAL NO. 17A-UI-09209-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QUALITY TRAFFIC CONTROL INC

Employer

OC: 12/18/16

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Michael Stubbs filed a timely appeal from the September 6, 2017, reference 02, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Stubbs was discharged on August 14, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on September 26, 2017. Mr. Stubbs participated personally and was represented by attorney Erik Bair. Daniel Ebright, represented the employer and was the only witness who testified on behalf of the employer.

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: Michael Stubbs was employed by Quality Traffic Control, Inc. as a full-time road construction Traffic Control Tech from 2015 until August 14, 2017, when the business owners, Jamie Jirak and Shawn Goodno, discharged him from the employment for allegedly consuming alcohol while on duty on August 6 and 8, 2017. On those days, Mr. Stubbs was working as part of a traffic control crew assigned to a road construction site near Williamsburg, Iowa. Traffic Control Tech Kyle Nicholson was working as part of the same crew. The employer did not have a supervisor at the job site.

On August 8 or 9, Mr. Nicholson alleged to District Manager Nate Donald that Mr. Stubbs and another Traffic Control Tech, Rod Wright, were drinking beer in a company vehicle at a Casey's store. Mr. Stubbs denies that he or the coworker were consuming beer or other alcohol and asserts that what Mr. Nicholson perceived to be alcohol was in fact a Red Bull soft drink. Once Mr. Nicholson made his report to Mr. Donald, Mr. Donald reported the alleged conduct to Tanner Morris, General Manager. Mr. Morris spoke with Mr. Nicholson. The employer's sole witness for the unemployment insurance appeal hearing, Daniel Ebright, Human Resources and Safety Office Manager, does not know what Mr. Nicholson said to Mr. Morris.

On August 9, 2017, Mr. Jirak, Mr. Morris, and Mr. Ebright met with Mr. Stubbs. During that meeting, Mr. Stubbs denied that he had been consuming alcohol. During that meeting, Mr. Jirak

stressed the importance of not consuming alcohol at work due to the dangerous nature of the road construction industry. During the meeting, Mr. Jirak told Mr. Stubbs that consuming alcohol at work could lead to discharge from the employment. During the meeting, Mr. Stubbs denied that he had consumed alcohol on the job. Mr. Stubbs told there employer there was no way that he was drinking on the job and that he realized the dangers of such conduct. In 2016, Mr. Stubbs had been seriously injured in the course of the employment when a drunk driver hit him. As a result of the injury, Mr. Stubbs had to undergo hip surgery and experiencing ongoing health issues related to the injury. As part of the employer's investigation of the allegation, Mr. Goodno spoke with Mr. Wright on August 11. Mr. Ebright was not present for that meeting, but alleges that Mr. Wright admitted during that meeting that he and Mr. Stubbs were consuming alcohol on the dates in question.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to prove misconduct in connection with the employment by a preponderance of the evidence. The employer's assertion that Mr. Stubbs consumed alcohol on the job comes down to Mr. Nicholson's allegation and Mr. Wright's alleged admission in conversation with Mr. Goodno. The employer elected not present testimony from Mr. Nicholson, Mr. Goodno, Mr. Morris or any other person with purported personal knowledge of the matter in question. The employer had the ability to present such testimony. The employer presented insufficient evidence to rebut Mr. Stubbs' testimony that he had not consumed alcohol on the job.

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

DECISION:

The September 6, 2017, reference 02, decision is reversed. The claimant was discharged on August 14, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs