

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT J SORENSON
Claimant

APPEAL NO. 14A-UI-05164-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BROWNS CREW CAR OF WYOMING INC
Employer

**OC: 04/27/14
Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Admin. Code r. 871 – 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 16, 2014, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on June 6, 2014. At the time of the hearing, claimant Robert Sorenson was not available at the number he had provided for the hearing and did not participate. Bryant Hunter, Human Resources Assistant, represented the employer. Exhibits One through Seven were received into evidence.

The claimant contacted the administrative law judge after the hearing record had closed. The claimant provided good cause to reopen the hearing record, but elected not to have the administrative law judge reopen the hearing record.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Robert Sorenson was employed by Brown's Crew Car of Wyoming, Inc., as a full-time driver from 2010 until April 27, 2014, when the employer discharged him from the employment for a second preventable accident that the employer deemed preventable. The final accident that triggered the discharge came to the employer's attention in May 2013 and the employer issued a written warning at that time. The employer had previously been aware of another accident that had occurred during the course of the employment. The final accident that triggered the discharge again came to the employer's attention on April 14, 2014, when Bryant Hunter, Human Resources Assistant, ran a periodic motor vehicle report on Mr. Sorenson. The company's written work rules subjected Mr. Sorenson to discharge from the employment if he had more than one preventable motor vehicle accident within a three-year period.

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.

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 evidence in the record fails to establish a current act of misconduct. The final accident that triggered the discharge came to the employer's attention in May 2013 and the employer addressed the matter with Mr. Sorenson at that time and stopped short of discharging Mr. Sorenson from the employment at that time. The matter that came to the employer's attention in May 2013 no longer constituted a current act in April 2014, when the motor vehicle record that included the accident came to the attention of Mr. Hunter. Because the discharge was not based on a current act, the administrative law judge concludes that Mr. Sorenson was discharged for no disqualifying reason. Mr. Sorenson is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claims deputy's May 16, 2014, reference 01, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css