

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL P DURST
Claimant

APPEAL NO: 06A-UI-08839-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DAVENPORT FARM & FLEET INC
Employer

**OC: 07/30/06 R: 03
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

Davenport Farm & Fleet filed a timely appeal from the August 17, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 19, 2006. Claimant Michael P Durst did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Cedar Falls Store Manager Rod Burkhead represented the employer and presented additional testimony through Cedar Falls Assistant Manager Jolene Schindler. The administrative law judge took official notice of Iowa Workforce Development records that indicate no benefits have been disbursed to the claimant. Employer's Exhibits One through Three were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct that would disqualify him for unemployment insurance benefits.

Whether the claimant's act of "doing donuts" with the employer's truck in the employer's lot constituted substantial misconduct that would disqualify him for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michael Durst was employed by Davenport Fleet & Farm as a full-time service technician at the Cedar Falls store from November 8, 2004 until July 31, 2006, when Store Manager Rod Burkhead discharged him.

The final incident that prompted the discharge occurred on July 28, 2006 and came to the attention of Assistant Manager Jolene Schindler shortly after it occurred. Mr. Durst and employee Chad Dawson were using the employer's truck to move trailers from one area of the employer's lot to another. Mr. Durst was driving and Mr. Dawson was a passenger in the vehicle. Ag Department employee Cheryl Homeister observed the truck go by an open door "at a pretty good speed." Ms. Homeister observed through a window a cloud of rising dust. Ms. Homeister stepped outside in time to observe the company pickup truck "doing donuts" in

an area next to the trailers. Ms. Homeister observed rocks and dust flying. Ms. Homeister immediately reported the incident to Assistant Manager Jolene Schindler. Ms. Homeister prepared a written statement on July 28.

Ms. Schindler immediately investigated and learned that Mr. Durst was driving and Mr. Dawson was a passenger in the truck. Ms. Schindler did not observe the behavior, but did meet Mr. Durst and Mr. Schindler as they were reentering the truck with another trailer in tow. Ms. Schindler questioned Mr. Durst regarding whether he had been "doing donuts" in the lot and Mr. Durst denied doing so. Mr. Durst initially said he may have been traveling fast enough to spray gravel, but then denied doing so. Chad Dawson provided a written statement on July 29 in which he stated that Mr. Durst had in fact "done a donut" in the gravel lot.

In August 2005, Store Manager Rod Burkhead reprimanded Mr. Durst for intentionally damaging one of the employer's telephones.

Mr. Durst established a claim for benefits that was effective July 30, 2006, but has collected no benefits.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Durst was discharged for misconduct in connection with the employment. It does.

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 employer argues that Mr. Durst behaved recklessly, placing people and property at risk by his behavior. A preponderance of the evidence supports the employer's argument. Reckless driving, by definition, involves a willful or wanton disregard for the safety of persons or property. See Iowa Code section 321.277. The evidence indicates that Mr. Durst operated the employer's truck in such a manner as to place himself, Mr. Dawson, and bystanders at risk of injury. The evidence indicates that Mr. Durst placed the truck, the nearby trailers, and any other property in the vicinity, at risk of damage.

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

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment

compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Mr. Durst has received no benefits in connection with the claim, there is no overpayment.

DECISION:

The Agency representative's August 17, 2006, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw