

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JESSIE J ANDERSON
Claimant

APPEAL NO. 18A-UI-06227-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SABRE COMMUNICATIONS CORP
Employer

OC: 05/13/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Jessie J. Anderson, the claimant, filed a timely appeal from a representative's unemployment insurance decision dated June 1, 2018, reference 02, which denied unemployment insurance benefits, finding that the claimant discharged from work on May 10, 2018, for failure to follow instructions in the performance of his job. After due notice was provided, a telephone hearing was held on June 21, 2018. Claimant participated. The employer participated by Ms. Kelli Beach, Human Resource Generalist, and Mr. Matt Kaylor, Quality Control Supervisor.

ISSUE:

The issue is whether the evidence in the record establishes work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Jessie Anderson was employed by Sabre Communications Corporation from October 11, 2007 until May 10, 2018, when he was discharged from employment. Mr. Anderson most recently was assigned to work as an NDT Technician "C" on a full-time basis and was paid by the hour. The department supervisor was Mr. Matt Kaylor. The claimant's immediate supervisor was lead person, Chad Carlson.

Mr. Anderson was discharged on May 10, 2018, based upon the employer's belief that Mr. Anderson had knowingly violated company safety policies by operating a forklift that was not part of his direct duties and without current certification.

Mr. Anderson had previously worked as a production employee for Sabre Communications Corp and had been certified and routinely operated a forklift while performing his duties. At a later date, Mr. Anderson was moved to a quality inspection position within the company where his duties primarily were to be focused on inspecting welds on production work. Because Mr. Anderson was familiar with the production side of the company, he often assisted production workers as they performed their duties. Mr. Anderson often operated a company forklift that was in the area to assist the other workers. Mr. Anderson believed that his previous forklift certification was still in effect.

During the approximately years preceding his discharge, the company had made a number of changes in management positions and changes in policy, and the company held general meetings to explain changes and the company's new expectations.

One of the policy changes was to have only currently certified forklift operators drive forklifts and to limit those who operated forklifts to only production department employees. It appears that the company had an internal certification process for forklift drivers and recently had been re-certified them on a year-by-year basis.

On May 10, 2018, a company lead person reported to Mr. Kaylor, Quality Control Department Manager, that Mr. Anderson had been observed operating a forklift in a production area. The lead person further asserted that Mr. Anderson had, when confronted, asked him to pretend that he had not seen Mr. Anderson operating a forklift. Because the company believed that the lead worker had repeatedly told Mr. Anderson to stay off the forklift, and that Mr. Anderson had not complied, Mr. Anderson was called to a meeting in the company's human resource department.

During the meeting, Mr. Anderson agreed that he had been operating the forklift, explaining that he was assisting production workers to perform their job. Mr. Anderson denied being previously warned not to operate the forklift and asserted his belief that his previous certification remained in effect. Based upon the lead person's assertions that he had repeatedly told Mr. Anderson to stay off the forklift, Mr. Anderson's admissions, and the fact that Mr. Kaylor had on one occasion spoken to Mr. Anderson about that issue himself, the decision was made to discharge Mr. Anderson from employment. The employer believed that the claimant was willfully disregarding company policies and warnings that had been given to him and that his operation of the forklift constituted a serious safety liability issue for the company.

Mr. Anderson had previously been given only one written warning for an incident unrelated to the reason for his discharge. The claimant had been issued no written warnings from the company about to his performing production work operating the forklift or his lack of certification. Mr. Anderson categorically denies being warned in any way about operating the forklift. The claimant believed his previous certification remained in effect and did not believe that his assisting other workers in performing the company's work would cause his discharge from employment.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes willful work-connected misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not.

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 insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992). While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct 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). Hearsay evidence is admissible in the administrative proceedings, however, it cannot be accorded equal weight as sworn, direct testimony providing that the direct, sworn testimony is credible and not inherently improbable.

In the case at hand, the employer relies primarily on hearsay evidence in support of its position that Mr. Anderson had been repeatedly warned and knowingly violated a company safety rule that resulted in his termination from employment. In contrast, the claimant participated personally and provided first-hand sworn testimony denying that he had been warned or that he was aware that assisting other workers by operating a company forklift would result in his termination from employment.

The employer's witnesses testified that on unspecified dates, various rules changes took place and that on unspecified dates, Mr. Anderson had been verbally warned by others not to assist in production work and not to operate a company forklift while doing so. The company further asserts that Mr. Anderson knew or should have known that his previous forklift certification had

expired and to operate a company forklift without the proper certification exposed the company to safety issues and potential liability. Mr. Kaylor, Quality Control Department Manager, testified that on one occasion he spoke to Mr. Anderson about operating the forklift, but he did not reduce the conversation to writing. He also does not recall the date that he spoke to Mr. Anderson about the issue. In contrast, Mr. Anderson categorically denies being warned on any occasion by Mr. Kaylor or his lead person about his lack of certification or that he should not be using the company forklift to assist others. The evidence also establishes that the company had a number of managers during the time leading up to Mr. Anderson's discharge and that a number of rule changes took place on unspecified dates.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. In as much as the evidence in the record does not establish that the employer had previously sufficiently warned the claimant about any of the issues leading to the separation, it has not met its burden of proof to establish that the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

The administrative law judge concludes that the evidence does not establish that the claimant was adequately warned that operating a company forklift that he had been previously certified to operate, could result in discharge from employment. In as much as the employer had not previously sufficiently warned the claimant that the issue could result in his discharge, it has not met the burden of proof to establish that the claimant acted in violation of current company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written) detailed and written notice should be given. While the decision to terminate Mr. Anderson may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the claimant's conduct did not rise to the level of intentional disqualifying misconduct sufficient to warrant the denial of job insurance benefits. Benefits are allowed provided the claimant is otherwise eligible.

DECISION:

The representative's unemployment insurance decision dated June 1, 2018, reference 02, is reversed. Claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

rvs/rvs