

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENNETH J HARDING

Claimant

APPEAL NO. 13A-UI-10585-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STREB CONSTRUCTION CO INC

Employer

OC: 01/06/13

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Kenneth Harding filed a timely appeal from the September 11, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 15, 2013. Mr. Harding participated personally and was represented by Attorney Paul McAndrew. Dave Streb represented the employer. The administrative law judge took official notice of the agency administrative file documents submitted for and generated in connection with the fact-finding interview.

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: Kenneth Harding was employed by Streb Construction Company as a full-time designated route truck driver from 2008 until August 12, 2013, when Dave Streb, President and Operations Manager, discharged him from the employment. Ms. Harding's immediate supervisor was Steve Donovan, Plant Manager.

The final incident that triggered the discharge was a conversation between Mr. Harding and Ms. Donovan at the end of Mr. Harding's work day on Friday, August 9, 2013. Mr. Harding had suffered an injury in the workplace in 2010 when he was walking with a hose over his shoulder, the hose got caught, and Mr. Harding was jerked backwards as a result. From that point forward, Mr. Harding had problems with his neck and severe headaches. Mr. Harding underwent a year of physical therapy. The physician chosen by the employer eventually concluded that Mr. Harding's medical issues could not definitively be connected to the workplace incident and referred Mr. Harding to follow up with a physician of his choosing for further evaluation and treatment. Mr. Harding followed up with one or more physicians at the University of Iowa Hospitals and Clinics, but continued to suffer pain and severe headaches through the end of his employment. During the shift on August 9, 2013, Mr. Harding had asked for assistance with lifting the hood of his truck. The request was denied. Mr. Harding continued

the work as assigned that day. At the end of the day, after Mr. Harding had delivered his truck and his keys back to the employer, he engaged Mr. Donovan in conversation about his ongoing pain issues. Mr. Harding was frustrated with the employer's position that his medical issues were not work related. The employer had detected a definite change in Mr. Harding's demeanor and/or personality after the 2010 incident and had grown tired of him raising the issue of his ongoing health issues. Mr. Harding had a pending worker's compensation claim. In an expression of frustration, Mr. Harding stated to Mr. Donovan that he was going to get "blood or money" from the employer to address his ongoing health issues. The odd figure of speech was not a bona fide threat to the employer. Instead, it was an expression of frustration that the employer viewed as part of Mr. Harding "ranting" about his health issues. On Monday, August 12, 2012, Dave Streb summoned Mr. Harding to a meeting and discharged him from the employment for "ranting" on August 9, 2013.

In making the decision to end the employment, the employer considered Mr. Harding's failure to have his assigned truck serviced at the regular 250-hour interval in July 2013. When the problem was caught in July, Mr. Harding had put 400 miles on the vehicle since the prior maintenance. Mr. Harding had driven the same truck for two years. Someone else, usually the mechanic, would ordinarily take care of the 250-hour maintenance. The mechanic would take the vehicle, perform the maintenance, and return it to Mr. Harding. Prior to July 2013, Mr. Harding did not know where to find the hour meter in the trucks computer system. There was usually a sticker in the dash area indicating when the vehicle was due for maintenance. Mr. Harding, other drivers, and the mechanic shared responsibility for ensuring the vehicle received regular maintenance.

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).

An employer has the right to expect decency and civility from its employees and an employee’s use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior’s authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

The employer did not present any testimony from Mr. Donovan, the person who had personally knowledge of the August 9, 2013 incident. The employer had the ability to present such testimony. The weight of the evidence indicates that Mr. Harding’s “rant” occurred in the context of a bona fide ongoing health issue for which he believed the employment was the cause. The weight of the evidence indicates that Mr. Harding’s utterance on August 9, 2013 was an expression of frustration, not a threat of harm to the employer. The weight of the evidence indicates that the employer did not perceive the “blood or money” utterance as a bona fide threat of harm. The evidence indicates instead that the employer simply wanted to be done discussing the health issue that the employer had decided was no longer work related. The weight of the evidence indicates that Mr. Harding’s August 9 utterance did not rise to the level of misconduct in connection with the employment. The weight of the evidence indicates that Mr. Harding was indeed negligent in failing to do his part to adhere to the 250-hour vehicle maintenance schedule in July 2013. Regardless of whether Mr. Harding knew how to access the hour gauge, Mr. Harding had driven the vehicle for a substantially longer period than he would ordinarily drive it between maintenance checks. A reasonable person would have taken

at least some minimal steps to inquire about whether the vehicle needed scheduled maintenance. That since incident of negligence was insufficient to establish misconduct in connection with the employment.

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

DECISION:

The agency representative's September 11, 2013, reference 01, decision is reversed. 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