

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID M KALINOWSKI
Claimant

APPEAL NO. 15A-UI-02688-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PARK VIEW OWNERS ASSOCIATION
Employer

OC: 02/08/15
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 20, 2015 (reference 01) decision that that allowed benefits to the claimant, provided he was otherwise eligible, and that held the employer's account could be charged for benefits; based on an Agency conclusion that the claimant had been discharged on February 8, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on April 3, 2015. Claimant David Kalinowski participated. Michael Wright, President, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit One into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation 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: David Kalinowski was employed by the Park View Owners' Association as a part-time maintenance worker from 2013 until February 8, 2015; when the Association's board of directors discharged him from the employment. Michael Wright, President, notified Mr. Kalinowski of the discharge. Tom Gaul, Maintenance Supervisor, was Mr. Kalinowski's immediate supervisor. During the winter months, Mr. Kalinowski's primary duties were snow removal from Association property.

The final incident that triggered the discharge concerned Mr. Kalinowski's non-work-related use of the employer's equipment and alleged use of the employer's snow removal equipment on unauthorized property. On February 1, 2015, Mr. Kalinowski performed snow removal work at the employer's association building and maintenance shed after a major snow storm. On that day, Mr. Kalinowski drove the employer's snow plow to his apartment complex a couple blocks

away from the employer's facility and made a brief stop. In a gesture of small community goodwill, Mr. Kalinowski lent the employer's tow chain to a resident at the apartment complex so that resident could assist other residents in moving their snowed-in vehicles. Mr. Kalinowski was aware that some of his neighbors were volunteer first responders and he was concerned that they would not be able to respond to an emergency if needed. There was no emergency at the time. Mr. Kalinowski and other maintenance staff had engaged in similar goodwill gestures on prior occasions. Mr. Kalinowski did not use the employer's snow plow to remove snow at his apartment complex or any other unauthorized area.

In making the decision to discharge Mr. Kalinowski from the employment, the employer considered another incident from summer 2014. In connection with that incident, Mr. Kalinowski had allowed his children to ride with him in the employer's Gator utility cart at a time when he was performing some burning work for the employer. Mr. Kalinowski was off the clock when he performed the work and was not compensated for the work. Someone had reported to Mr. Gaul that Mr. Kalinowski's children had been on the cart. Mr. Gaul spoke to Mr. Kalinowski and said he was glad Mr. Kalinowski was showing his children around but to be mindful of appearances.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 misconduct in connection with the employment. The evidence indicates that the final event amounted to good faith error in judgment on the part of Mr. Kalinowski and that he had no intention of acting contrary to the interests of the employer when he loaned the employer's tow chain in goodwill gesture in the context of a major snow storm. The evidence fails to support the allegation that Mr. Kalinowski used the employer's snow plow to clear snow from any unauthorized area. The evidence also indicates that the Gator incident from the summer of 2014 was another isolated good faith error in judgment on the part of Mr. Kalinowski, rather than conduct motivated by an intention to act contrary to the employer's interests.

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

DECISION:

The February 20, 2015 (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/can