IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHARLES CUBBAGE
Claimant

MADDEN LTD
C/O MIKE MADDEN
Employer

APPEAL NO. 06A-UI-09379-JT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/20/06 R: 03
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Charles Cubbage filed a timely appeal from the September 18, 2006, reference 01, decision that denied benefits. Mr. Cubbage requested an in-person hearing. After due notice was issued, an in-person hearing was held on October 24, 2006. Mr. Cubbage did not appear. General Manager Al Irey represented the employer.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Charles Cubbage was employed by Madden Ltd. as a full-time truck driver from February 2, 2005 until August 19, 2006, when General Manager Al Irey discharged him.

The final incident that prompted the discharge came to the attention of the employer August 17 or 18, 2006, when Mr. Irey learned from a Casey's representative that Mr. Cubbage had failed to deliver a load of water to Casey's in Ankeny. Mr. Irey investigated the matter and learned that Mr. Cubbage had failed to pick up the load of water in Wisconsin on August 11-12. The employer had dispatched Mr. Cubbage to deliver another load in Wisconsin and to bring the load of water back to Iowa. Mr. Cubbage had delivered the load in Wisconsin and then traveled 75 miles to pick up the load of water. The production plant where Mr. Cubbage was to load the water closes at 10:00 p.m. and reopens at 3:00 a.m. Mr. Cubbage arrived at the facility at 11:00 p.m., found the facility closed, concluded the facility was closed for the weekend, and returned to Iowa without the load of water. Mr. Cubbage did not say anything to the employer about not being able to collect the load. Mr. Cubbage had hauled water from the facility one time before, in June. Mr. Cubbage may not have been aware of the water plant's overnight or weekend hours of operation. The employer expected that if Ms. Cubbage had difficulty with loading or unloading he would contact Mr. Irey for assistance in resolving the issue. Mr. Cubbage had followed this procedure in connection with several prior loads. Mr. Cubbage

did not contact Mr. Irey when he found the water plant closed. The next load waiting for Mr. Cubbage in Iowa was not due to be delivered in Georgia until Tuesday and, therefore, would not have required Mr. Cubbage to rush back to Iowa without further investigating the situation regarding the load of water.

The employer had previously been concerned with Mr. Cubbage's work performance when Mr. Cubbage hit a post. Mr. Cubbage reported the damage to the employer's trailer as a minor scrape. The employer subsequently learned the accident had caused $4,800.00 damage to the employer's equipment. The employer concluded Mr. Cubbage had misrepresented the extent of the damage.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Cubbage was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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).

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 establishes that Mr. Cubbage was negligent in failing to notify the employer that he had been unable to collect the load of water in Wisconsin. The evidence further indicates that Mr. Cubbage was negligent in failing to contact Mr. Irey for assistance and/or instructions regarding the load of water. The evidence in the record is insufficient to allow the administrative law judge to conclude Mr. Cubbage was careless and/or negligent in connection with the earlier accident involving the post or his reporting of the accident to the employer.

Though Mr. Cubbage was negligent in his handling of the matter involving the load of water, the evidence indicates this was an isolated incident of ordinary negligence. The evidence in the record fails to establish negligence and/or carelessness so recurrent as to indicate willful and/or wanton disregard of the interests of the employer. Though the decision to discharge Mr. Cubbage was within the discretion of the employer, the administrative law judge concludes that Mr. Cubbage was discharged for no disqualifying reason. Accordingly, Mr. Cubbage is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Cubbage.

DECISION:

The Agency representative's September 18, 2006, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs