

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL A CAPPS
Claimant

APPEAL NO. 08A-UI-09247-JTT

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

JIM BENDER INC
Employer

**OC: 08/03/08 R: 01
Claimant: Appellant (2-R)**

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

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the October 1, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 28, 2008. Claimant participated. Jim Bender, President and Owner, represented the employer.

The original decision in this matter contained errors in the Decision section that are corrected herein.

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: Michael Capps was employed by Jim Bender Inc. as a full-time over-the-road truck driver from March 1, 2008 until the end of July 2008, when Jim Bender, President and Owner, discharged him from the employment. Mr. Capps' employment required a commercial driver's license (CDL). On July 25, 2008, Mr. Capps was arrested and charged with a criminal offense of operating while intoxicated. Mr. Capps was off-duty and was in his private vehicle. The arresting officer confiscated Mr. Capps' driver's license and issued a ten-day temporary license. Mr. Capps was taken to a jail facility and posted bond with the assistance of a bail bondsman. The bail bondsman told Mr. Capps that he could not leave the state of Iowa.

On Saturday, July 26, Mr. Capps notified dispatcher Jim Detloff about the arrest, charge and revocation. Mr. Capps told Mr. Detloff that he did not have commercial driving privileges and that he could not leave the state of Iowa. Mr. Capps was not scheduled to go out on the road for the employer until Tuesday, July 29, and the employer had time to secure another driver.

During the next couple days, Mr. Capps secured legal counsel. Mr. Capps learned that the bail bondsman had given him erroneous information and that his movement was not restricted to the state of Iowa. Mr. Capps and his attorney filed an appeal of the license revocation. Based on

the appeal of the license revocation, the revocation was stayed, and Mr. Capps retained his driving privileges, including his commercial driving privileges, until October 2008. Mr. Capps' appeal hearing concerning the license revocation was scheduled for September. Within a couple days of first notifying the employer of the arrest and charge, Mr. Capps provided the employer with documentation of his driving status. Mr. Capps provided the employer with the information he had received from his attorney. This included the clarification that he could travel outside the state of Iowa and that he was still eligible to operate a commercial motor vehicle. Jim Bender, President and Owner, had already spoken with his insurance carrier at the time Mr. Capps provided the updated information. Mr. Bender had been advised that keeping Mr. Capps on staff while the criminal case was pending would expose the employer to increased liability. Mr. Bender notified Mr. Capps that he was discharged from the employment.

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).

In Cook v. Iowa Dept. of Job Service, 299 N.W.2d 698 (Iowa 1980), the Supreme Court of Iowa held that an employee truck driver was discharged for misconduct. The employee had been convicted of driving violations during non-work hours and in his personal car. The employer's insurance carrier notified the employer by telephone, and later by letter, that the carrier would no longer cover the truck driver due to his driving record. This information prompted the employer to discharge the employee. The Court reasoned that the citations bore directly on the employee's ability to work for the employer and the employee was aware that his off-duty driving citations could cause him to lose his license. The Court reasoned that no one compelled the truck driver to violate the rules of the road.

The Cook case is distinguishable from the present case. In this case, Mr. Capps was arrested but not yet convicted of the violations that factored into the discharge. In this case, Mr. Capps had appealed the driving revocation and his driving privileges, including his commercial driving privileges, were restored while his appeal was pending. The appeal of the license revocation was still pending at the time the employer discharged Mr. Capps. In this case, the employer's insurance company had not notified the employer that it would no longer provide coverage for Mr. Capps. The question is not whether the employer was reasonable in its decision to discharge Mr. Capps from the employment. The question, instead, is whether Mr. Capps was discharged for a reason that would disqualify him for unemployment insurance benefits.

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

The administrative law judge notes that Jim Bender Inc. is not a base period employer. Accordingly Jim Bender Inc. will not be charged for any benefits paid to Mr. Capps during the benefit year that started August 3, 2008 and will end on or about August 2, 2009. The employer's account would only be charged if Mr. Capps establishes a new claim for benefits during a subsequent claim year, if Mr. Capps is at that time deemed eligible for benefits, and if the employer is at that time a base period employer. A base period employer is an employer for whom the employee has worked during the first four of the last five calendar quarters that predate the quarter in which the claim for benefits is established.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The evidence in the record raises the question of whether Mr. Capps has met the availability requirements of Iowa Code section 96.4(3) since he established his claim for unemployment insurance benefits. This matter will be remanded to the Claims Division for determination of that issue.

DECISION:

The Agency representative's October 1, 2008, 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 for benefits paid to the claimant.

This matter is remanded to the Claims Division for determination of the claimant's work availability since he established his claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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