IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DAVID A RIGHI
Claimant

CASEY'S RETAIL COMPANY
Employer

APPEAL NO. 17A-UI-06554-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/28/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

David Righi filed a timely appeal from the June 19, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Righi was discharged on May 25, 2017 for conduct not in the best interest of the employer. After due notice was issued, a hearing started on July 27, 2017 and concluded on August 4, 2017. Mr. Righi participated and was represented by attorney Jeffrey Boehlert. Kathy Lauritzen of Equifax represented the employer and presented testimony through Kip Blake. Exhibits 1 through 8 and A were received into evidence.

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 Righi was employed by Casey's Retail Company as the full-time Corporate Grounds Supervisor until May 25, 2017, when the employer discharged him from the employment in response to a May 24, 2017 workplace accident. Mr. Righi performed his work duties at the employer's corporate campus in Ankeny. Kip Blake, Assistant Facilities Manager, was Mr. Righi's immediate supervisor. Mr. Righi began his employment with Casey's in 1990. Mr. Righi's duties included lawn mowing and snow removal duties. Mr. Righi supervised two employees and was responsible for interacting with contractors in connection with snow removal.

The final incident that triggered the discharge occurred on May 24, 2017. Toward the end of his work day, Mr. Righi was mowing an area adjacent to a pond when he accidentally drove a new John Deere 72-inch front deck commercial lawnmower into the pond. Mr. Righi had used the particular mower about 90 minutes that day and had used the new mower only two to three hours in total. The layout of the forward, reverse, and brake pedals on the John Deere mower differed from the Jacobson brand mower Mr. Righi was accustomed to using. While Mr. Righi was making a three-point turn in the area adjacent to the pond, and as he was attempting to back up as part of that three-point turn, a portion of Mr. Righi's foot accidentally engaged the pedal that moved the mower forward. Mr. Righi had been performing his duties in a conscientious manner up to that point. Mr. Righi was making the three-point turn to avoid

damaging the sod with the mower. Mr. Righi was looking behind him to safely back up at the time his foot caught the forward pedal and propelled him into the pond. Mr. Righi did not have time to correct his error before the mower moved forward into the pond. Mr. Righi determined he could not safety exit the enclosed cab of the through the only functional door without potentially rolling the mower and/or landing in a deep area of the manmade pond. Mr. Righi summoned Mr. Blake for help. Mr. Blake and a security guard responded to the scene to assist Mr. Righi with exiting the mower and to remove the mower from the pond. Mr. Righi provided an incident statement and showed an appropriate level of concern throughout the incident. Though the mower could be repaired, at a cost of $2,372.46, the water damage prompted the mower dealer to void the warranty on the new mower.

In making the decision to discharge Mr. Righi from the employment, the employer considered another equipment accident. In early 2015, Mr. Righi was operating a rented snow removal machine to move snow to an unpaved area adjacent to a parking slot, when the machine slid down the sloped grade into a chain link fence. Mr. Righi had safely made multiple trips the area without incident and did not discern, before it was too late, that melted snow had made the area slick. The cost of repairing the snow removal tool was $4,791.60. The employer incurred additional expense to repair the chain link fence.

In making the decision to discharge Mr. Righi from the employment, the employer considered a performance concern from a weekend in December 2015, wherein Mr. Righi did not perform his snow removal duties to Mr. Blake's expectations. Mr. Righi was responsible for making certain that snow was removed from the sidewalk, parking lot and truck lot at the Ankeny campus. Mr. Righi was responsible for contacting outside contractors to have them spread sand on the on the cleared lot. Mr. Righi had begun removing snow at noon on Saturday. By the time Mr. Righi left at 2:00 a.m. Sunday morning, a portion of the lot and a portion of the sidewalk had not been cleared of snow. In addition, snow was blowing and drifting on the property. Mr. Righi had directed an employee to arrive at 5:00 a.m. on Sunday to continue the snow removal. At the time Mr. Righi left work on Sunday morning, he planned to return on Sunday to check his subordinate's progress on the snow removal. However, Mr. Righi did not return to the property on Sunday to check on the progress of the snow removal and did not summon the outside contractor to spread sand on the lot. The yard truck could sufficiently navigate the lot to move trailers around, but the lot remained slick. Mr. Blake arrived at the Ankeny campus at 10:30 a.m. on Sunday and observed that snow removal work was incomplete. Mr. Righi had not communicated with Mr. Blake to indicate a need for assistance or to communicate Mr. Righi's plan for completing the snow removal duties.

In January 2016, Mr. Blake issued a written reprimand to Mr. Righi that was intended to address Mr. Righi's performance deficits over the course of several years. The reprimand did not address specific incidents. Instead, the reprimand raised generalized concerns regarding failure to follow directives, failing to direct and supervisor subordinates, failure to maintain equipment, failure to notify Mr. Blake regarding changes in Mr. Righi's work hours, and failure to complete paperwork, including employee performance evaluations, in a timely manner. After that written reprimand, the employer did not issue any additional reprimands to Mr. Righi until after the May 24, 2017 lawnmower incident.

REASONING AND CONCLUSIONS OF LAW:

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 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 weight of the evidence fails to establish a current act of misconduct in connection with the employment. The May 24, 2017 incident that triggered the discharge was an accident in the truest sense. The unfortunate incident occurred in the context of Mr. Righi performing his duties in a conscientious manner with a new piece of equipment configured differently than equipment Mr. Righi had previously used to perform the same work. It did not result from intentional disregard of the employer's interests. It did not result from carelessness or negligence on the

part of Mr. Righi. The accident did not constitute misconduct in connection with the employment and cannot serve as a basis for disqualifying Mr. Righi for unemployment insurance benefits. Mr. Righi is eligible for benefits provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

Even if the administrative law judge had concluded that there must have been carelessness or negligence on May 24, 2017 because there was an accident and equipment damage, the weight of the evidence in the record would not establish a pattern of careless and/or negligence demonstrating an intentional and substantial disregard of the employer's interests. Prior to the May 24, 2017 incident, the next most recent similar incident occurred about two and a half years earlier, when the rented snow removal equipment slid down an inclined area designated as the place to which Mr. Righi was to move snow from the paved lot. The weight of the evidence fails to establish that Mr. Righi was careless or negligent in connection with that incident. Mr. Righi had been working in the same area with the same equipment without incident. The employer failed to present sufficient evidence to prove that a reasonable person would have discerned a risk in performing the work as Mr. Righi was performing it. These two incidents are divided by a two and a half year period of daily operation of grounds-keeping equipment without incident. The evidence does indicate a degree of negligence on the part Mr. Righi in connection with the December 2015 weekend snow removal project. Mr. Righi did not follow through with his plan and obligation to check on the status of the snow removal project on Sunday, did not summon an outside vendor to sand the lot, and did not contact Mr. Blake for assistance or to provide an update concerning the project left undone. The evidence in the record is insufficient to establish any other carelessness, negligence and/or intentional disregard of the employer's interests. The January 2016 reprimand concedes as much by making general statements regarding performance concerns covering several years, rather than addressing a specific incident.

DECISION:

The June 19, 2017, reference 01, decision is reversed. The claimant was discharged on May 25, 2017 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/rvs