

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHAD J BARND
Claimant

B G BRECKE INC
Employer

APPEAL NO. 19A-UI-07295-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/23/18
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Chad Barnd filed a timely appeal from the September 6, 2019, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Mr. Barnd was discharged on August 15, 2019 for sleeping on the job. After due notice was issued, a hearing was held on October 7, 2019. Mr. Barnd participated. The employer did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate.

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: Chad Barnd was employed by B.G. Brekke, Inc., as a full-time laborer until August 15, 2019, when the employer discharged him from the employment for allegedly sleeping on the job. On August 15, 2019, Mr. Barnd was assigned to working on an underground water drainage project outside a residential customer's home. Mr. Barnd began his work day at 7:00 a.m. and was scheduled to be done at 5:00 p.m. At about 10:00 a.m., Mr. Barnd's supervisor on the project instructed Mr. Barnd to go on break until the supervisor returned with a necessary part. Mr. Barnd collected his lunch from the work truck and then stretched out on the customer's front yard to look at his cell phone. Mr. Barnd was lying on the customer's yard when a company representative pulled up to the property and took a photograph of Mr. Barnd. The employer accused Mr. Barnd of sleeping on the job and told him that his conduct made the company look bad. Mr. Barnd denied that he had been sleeping.

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 a discharge 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).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See *Hurtado v. IDJS*, 393 N.W.2d 309 (Iowa 1986). In *Hurtado*, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

The evidence in the record establishes a discharge for no disqualifying reason. The employer failed to participate in the appeal hearing and failed to present any evidence to meet burden of proving, by a preponderance of the evidence, a discharge based on misconduct in connection with the employment. The employer presented no evidence to rebut Mr. Barnd's testimony that he was not sleeping on the job. Mr. Barnd is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The September 6, 2019, reference 01, decision is reversed. The claimant was discharged on August 15, 2019 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/rvs