

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLAS D SCHULT
Claimant

APPEAL NO. 11A-UI-13707-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JENSEN BUILDERS LTD
Employer

**OC: 09/18/11
Claimant: Appellant (2-R)**

Section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

Nicholas Schult filed a timely appeal from the October 12, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 9, 2011. Mr. Schult participated. Tom Nelson, director of human resources, represented the employer. Exhibit A was received into evidence. The parties waived formal notice on the issue of whether the claimant had voluntarily quit for good cause attributable to the employer or been discharged for misconduct in connection with the employment.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nicholas Schult was employed by Jensen Builders as a full-time carpenter from September 2010 and last performed work for the employer on September 17, 2011. Mr. Schult's immediate supervisor at the time he last performed work for the employer was Foreman Perry Ellsworth and General Superintendent Nate Dallas. On September 19, 2011, Mr. Schult went to a medical clinic in connection with pain in his left hand, wrist, and forearm. Mr. Schult is right-handed. On that day, a nurse practitioner provided a note that indicates as follows: "Mr. Schult is advised to minimize use of left hand and forearm due to pain and possible nerve impingement. He has been referred to a hand specialist. Further restrictions and/or lifting of same are pending that evaluation." Mr. Schult returned to the employer and requested a light-duty assignment. Mr. Schult offered the note, but Mr. Dallas said he did not need it. The employer told Mr. Schult that the employer did not have light-duty construction work for safety and insurance reasons. Foreman Perry Ellsworth spoke to Mr. Dallas about the possibility of having Mr. Schult remain on the jobsite, but the employer elected not to allow that. Mr. Schult did not request a leave of absence. Mr. Schult was not certain whether his wrist problems were work-related. Neither Mr. Schult nor the employer treated the matter as a workers' compensation injury. Mr. Schult continued to request light-duty work and the employer continued to decline to make it available to him.

REASONING AND CONCLUSIONS OF LAW:

The weight of the evidence in the record establishes a separation that occurred on September 19, 2011.

In Wills v. Employment Appeal Board, the Supreme Court of Iowa held that an employee did not voluntarily separate from employment where the employee presented a limited medical release that restricted the employee from performing significant lifting and the employer, as a matter of policy, precluded the employee from working so long as the medical restriction continued in place. See Wills v. Employment Appeal Board, 447 N.W.2d 137 (Iowa 1989). In Wills, the Court concluded that the employer's actions were tantamount to a discharge. So, too, the employer's actions in the present matter effected an involuntary separation from the employment tantamount to a discharge. The weight of the evidence establishes that Mr. Schult's left hand, wrist, and arm issues were either caused by or aggravated by the construction work her performed for the employer. The employer had an obligation to provide Mr. Schult with reasonable accommodations that would allow him to continue in the work. See Sierra v. Employment Appeal Board, 508 N.W. 2d 719 (Iowa 1993). The evidence fails to establish that Mr. Schult at any point requested a leave of absence. The weight of the evidence establishes a discharge on September 19, 2011.

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

The evidence raises the question of whether Mr. Schult has met the work ability and availability requirements of Iowa Code section 96.4(3) since he established his claim for benefits. The matter will be remanded to the Claims Division for adjudication of that issue.

DECISION:

The Agency representative's October 12, 2011, 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.

This matter is remanded to the Claims Division for determination of whether the claimant has been able to work and available for work since he established his claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw