

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NATHAN A THOMSON
Claimant

APPEAL NO. 14A-UI-09952-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

C-FAB LLC
Employer

OC: 08/24/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Nathan Thomson filed a timely appeal from the September 16, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on October 14, 2014. Mr. Thomson participated. Todd Cleppe represented the employer and presented additional testimony through Brian Dircks, Trey Smith and Tina Wallace. Exhibits One through Seven 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: Nathan Thomson was employed by C-Fab, L.L.C., as a full-time Lube Tech from September 2013 until August 29, 2014, when the employer discharged him from the employment. The employer provides light-duty maintenance and equipment lubrication services for an ADM production facility in Cedar Rapids. Mr. Thomson's immediate supervisor was Brian Dircks, Field Supervisor. Mr. Thomson's regular work hours were 6:45 a.m. to 3:15 p.m., Monday through Friday.

The final incident that triggered the discharge followed an extended workday on August 22, 2014. At that time, the ADM plant was in temporary shutdown and C-Fab needed to take that opportunity to perform as much work as possible during the shutdown to fulfill its agreement with ADM. The employer strongly encouraged, but did not compel, employees to work beyond their regular quit time. Some of the C-Fab employees stayed until 2:45 a.m. to complete work at the C-Fab plant. Mr. Thomson elected not to stay beyond his 3:15 p.m. quit time. ADM has a plant safety policy that limits the number of hours workers can perform work in the plant without a break. The policy includes a process for requesting a waiver of the limit. When Mr. Thomson returned to work after other members of the work crew had worked into the night, Mr. Thomson continued to be concerned that the employer had expected the employees to work such long hours. Mr. Thomson viewed the matter as a worker safety issue. Mr. Thomson would regularly

interact with representatives of ADM as part of his regular duties. In the course of doing that on the day after the extended work hours, Mr. Thomson reported to the ADM representative which C-Fab employees were not yet at the plant and discussed with the ADM representative that the reason those employees were not yet in were the extended work hours from the previous day. The ADM representative reinforced the plant safety rule required limiting work hours during the discussion. When certain C-Fab employees reported to the plant without being away from the plant for the required eight-hour period, they were directed to leave. During the shift, Mr. Thomson spoke to his coworkers and some of the coworkers spoke to him regarding their concerns related to the extended work hours on August 22. Mr. Thomson spoke to Lube Tech Trey Smith and chastised him for working the hours. Mr. Smith is the business owner's nephew and Mr. Thomson asserted that relationship caused Mr. Smith to want to "suck up" to the employer. Mr. Smith rebuked Mr. Thomson and said he was only interested in getting the work done. Mr. Smith also spoke with Mr. Dircks and raised a concern that Mr. Dircks was not sufficiently advocating on behalf of employees. Mr. Dircks reprimanded Mr. Thomson for what the employer perceived to be disruption of the workplace and suspended Mr. Thomson for three days. Mr. Dircks told Mr. Thomson that the employer would continue to review his performance and attitude and would later make a decision about whether he could continue in the employment.

Mr. Thomson returned from the suspension on August 29, 2014. On the day Mr. Thomson returned to work, he asked Mr. Dircks multiple times about his job status. This was annoying to Mr. Dircks. During that same day, Mr. Thomson asked Mr. Dircks whether another employee could assist him in performing a particular task. Mr. Thomson had first checked with the employee's lead person to make certain the employee would be available. Mr. Dircks granted Mr. Thomson to use the other employee, provided the lead said it was okay. At that time, Mr. Thomson told Mr. Dircks that the lead had already said it was okay. Mr. Dircks perceived that prior contact with the lead person to insubordination. The employer decided that same day to discharge Mr. Thomson from the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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 evidence in the record fails to establish misconduct in connection with the employment. The discharge was based primarily on Mr. Thomson's discussion of work conditions with his coworkers. That discussion was protected speech under the National Labor Relations Act, 29 U.S.C. §§ 151-169, and did not constitute misconduct in connection with employment. The evidence does not support the employer's assertion that Mr. Thomson violated any confidentiality rule. The evidence indicates instead that Mr. Thomson had appropriate contact with the ADM representative and provided appropriate safety information requested by that person. The evidence fails to support the employer's assertion that Mr. Thomson was insubordinate. Mr. Thomson merely made certain that the coworker was available to assist him on the last day before he asked Mr. Dircks' blessing. Mr. Thomson had legitimate concerns about the safety risks that the employer was introducing to the ADM plant through prolonged work hours. Mr. Thomson's raising of those concerns in no manner created a safety risk.

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

DECISION:

The claims deputy's September 16, 2014, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs