

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS R REED
Claimant

APPEAL NO. 09A-UI-00036-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DENNY'S AUTOMOTIVE CENTER INC
Employer

**OC: 11/02/08 R: 03
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Thomas Reed filed a timely appeal from the December 23, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 14 2009. Mr. Reed participated. Steve Denny, President, represented the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer operates an automobile sales and service business. Thomas Reed was employed by Denny's Automotive Center, Inc., as a full-time store manager from April 3, 2006 until July 7, 2008, when Steve Denny, President, discharged him. Mr. Denny was Mr. Reed's immediate supervisor.

The final incident that prompted the discharge happened on or about June 28, 2008, when Mr. Reed was arrested in Waverly for operating a motor vehicle while intoxicated and driving while barred. Mr. Reed was operating a car from the employer's inventory without the employer's consent at the time he was arrested. Mr. Reed did not have a valid license. Mr. Denny learned about the incident when a law enforcement officer contacted him at 3:00 a.m. to notify him that Mr. Reed had been arrested in connection with operating one of the employer's vehicles. Mr. Denny elected not to have Mr. Reed charged with the offense of operating a motor vehicle without the owner's consent. Mr. Reed was transported to a law enforcement facility upon his arrest. Mr. Denny spoke with Mr. Reed shortly after the arrest. Mr. Denny was willing to assist Mr. Reed in securing his release from custody. During the discussion, Mr. Denny told Mr. Reed that he was willing to assist Mr. Reed as a friend and that the assistance was not premised on any decision he had made to allow Mr. Reed to continue in the employment. Mr. Reed secured his release from custody by other means. Mr. Reed reported for work on Monday, June 30, 2008. Mr. Reed continued to work until July 7, 2008, when Mr. Denny notified him 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).

The evidence establishes a "current act." On the day the employer learned of the unauthorized operation of its vehicle, the employer placed Mr. Reed on alert that his job might be in jeopardy.

A reasonable person in Mr. Reed's position would have understood that his job might be in jeopardy.

The weight of the evidence indicates that Mr. Reed was discharged for misconduct in connection with the employment. On or about June 28, Mr. Reed operated one of the employer's vehicles without the employer's permission. Mr. Reed knew at the time that he did not have permission to operate the vehicle and knew at the time that he did not possess a valid driver's license. Mr. Reed's unauthorized and unlawful operation of the employer's vehicle resulted in Mr. Reed being arrested and charged with two criminal offenses. Mr. Reed's unauthorized and unlawful operation of the vehicle exposed the employer to liability for damage or injury that could have resulted from Mr. Reed's operation of the vehicle.

Mr. Reed is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Reed.

DECISION:

The Agency representative's December 23, 2008, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs