

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ARTURO OROZCO

Claimant

APPEAL NO. 17A-UI-01656-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

J A KING AND COMPANY LLC

Employer

OC: 01/01/17

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Arturo Orozco filed a timely appeal from the February 2, 2017, reference 02, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an on the claims deputy's conclusion that Mr. Orozco was been discharged for insubordination. After due notice was issued, a hearing was held on March 7, 2017. Mr. Orozco participated. Marjie Troutman represented the employer. Spanish-English interpreter Teo Rios of CTS Language Link was available to assist with the hearing if needed, but did not actually perform any interpreting in connection with the hearing. Exhibits 1 and 3 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: J.A. King and Company, L.L.C., maintains and repairs weight scales of various types including vehicle weighing scales. Arturo Orozco was employed by J.A. King and Company, as a full-time scale service apprentice from 2015 until January 1, 2017, when Jason Dirks, Service Manager, discharged him from the employment. Mr. Orozco was assigned to the employer's shop in Council Bluffs. Mr. Orozco resided at all relevant times in Omaha. Mr. Dirks was Mr. Orozco's immediate supervisor during the last several months of the employment. Mr. Orozco's usual work hours were 7:00 a.m. or 8:00 a.m. to 5:00 p.m. Mr. Orozco was also required to be available for after-hours on-call duties. At the start of the employment, the employer had Mr. Orozco sign on offer letter to acknowledge key conditions of the employment. The conditions set forth in the offer letter included the following:

EXPECTATIONS:

As a Service Technician you will be expected to answer your phone throughout the day and on weekends in order to respond to emergency calls.

Mr. Orozco was one of three service employees who worked under Mr. Dirks. The on-call duties rotated amongst the three service employees. In December 2016, one of the service employees passed away. This increased the on-call responsibilities of Mr. Orozco and the remaining service employee, Scott Ortiz, until a new scale service apprentice could be hired.

The final incident that triggered the discharge occurred at noon on Sunday, January 1, 2017, New Year's Day, when Mr. Orozco refused Mr. Dirks' directive to report for work to replace a printer for a customer. Mr. Orozco had performed similar work for the employer in the past. Mr. Orozco had been unaware that he was expected to be on-call on New Year's Day. Mr. Orozco was in Denison with his extended family when he received Mr. Dirks' telephone call. Mr. Orozco had consumed alcohol at the family gathering. When Mr. Dirks directed Mr. Orozco to report for duty, Mr. Orozco said he could not because he was an hour away from home and did not have his company vehicle or equipment. Mr. Dirks offered to meet Mr. Orozco half way and to bring a vehicle for him to use on the service call. Mr. Orozco told Mr. Dirks that he could not report for duty because he was spending time with his family out of town. Mr. Orozco told Mr. Dirks that he could not report for duty because he had been consuming alcohol and did not want to risk loss of his driver's license by operating a motor vehicle after consuming alcohol. Mr. Dirks told Mr. Orozco that he was being terminated for his failure to report for work and to bring his all of his equipment to the workplace the following Tuesday, January 3, 2017. Mr. Dirks had Mr. Ortiz respond to the after-hours service call. Mr. Ortiz had also reported for work in connection with after-hours calls for service on December 24, 25 and 26, 2016. When Mr. Orozco appeared at the workplace on January 3, 2017, Mr. Dirks had him sign a discharge memo. The memo stated that Mr. Ortiz had failed to work his fair share of the holiday time.

On October 13, 2016, Mr. Dirks has issued a written warning to Mr. Orozco for a violation of the employer's "Availability to Work Guidelines." The warning was based on Mr. Orozco's failure to report for duty on Sunday, October 23, 2016 in response to an after-hours call for service.

On May 2, 2016, Mr. Orozco and a coworker left work early at 11:00 a.m. without approval. After Mr. Orozco and the coworker left, Mr. Orozco consumed alcohol. Mr. Dirks subsequently called Mr. Orozco during the Mr. Orozco's scheduled shift. Mr. Orozco could not return for the remainder of his shift because he had consumed alcohol.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish a final, current act of misconduct in connection with the employment. The administrative law judge notes that the employer had the ability to present testimony from Mr. Dirks, but elected not to present such testimony. The employer had presented insufficient

evidence to rebut Mr. Orozco's testimony that he did not know he was supposed to be on-call New Year's Day. Given that Mr. Orozco did not know he was on-call that day, the administrative law judge cannot find Mr. Orozco's consumption of alcohol at a family gathering on New Year's Day, or his refusal to report for work after consuming alcohol, to be an unreasonable refusal of the employer's directive. Because the employer has not proved misconduct in connection with the final incident, and because the next most recent incident that factored in the discharge occurred in October 2016, the administrative law judge concludes that Mr. Orozco was discharged for no disqualifying reason. Mr. Orozco is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The February 2, 2017, reference 02, decision is reversed. The claimant was discharged on January 1, 2017 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