

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL A DAY
Claimant

APPEAL NO. 10A-UI-00523-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VAN DIEST SUPPLY CO
Employer

OC: 12/13/09
Claimant: Appellant (2-R)

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

STATEMENT OF THE CASE:

Michael Day filed a timely appeal from the January 7, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 18, 2010. Mr. Day did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Clark Vold, Director of Manufacturing, represented the employer and presented additional testimony through Kelly Sayer, Director of Logistics. Exhibits One through Eight were received into evidence.

ISSUE:

Whether Mr. Day 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: Michael Day was employed by Van Diest Supply Company as a full time shipping and receiving operator from 2005 until December 15, 2009, when Clark Vold, Director of Manufacturing, discharged him for sleeping on the job. Mr. Day was assigned to the overnight shift. The hours of the overnight shift were 11:00 p.m. to 7:30 a.m. Mr. Day's immediate supervisor was Gary Eddington, Team Leader.

The final incident that triggered the discharge occurred on December 15, 2009. At 6:05 a.m., Kevin Sharp, Regulatory Affairs Manager, entered Mr. Day's work area and found Mr. Day sitting on a bucket near a warm air vent asleep. Mr. Sharp observed Mr. Day for 45 seconds before he woke up Mr. Day. Mr. Day indicated that he was waiting to wash a particular truck. Mr. Day indicated that he had sat down because he had been feeling very sick throughout the shift. Mr. Day also indicated that he had fallen on ice at 5:50 a.m. and had hit his head. A coworker, Don Wildt confirmed that he had seen Mr. Day fall, but did not know Mr. Day had been injured. Upon further questioning, Mr. Day indicated that his head hurt prior to the fall. At 10:00 a.m. that same morning, Mr. Day was examined by a Dr. Latella, who concluded there was no indication of a concussion but referred Mr. Day to his own doctor for diagnosis and

treatment for what Dr. Latella suspected was temporal arteritis, inflammation that damages arteries.

In making the decision to discharge Mr. Day, the employer considered prior incidents wherein the employer suspected Mr. Day had been sleeping on the job or was taking steps to sleep on the job. On April 10, 2009 the Assistant Safety Director, Wes Dicken saw Mr. Day enter a darkened building. Mr. Dicken entered the building after 30 seconds or so and found Mr. Day sitting on some stairs in the dark. On November 7, 2009, Mr. Dicken entered a darkened break room area as Mr. Day was coming out of the darkened restroom stretching and yawning.

The employer's work rules prohibited sleeping or malingering on the job. Mr. Day had received a copy of the work rules at the start of his 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).

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 weight of the evidence in the record fails to establish misconduct in connection with the final incident that triggered the discharge. The evidence in the record indicates that there were extenuating circumstances associated with the conduct Mr. Sharp witnessed on December 15. The weight of the evidence indicates that Mr. Day had suffered a fall on the ice and had hit his head about 15 minutes before Mr. Sharp found him sitting on a bucket. The weight of the evidence indicates that Mr. Day had otherwise been sick during that shift and most likely, according to the employer's doctor, had an underlying serious medical condition. The weight of the evidence fails to establish a current act of misconduct. See 871 IAC 24.32(8). Because the evidence fails to establish a current active misconduct, the administrative law judge need not consider the prior incidents and whether they involved misconduct. See 871 IAC 24.32(8).

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

Mr. Day's absence from the hearing, coupled with the evidence in the record, calls into question whether Mr. Day has been able to work and available for work since he established his claim for unemployment insurance benefits. This case will be remanded to the Claims Division for determination of those additional issues.

DECISION:

The Agency representative's January 7, 2010, 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/pjs