

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**ALAN L SHACKLETON
2300 WASHINGTON ST
CEDAR FALLS IA 50613**

**FAHR BEVERAGE INC
PO BOX 358
WATERLOO IA 50704**

**Appeal Number: 05A-UI-08172-JTT
OC: 07/10/05 R: 03
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Fahr Beverage filed a timely appeal from the August 3, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 24, 2005. Vice President Jane Fahr represented the employer. Alan Shackleton responded to the hearing notice by providing a telephone number for the hearing, but was not available at that number at the time of the hearing and did not participate. Exhibits One and Two were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Alan Shackleton was employed by Fahr Beverage as a full-time support delivery driver from June 13, 2005 until July 8, 2005, when Vice President Jane Fahr discharged him for failing to maintain a

valid commercial driver's license and for providing false and/or misleading information on his application and/or at the time of his interview.

Mr. Shackleton's driving duties required him to maintain a valid commercial driver's license. At the time Mr. Shackleton commenced the employment, he possessed a valid commercial driver's license.

Ms. Fahr interviewed and hired Mr. Shackleton. At the time of the interview, Ms. Fahr asked Mr. Shackleton whether there were any problems with his driving record that would prevent him from being covered by the employer's insurance. Mr. Shackleton responded, "No" and that his driving record was "fine." Mr. Shackleton did not provide additional details and the employer did not press the matter any further. The employer has the practice of requiring newly hired drivers to provide the employer with a copy of the driver's Iowa Department of Transportation (D.O.T.) driving history. The employer then submits the driving history to its insurer. The insurer then determines whether the insurer is able to extend coverage to the new employee.

Prior to the date of discharge, Mr. Shackleton had provided a copy of his driving history to Ms. Fahr, but Ms. Fahr did not forward the document to the employer's insurer. The driving history is dated June 29, 2005, and indicates, in relevant part, as follows: On July 15, 2004, Mr. Shackleton was convicted of speeding. On August 24, 2004, Mr. Shackleton was convicted of operating without a driver's license. From November 29 to December 21, 2004, Mr. Shackleton's license was suspended for non-payment of an Iowa fine. On December 21, 2004, the D.O.T. issued a class "A" commercial driver's license (C.D.L.) to Mr. Shackleton. The C.D.L. had an expiration date of August 18, 2009. On May 31, 2005, Mr. Shackleton was convicted of failing to obey a traffic sign/signal in a commercial motor vehicle. From July 22 to October 20, 2005, Mr. Shackleton's driving privileges were to be suspended for habitual violator status. The driving history indicates that as of the date of inquiry, June 29, 2005, both Mr. Shackleton's non-commercial driver's license and his commercial driver's license were valid.

On June 17, 2005, the Iowa Department of Transportation (DOT) issued an Official Notice that notified Mr. Shackleton that his privileges to operate and register motor vehicles would be suspended from July 22, 2005 until October 20, 2005, and would remain suspended until he provided and maintained proof of financial responsibility. The Notice indicated that the suspension was based on the D.O.T.'s determination that Mr. Shackleton was a Habitual Violator by virtue of incurring three moving violations within a 12-month period. The Notice set forth appeal rights and a July 12 deadline for appeal. The Notice set forth the right to apply for a temporary restricted license (work permit) during the period of suspension. The Notice also set forth the requirement that Mr. Shackleton pay a \$200.00 civil penalty before his driving privileges be reinstated, and notified Mr. Shackleton that he would continue on probationary driving status from October 21, 2005 until October 21, 2006. The document does not indicate when Mr. Shackleton received the Notice.

A few days before Ms. Fahr discharged Mr. Shackleton, Mr. Shackleton provided Ms. Fahr with a copy of the Notice of suspension. Ms. Fahr had already received the driving history. At the time Mr. Shackleton provided the Notice, he indicated his intention to file an appeal and to request a temporary restricted license that would allow him to fulfill his driving responsibilities at work. Ms. Fahr consulted with the employer's insurer, which indicated that it was possible the D.O.T. would allow Mr. Shackleton to continue driving at work, provided he followed guidelines the D.O.T. would impose. Ms. Fahr did not ask the insurer for a decision as to whether the insurer would be able to provide coverage for Mr. Shackleton.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Shackleton was discharged for misconduct in connection with his employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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 to misconduct, a discharge her 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). 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).

The employer has offered two bases for its decision to discharge Mr. Shackleton. The first basis is that Mr. Shackleton was no longer able to fulfill his duties, due the impending suspension of his license. The second basis is that Mr. Shackleton mislead and/or lied in his application and/or his interview.

The administrative law judge will first address the pending D.O.T. sanction. The evidence in the record indicates that Mr. Shackleton had a valid commercial driver's license at the time he commenced the employment and continued to have a valid C.D.L. at that time he was discharged from the employment. None of the D.O.T. entries constituted misconduct *in connection with the employment*, as all of the convictions pre-dated the employment and/or occurred outside the employment. See Iowa Code Section 96.5(2)(a).

The administrative law judge will now address the issue of whether Mr. Shackleton acted in a willful and wanton disregard of the employer's interests by means of the information he provided in his written application and/or at his interview. At numbered paragraph six of the application, Mr. Shackleton indicated that he possessed a valid commercial driver's license. This was true and continued to be true at the time of the discharge. At the time of the interview, Ms. Fahr's question for Mr. Shackleton was whether there were any problems with his driver's license that would prevent the employer's insurer from being able to provide coverage. Mr. Shackleton responded, "No" and that his driving history was "fine." The evidence indicates that as of the date of hire, Mr. Shackleton would not have known that the D.O.T. intended to suspend his driving privileges or that anything on his driving history would prevent him from being covered by the employer's insurance. The Notice had not yet issued. The question the employer posed to Mr. Shackleton regarding the content of his driving record was a general question and Mr. Shackleton reasonably provided a general response. The evidence indicates that the employer did not ask its insurer whether it would be able to extend coverage to Mr. Shackleton and the evidence does not indicate any refusal to extend coverage on the part of the insurer. Ms. Fahr did discuss with the insurer Mr. Shackleton's statement that he intended to appeal and to apply for a temporary restricted license that would allow him to fulfill his driving responsibilities at work. The insurer advised Ms. Fahr that Mr. Shackleton probably would be allowed to continue driving as long as he complied with D.O.T. guidelines. The evidence in the record does not support a conclusion that Mr. Shackleton provided false information on his application or during the interview.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Shackleton was not discharged for misconduct in connection with the employment. Accordingly, Mr. Shackleton is eligible for benefits, provided he is otherwise eligible.

DECISION:

The Agency representative's decision dated August 3, 2005, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. Though the employer is not at this time a base period employer, the employer's account may be assessed in the future for benefits paid to the claimant.

jt/pjs