

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KYLE I SWICK

Claimant

APPEAL NO. 08A-UI-06953-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELTER STORAGE EQUIPMENT CO INC

Employer

**OC: 12/16/07 R: 03
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Kyle Swick filed a timely appeal from the July 25, 2008, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on August 13, 2008. Mr. Swick participated. Barbara Himes, Human Resources Manager, represented the employer and presented additional testimony through Dean Welter, Cedar Rapids Store Manager.

ISSUE:

Was Mr. Swick 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: Kyle Swick was employed by Welter Storage Equipment Company as a full-time delivery and installation laborer from February 25, 2008 until June 26, 2008, when Cedar Rapids Store Manager Dean Welter discharged him. The incident that prompted the discharge occurred on June 26. Mr. Swick and another employee, Ryan Russell, were assigned to unload a truck full of office furniture. The truck was improperly loaded and packed tight with office furniture. This left little room for Mr. Swick to maneuver a handcart or otherwise maneuver the furniture to unload it. Mr. Swick and Mr. Russell had attached a three-foot wide, 20-foot long, metal and fiberglass ramp to the back of the truck. Mr. Swick experienced difficulty in unloading the first item, a metal hutch, from the truck. Mr. Russell had left the area for a restroom break or some other purpose. Rather than waiting for Mr. Russell to return or asking for help from someone else, Mr. Swick used a two-wheeled cart to pull the hutch from the truck. As Mr. Swick attempted to turn the cart and go down the ramp, the hutch fell onto the ramp. Rather than waiting for Mr. Russell to return or asking from help from someone else, Mr. Swick pushed the hutch down the metal and fiberglass ramp. The hutch was in contact with the surface of the ramp, rather than on a handcart. In the process of unloading the hutch and pushing it down to the floor, Mr. Swick caused significant damage to the metal hutch. Another employee, Andy Ostercamp, entered the area as Mr. Swick was pushing the hutch down the ramp. Mr. Swick did not ask Mr. Ostercamp for help and Mr. Ostercamp did not offer any. Instead, Mr. Ostercamp reported to Store Manager Dean Welter that he had heard Mr. Swick yelling profanities and roughly

handling furniture as he unloaded the truck. Mr. Ostercamp told Mr. Welter that he would check on the situation. Mr. Welter investigated and saw that five or six desks had been damaged in the process of unloading the truck. Mr. Welter spoke with Mr. Russell, who indicated that Mr. Swick had been rough with the furniture and ill-tempered while unloading the truck. Mr. Russell requested not to work with Mr. Swick. Mr. Welter then spoke with Mr. Swick. Mr. Welter observed the damaged hutch, which Mr. Swick had placed in the scrap pile. The total damage to the furniture was approximately \$1,000.00. Mr. Welter told Mr. Swick that he had to let him go because of the damaged furniture.

The employer has an employee handbook, which Mr. Swick received and signed for on February 25, 2008. The handbook sets forth employee conduct that may result in disciplinary action. The handbook provision included destruction of the employer's property as conduct that could lead to disciplinary action.

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 administrative law judge notes that the employer did not present testimony from Mr. Ostercamp, who observed Mr. Swick unloading the hutch, or from Mr. Russell, who assisted Mr. Swick with unloading the rest of the truck. Both employees are still with the employer and could have been made available to provide more direct and satisfactory evidence than was presented.

The real question in this case is whether the damage to the employer's property was the result of intentional conduct on the part of Mr. Swick or the result of carelessness and/or negligence on the part of Mr. Swick. The greater weight of the evidence in the record indicates that Mr. Swick was indeed careless in his effort to unload the poorly loaded truck. The evidence in the record indicates that Mr. Swick was indeed negligent in failing to wait for help once he encountered problems unloading the truck by himself. The evidence indicates that other employees were in fact available to assist Mr. Swick. Though the evidence clearly establishes carelessness and negligence, the evidence presented at the hearing is insufficient to establish that Mr. Swick intentionally caused damage to the employer's property. The isolated incident of careless and/or negligent conduct does not establish willful and/or wanton disregard of the employer's interests and, therefore, does not disqualify Mr. Swick for unemployment insurance benefits. See 871 IAC 24.32(8), above, which requires a pattern of recurrent carelessness and/or negligence to establish misconduct.

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

The administrative law judge notes that Welter Storage Equipment Company is not a "base period employer" for purposes of Mr. Swick's current claim benefit year. The current claim benefit year started on December 16, 2007 and will end on or about December 14, 2008. The base period employer(s) with liability for benefits paid during the current benefit year would be those employers for whom Mr. Swick worked during the third and fourth quarter of 2006 and the first and second quarter of 2007. Because Welter Storage Equipment Company is not a base period employer for the current benefit year, Welter Storage Equipment Company will not be charged for any benefits paid to Mr. Swick during the current benefit year. The employer's account would only be charged if Mr. Swick establishes a claim for benefits after the expiration of the current benefit year, only if he is deemed eligible for benefits at that time, and only if the employer is at that point deemed a "base period employer."

DECISION:

The Agency representative's July 25, 2008, reference 02, 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/css