

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOELAN L OWEN
Claimant

APPEAL NO. 11A-UI-03564-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA DEPT OF TRANSPORTATION
Employer

OC: 02/06/11
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Joelan Owen filed a timely appeal from the March 22, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 12, 2011. Mr. Owen participated. David Williams of TALX represented the employer and presented testimony through Dana McKenna, Jim Bane, and Dick Mattox. The administrative law judge took official notice of the Clerk of Court records regarding Pottawattamie Case Number CBSMMG134410, which records are available to the public at the Iowa Judicial Branch's website: www.iowacourts.state.ia.us.

ISSUE:

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

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joelan Owen was employed by the Iowa Department of Transportation as a full-time highway tech associate from 2007 until February 3, 2011, when the employer discharged him in connection with an incident on December 12, 2010.

On the morning of December 12, 2010, Mr. Owen had completed a full shift operating a snowplow to help clear the Interstate highway after a snow storm. The highway had been closed due to the storm. Mr. Owen's immediate supervisor was Dick Mattox, highway maintenance supervisor. Mr. Mattox asked Mr. Owen to stay on after the scheduled end of his shift to continue to help with snow removal and Mr. Owen agreed to do that. Mr. Owen then went to a Council Bluffs convenience store to refuel his assigned truck. Mr. Owen had problems with getting the diesel pump to operate correctly and entered the convenience store to talk to the clerk.

Inside the convenience store were two Council Bluffs police officers, Officer Scott Halbrook and Officer Darin Budd. Mr. Owen saw that the two officers were drinking coffee. Mr. Owen asked the store clerk whether he had received any complaints about the diesel pump. The clerk said he had not. The clerk instructed Mr. Owen to try the pump again. As Mr. Owen was exiting the convenience store he addressed the police officers and asked them about a recent accident involving a police officer and police vehicle. Mr. Owen had not seen anything about the accident on the news and wanted to know who was deemed at fault. One of the officers responded that the person who had run the red light had been at fault. Mr. Owen returned to the diesel pump, which he could not get to function. Mr. Owen tried another pump, had problems with that one, and returned to the convenience store to speak further with the clerk. The clerk gave Mr. Owen a card he could use to start the pump.

While Mr. Owen in the store, ostensibly for the purpose of getting further help from the clerk, Mr. Owen addressed the officers further in an antagonistic tone and brought up an accident back in February 2007 that involved a police car. Mr. Owen was of the mindset that police officers as public servants had an obligation to answer any questions he might put to them, or comments he might make to them, concerning matters of public record. Mr. Owen then brought up yet another accident that involved a police car, also from February 2007. Officer Halbrook provided a response that acknowledged such things can happen. Mr. Owen added that such incidents seemed to happen more frequently in Council Bluffs. Mr. Owen then exited the store, returned to the diesel pump, and used the clerk's card to operate the pump.

The officers had followed Mr. Owen out of the convenience store. Officer Halbrook asked Mr. Owen what his issue was with the Council Bluffs Police Department. Mr. Owen said he did not have an issue. Mr. Owen said he was just doing his job, trying to make conversation, and asking "public knowledge questions." The officers continued to follow Mr. Owen to his truck. One of the officers asked Mr. Owen for the name of his supervisor. Mr. Owen gave Mr. Mattox's name. Officer Halbrook directed Mr. Owen to present his ID. Mr. Owen told the officer he had not done anything wrong and, therefore, did not have to present his ID. Officer Budd told Mr. Owen that he needed to present his ID or go to jail. Mr. Owen provided the ID. Officer Halbrook told Mr. Owen that he was issuing a ticket to him for Disorderly Conduct.

The officers then placed Mr. Owen in the back seat of a squad car. Officer Halbrook then directed several demeaning comments to Mr. Owen. The officer told Mr. Owen, "I hope you've enjoyed working for the State, idiot." In addition, Officer Halbrook called Mr. Owen a moron. Mr. Owen did not offer further response.

The officers then contacted Mr. Mattox and a police sergeant, both of whom reported to the convenience store. The officers escorted Mr. Owen to the back of the convenience store for a meeting with the sergeant and Mr. Mattox. The officers alleged that Mr. Owen had been loud and had yelled while addressing the officers inside the door. Mr. Owen repeated his statement that he had just been trying to make conversation about matters of public knowledge. The officers indicated that Mr. Owen was being cited for Disorderly Conduct. The officers issued a citation that obligated Mr. Owen to appear in court on December 20, 2010. Mr. Mattox directed Mr. Owen to return his truck to the D.O.T. garage and to go home.

On December 13, 2010, Mr. Mattox notified Mr. Owen that he was being placed on paid suspension while the employer investigated the matter. Mr. Mattox read a letter to Mr. Owen that set forth the employer's expectations regarding what Mr. Owen would and would not do during the paid suspension. Mr. Mattox told Mr. Owen that after the investigation he would be notified regarding the next step in the process. Mr. Mattox said nothing to Mr. Owen to place him on notice that he faced possible discharge from the employment.

On December 15, Mr. Mattox interviewed the store clerk. The store clerk told Mr. Mattox that Mr. Owen, or “the D.O.T. person,” had yelled at the officers from the front of the store while the officers were located at the back of the store. The clerk indicated that Mr. Owen had yelled about a police car-pedestrian accident and a 2007 incident wherein a cop caused an accident that injured one of Mr. Owen’s family members. The clerk indicated that Mr. Owen had not said or done anything uncivil to the clerk.

On December 20, 2010, Mr. Owen appeared in front of a Pottawattamie County judge, entered a guilty plea to the offense of Disorderly Conduct in violation of Council Bluffs Ordinance 8.20.050(1) and was assessed a fine.

At the time Mr. Mattox became involved in the events of December 12, he had notified Jim Bane, district maintenance manager, of the matter. On December 27, Mr. Bane and Mr. Mattox interviewed the two police officers involved in the matter. Officer Halbrook told the employer that the officers had been at the back of the store updating a computer, that Mr. Owen yelled at them from the front of the store, that this startled the officers, and that Mr. Owen went on about an accident a week earlier that had not involved the officers. Officer Halbrook told the employer that Mr. Owen started back up and talked about an accident involving his parents in 2007. Officer Halbrook told the employer that when he and Officer Budd followed Mr. Owen out of the store, that Mr. Owen began yelling at him about Council Bluffs cops being crooked and that they needed to stop hurting people. Officer Halbrook told the employer that Mr. Owen was belligerent and refused to disclose his supervisor. Officer Budd confirmed Officer Halbrook’s version of events and further indicated that he had told Mr. Owen to produce is ID or he was going to jail.

On December 30, Mr. Bane and Mr. Mattox interviewed Mr. Owen. Mr. Owen admitted to asking the officers questions during his trips into the store, including trips about an accident involving his parents. Mr. Owen indicated that the officers had taken steps to identify him and his supervisor, and that he had been placed in the back of a squad car. Mr. Owen conceded that he had “screwed up” by asking questions. Mr. Owen admitted that he had asked questions about an accident a week earlier and who was found at fault in that matter. Mr. Owen told the employer he had other family issues weighing on him.

On February 3, 2011, the employer met with Mr. Owen for a pre-termination Loudermill hearing. See Cleveland Bd. Of Ed. v. Loudermill, 470 U.S. 532 (1985). In the meantime, Mr. Mattox and Mr. Bane continued to perform their regular duties relating to snow removal. They also consulted with other appropriate departmental staff. Mr. Owen had been hospitalized for a few days, but had otherwise been available to the employer, pursuant to the employer’s December 13, 2010 directive. At the Loudermill hearing, Mr. Owen indicated that at the time of December 12 incident he had been irritated over the incident involving his parents and had things going on at home that impacted on his behavior.

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).

Council Bluffs Municipal Code rule 8.20.050(1) provides as follows:

Whosoever commits any of the following acts shall be guilty of a misdemeanor:

(1) Any person in a store, hotel, tavern, grocery, inn, restaurant, or any other place of business in the city or any parking lot in the close proximity of such place of business

who shall engage or participate in the following conduct shall be guilty of disorderly conduct: using abusive or obscene language or profanity or insulting names or epithets which by their very utterance tend to incite another to immediate breach of the peace; talking, calling, or yelling so loudly as to disrupt other persons in lawful pursuits in the immediate locality; quarreling, fighting, brawling or striking or beating another person.

The weight of the evidence fails to establish a discharge based on a current act of misconduct. The conduct that triggered the discharge occurred on December 12, 2010. The employer waited until February 3, 2011, to notify the claimant that the conduct could or would result in his discharge from the employment. The evidence establishes that the employer completed its investigation on December 30, 2010, with the interview of the claimant. The employer has failed to present sufficient evidence to establish a reasonable basis for the delay from December 30, 2010 until February 3, 2011. The evidence establishes that the claimant was available to the employer, pursuant to the employer's directive, for all but a few days when he was hospitalized. Because the discharge was not based on a current act, the administrative law judge need not rule on whether the conduct in question was indeed misconduct in connection with the employment.

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

DECISION:

The Agency representative's March 22, 2011, reference 01, decision is reversed. The discharge was not based on a current act. 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/kjw