

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**DAVID M KEIL**  
Claimant

**APPEAL NO. 18A-UI-07103-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KMB PROPERTY MANAGEMENT II LLC**  
Employer

**OC: 06/03/18**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

David Keil filed a timely appeal from the June 22, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Keil had been discharged on May 7, 2018 for misconduct in connection with the employment. After due notice was issued, a hearing was held on July 19, 2018. Mr. Keil participated. Mitch King represented the employer and presented additional testimony through Joe O'Leary.

**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: David Keil was employed by KMB Property Management II, L.L.C. as a full-time maintenance technician from January 2017 until May 7, 2018, when Mitch King, the business owner, discharged him from the employment. KMB provides property management services concerning residential and commercial properties in the Iowa City and Davenport areas. Mr. Keil's usual work hours were 8:00 a.m. to 5:00 p.m. Mr. Keil was also required to work after regular business hours as needed. Joe O'Leary, Maintenance Manager, was Mr. Keil's immediate supervisor. At all relevant times, Mr. Keil resided in a rural area near Oxford Junction, about 42 miles from Davenport and about 50 miles from Iowa City. Mr. Keil was initially assigned to the employer's Davenport operation, but was subsequently reassigned to the employer's Iowa City operation due to issues with Mr. Keil failing to respond to after-hours calls for service.

The final conduct that triggered the employer's decision to discharge Mr. Keil from the employment occurred in connection with a Friday, May 4, 2018 absence. On that day, Mr. Keil's vehicle broke down outside of Tipton, while Mr. Keil was enroute to work. At some point between 6:45 a.m. and 7:45 a.m., Mr. Keil sent a text message to Mr. King to let Mr. King know that his vehicle had broken down and that he would not be coming to work. The employer lacked a specific absence reporting policy beyond prohibiting no-call/no-show absences and

requiring 72 hours' notice of a request to use paid time off. It was not the absence itself that triggered the discharge, but Mr. Keil's failure to respond to the employer's multiple attempts to reach him on May 4 that triggered the discharge. Between 7:45 a.m. and 8:00 a.m., Mr. King called Mr. Keil in an attempt to learn from Mr. Keil where he had gotten in his mowing duties the previous day. When Mr. Keil did not answer, Mr. King left a voice mail message. Between 8:00 a.m. and 8:30 a.m., Mr. King sent a text message to Mr. Keil, but Mr. Keil did not respond. At the time, Mr. Keil was upset about his broken down vehicle and upset with the employer for not having given him a work truck to drive back and forth to work. The employer had never agreed to provide transportation for Mr. Keil back and forth to work. Mr. Keil elected not to respond to Mr. King's attempts to contact him.

Mr. Keil was next scheduled to work on Monday, May 7, 2018. On that day, Mr. King met with Mr. Keil and explained why he was ending Mr. Keil's employment. Mr. King referenced an earlier event on February 11, 2018, wherein Mr. Keil had failed to report to work to assist with snow removal and had failed to respond to Mr. O'Leary's multiple attempts to contact Mr. Keil regarding the need to report for work to assist with snow removal. In connection with that earlier event, Mr. Keil had elected not to respond to Mr. O'Leary. Though Mr. Keil had previously been relieved of responding to after-hours calls for service due, the employer had not relieved Mr. Keil from assisting with snow removal. On February 9, Mr. O'Leary had warned employees, including Mr. Keil of impending snow and that they would be summoned to work that weekend when the snow arrived. On February 12, 2018, the employer had issued a written reprimand to Mr. Keil based on his failure to report for work and failure to respond to Mr. O'Leary.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 weight of the evidence in the record establishes misconduct in connection with the employment based on the Mr. Keil's repeated, intentional refusal to respond to the employer's attempts to contact him for work purposes on May 4 and on February 11, 2018. The weight of the evidence establishes in connection with both incidents that Mr. Keil was aware that the employer was attempting to reach him for work purposes. The weight of the evidence establishes that the employer reasonably expected Mr. Keil to respond to such attempts to contact him and had issued previous reasonable directives to that effect. The weight of the evidence establishes that in connection with both dates, Mr. Keil unreasonably refused to acknowledge or respond to the employer's attempts to reach him for legitimate business purposes. The pattern of conduct included earlier concerns that prompted the employer to reassign Mr. Keil from the Davenport operation to the Iowa City operation. Mr. Keil's pattern of conduct demonstrated an intentional and substantial disregard of the employer's interests and constituted misconduct in connection with the employment.

Because the evidence in the record established a discharge based on misconduct in connection with the employment, Mr. Keil is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Keil must meet all other eligibility requirements. The employer's account shall not be charged.

**DECISION:**

The June 22, 2018, reference 01, decision is affirmed. The claimant was discharged on May 7, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs