

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LELAND O SAMS**

Claimant

**APPEAL NO. 13A-UI-01480-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CITY OF OSCALOOSA**

Employer

**OC: 12/16/12**

**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 1, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 8, 2013. Mr. Sams participated personally and was represented by Attorney Randall Stravers. David Dixon, City Attorney, represented the employer and presented testimony through Gary Vroegh and Pal Akhilesh. Exhibits One through Eleven and Thirteen were received into evidence.

**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: Leland Sams was employed by the City of Oskaloosa as a full-time Operator 1 until December 19, 2012, when Gary Vroegh, Street Supervisor, and Pal Akhilesh, City Engineer and Public Works Director, discharged him from the employment for repeated safety violations. Mr. Sams had started with the City in 2004 and had become an Operator 1 in 2006. Mr. Sams' duties involved operating skid loaders, backhoes and other equipment. Mr. Sams' duties involved patching streets, placing and removing street signs and traffic signals, and other similar work. Mr. Vroegh was Mr. Sams' immediate supervisor. Mr. Vroegh reported to Mr. Akhilesh.

The final two incidents that triggered the discharge happened on December 14, 2012. On that day, Mr. Sams ran multiple stop signs in a city vehicle as he was driving from one area of the city to another. Mr. Sams had previously caused an accident through similar behavior and had been admonished at the time of the earlier incident to stop at all stop signs and traffic control devices. One of the times Mr. Sams ran a stop sign on December 14, the head of another city department witnessed the incident and reported it to Mr. Vroegh. When Mr. Vroegh confronted Mr. Sams about the incident, Mr. Sams admitted to running the stop sign and added that no one on the city's street crew stopped at stop signs.

The second incident on December 14, 2012, concerned the placement of a steel anchor post to be used for placement of a no-parking sign. Mr. Vroegh had assigned Mr. Sams and Lead Operator Steve Watts to place street posts that day. Mr. Watts had been with the city for three decades. Mr. Watts' designation of Lead Operator designated his authorization to operate all of the employer's heavy equipment. Though Mr. Watts did not have supervisory authority over Mr. Sams, Mr. Sams deferred to Watts lengthy experience with the city. Mr. Vroegh had marked a curb-side area as the tentative area where the no-parking sign should be placed. The city then had the sanitary sewer utility mark the underground location of the sanitary sewer line and had MidAmerican Energy mark the underground location of its pressurized natural gas line so that the street crew could safely place the no-parking anchor post without interfering with the underground utility lines. On December 14, Mr. Sams and Mr. Watts went to the area to place the no-parking sign. They located Mr. Vroegh's placement flag, but ignored the utility location markings on the ground and the utility warning flags sticking out of the ground. They used a jackhammer to place the metal no-parking anchor post three and a half feet into the ground immediately over the green painted line designating the location of the sewer line. They placed the metal anchor post within 11 inches of the pressurized natural gas line. The gas line was clearly marked on the ground with an orange line and a yellow and red warning flag that indicated any digging within 18 inches of either side of the utility line marker should be done by hand. Neither Mr. Sams nor Mr. Watts bothered to read or heed the MidAmerican warning sign. Mr. Vroegh had just spoken to the crew that morning about the need to place street posts no less than 18 inches away from utility lines. Mr. Sams had been present for that conversation. Shortly after Mr. Watts and Mr. Sams placed the anchor post, Bill Almond from the city's wastewater department observed the unsafe placement of the post and notified Mr. Vroegh. When Mr. Vroegh confronted the pair about placement of the post, Mr. Sams initially said he was inexperienced in placing posts. Mr. Sams' previous experience with placing sign posts had primarily involved replacing existing posts, not placement of brand new posts where none had previously been located. Mr. Sams said he had believed the utilities were located deep enough that placement of the post would not be an issue.

In making the decision to discharge Mr. Sams from the employment, the employer considered several prior incidents. In April 2012, Mr. Sams backed a city vehicle into a concrete wall, causing damage to the vehicle. The incident happened because Mr. Sams backed without having a clear view of what was behind the vehicle he was operating. In February 2010, Mr. Sams failed to stop at a stop sign when he was putting sand on a street. As Mr. Sams moved into the intersection, another driver, who had the right of way, swerved and hit a street post. There was no reason for Mr. Sams to disregard the stop sign and fail to yield the right of way. Mr. Sams caused the accident and prompted an insurance claim against the city. It was after this incident that the employer reinforced the expectation that Mr. Sams would comply with all traffic safety rules, including stopping at controlled intersections. In July 2009, Mr. Sams backed into another vehicle, causing damage to the employer's vehicle and prompting a law suit against the city. Mr. Sams backed the vehicle without a clear view of what was behind him. When Mr. Sams eventually saw the vehicle behind him, he was unable to stop the employer's vehicle in time to avoid a collision. Worn brakes on the employer's vehicle were a factor in the collision. In July 2008, Mr. Sams caused damage to a parked vehicle while operating the city's equipment. In August 2007, Mr. Sams caused a power outage and placed himself and others at risk when he raised the boom on the employer's vehicle into an electrical ground wire. Also in August 2007, Mr. Sams drove the employer's boom truck through a fast-food restaurant drive-through and collided with the canopy of the drive-through.

The employer had raised Mr. Sams' safety violations as concerns at the time of prior annual reviews.

## 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 establishes that Mr. Sams, and his coworker, were both negligent in connection with the placement of the no-parking anchor post on December 14, 2012. Both were negligent in failing to read the gas utility warning sign that told them to hand dig any sign to be placed within 18 inches of the gas utility marking. Both failed to get clarification on placement of the post prior to placing it in an unsafe manner. The weight of the evidence fails to support Mr. Sams' assertion that Mr. Vroegh instructed Mr. Sams or Mr. Watts to place the sign post without regard to the utility markings.

The weight of the evidence establishes an intentional violation of one or more stop signs on or about December 14, 2012. That incident followed a similar incident in 2010 that resulted in a motor vehicle accident and followed a clear statement from the employer that Mr. Sams was expected to obey all traffic control devices.

The weight of the evidence establishes carelessness and/or negligence in connection with several other incidents. These included the April 2012 incident in which Mr. Sams backed a city vehicle into a concrete wall, the July 2008 incident when Mr. Sams caused damage to a parked vehicle, and the two incidents in August 2007. These also include the unsafe backing incident in July 2009.

Had the sign placement incident been the only thing the employer considered in discharging Mr. Sams from the employment, that incident by itself would have been insufficient to establish misconduct in connection with the employment that would disqualify Mr. Sams for unemployment insurance benefits. However, the sign placement incident was far from the only incident the employer took into consideration. While that incident involved negligence, Mr. Sams' failure to stop at the stop sign involved intentional misconduct. Not only was that conduct a violation of the safety rules the employer had reinforced in connection with a prior similar incident in which Mr. Sams caused an accident. The conduct was also clearly a traffic offense. In other words, Mr. Sams broke the law while operating a city vehicle. The final incidents, plus the prior incidents of carelessness and negligence, were sufficient to indicate a pattern of conduct demonstrating willful disregard of the safety standards the employer reasonably expected Mr. Sams to follow.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Sams was discharged for misconduct. Accordingly, Mr. Sams is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

**DECISION:**

The Agency representative's February 1, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. 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 allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/tll