

**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**

**ADOLPH HANSON
15390 – 440TH ST
LELAND IA 50453**

**LARSON GRAIN & TRUCKING INC
506 S HARRISON
THOMPSON IA 50478**

**STEVEN BAKKE
ATTORNEY AT LAW
150 N CLARK
FOREST CITY IA 50436**

**Appeal Number: 04A-UI-03844-ET
OC: 03-07-04 R: 02
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/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 2, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 27, 2004. The claimant participated in the hearing. Gary Larson, Owner, participated in the hearing on behalf of the employer and was represented by Attorney Steven Bakke.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time truck driver for Larson Grain & Trucking from April 21,

2003 to February 23, 2004. During an insurance audit in November 2003, the employer learned the claimant had a previous DUI and the insurance company stated it would not insure him. Insurance companies will not insure drivers for three years following a DUI. The employer asked the insurance company to find out when the DUI occurred and if the three-year period had expired. In February 2004 the insurance company notified the employer the DUI was in November 2002 and it would not insure the claimant. The employer terminated the claimant's employment February 23, 2004. The employer did not ask the claimant about his driving record at the time of hire. The claimant believed the employer would check his driving record and, although he was aware of the three-year rule, he had heard that some insurance companies were "not as strict" with smaller, farmer-owned companies.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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, (8) 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).

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant received a DUI five months before being hired by the employer. While the employer argues the claimant indicated he was “drug free” on his résumé and it relied on that statement in determining he had a clean driving record, it did not provide any evidence that the claimant was not drug free. The administrative law judge does not agree with the employer’s contention that the claimant falsified his employment application by stating he was drug free when he had a previous DUI. The employer did not ask the claimant about his driving record at the time of hire or check his record during the first seven months of employment, and then waited three more months to terminate the claimant’s employment after learning about the DUI. The issue is not whether the employer was right or even had any other choice but to terminate the claimant’s employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). While the claimant should have told the employer he had a DUI five months before he was hired, the employer bears the ultimate responsibility for checking the driving records of employees. Consequently, the administrative law judge concludes the employer has not met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are allowed.

DECISION:

The April 2, 2004, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

je/b