

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TATE, JASON, A
Claimant

APPEAL NO. 12A-UI-09594-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KRYGER GLASS COMPANY
Employer

OC: 07/01/12
Claimant: Respondent (5)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 6, 2012, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on August 30, 2012. Claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Sheri Sealock, Human Resources Director, represented the employer. Exhibits One through Five were received into evidence. The administrative law judge took official notice of the official clerk of court records for Polk County case number OWOM073554 available to the public at www.iowacourts.state.ia.us.

ISSUES:

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: Jason Tate was employed by Kryger Glass Company as a full-time warehouse worker from October 2011 until July 6, 2012, when the employer discharged him from the employment. Mr. Tate's immediate supervisor was Nick Smith, Warehouse Supervisor.

Mr. Tate's warehouse duties included filling in for absent delivery drivers as needed. The employer expected Mr. Tate to operate company vehicles in a safe manner. The employer expected Mr. Tate to maintain a valid driver's license with an adequate driving record, as determined by the employer's insurer. Mr. Tate signed his acknowledgment of these conditions of his employment in October 2011.

The decision to discharge Mr. Tate was based on notice the employer received from its insurance company on April 11, 2012, that Mr. Tate was no longer qualified to drive the employer's vehicles and that the insurance company would no longer cover his operation of the employer's vehicles. On February 23, 2012, Mr. Tate was arrested in Polk County and charged

with Operating While Intoxicated First Offense. The offending behavior occurred while he was off-duty.

After the employer received notice from their insurer that the insurer would no longer cover Mr. Tate's operation of company vehicles, Mr. Smith spoke to Mr. Tate about the matter on April 13. Mr. Smith notified Mr. Tate that the employer planned to keep him employed for about another month while the employer hired and trained a replacement employee. On April 30, 2012, Mr. Smith had Mr. Tate sign a document that read as follows:

According to your current MVR, our insurance company considers you as an unacceptable driver. Company policy states that you must hold a valid driver's license and be insurable according under the company's liability policy. Any employee operating a company vehicle must maintain a responsible driving record. An irresponsible driving record includes suspension, revocations, numerous violations, or rejection by the company's insurance carrier and may result in disciplinary action up to and including termination of employment.

By signing this document, you, the employee, acknowledges that you have been informed of your driving status with Kryger Glass and understand the policy, and agrees to follow the policy.

Due to privacy issues, our insurance does not provide us a copy of your MVR. If you would like a FREE copy, please contact the Insurance Information Exchange (IIX) at 1-800-683-8553 and select option 6. IIX will fax a copy to you and you will need to complete it and return it to IIX. Once they have received the completed form, IIX will mail your MVR to your home address.

The employer ended up keeping Mr. Tate employed for almost another three months after receiving notice that the insurance company would no longer cover Mr. Tate's operation of the employer's vehicles. In the meantime, the employer hired two different replacement workers, who did not work out and who separated from their employment with Kryger Glass. The employer eventually moved another current employee into Mr. Tate's former warehouse worker position that included the driving responsibilities.

In April, Mr. Smith had moved Mr. Tate to a different warehouse position where he did not operate the employer's vehicles. Mr. Tate continued in this new position until July 6, 2012, when the employer discharged him from the employment. In connection with the discharge, Mr. Smith drafted an exit interview document that indicated the employment ended because Mr. Tate's position was eliminated. In the same document, Mr. Smith included glowing comments about Mr. Tate's work performance.

On May 24 2012, Mr. Tate had pled guilty to the OWI offense and was granted a deferred judgment.

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).

In Cook v. Iowa Department of Job Service, 299 N.W.2d 698 (Iowa 1980), the Iowa Supreme Court held that when a truck driver lost his insurability because of traffic tickets he accumulated, and thereby lost his ability to perform his driving duties, the loss was self-inflicted and constituted misconduct. In Cook, the claimant's employment required that he be able to operate motor vehicles. Through commission of traffic offenses and resulting convictions, the claimant rendered himself incapable of continuing in the employment.

The evidence in the record fails to establish a discharge based on a *current act* of misconduct. The employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence to establish that the employer notified Mr. Tate in April that the employer planned to discharge him from the employment in the near future. The employer had the ability to present testimony through Mr. Smith, but elected not to present that testimony. The April 30 document the employer had Mr. Tate sign does not indicate such a plan. Instead, it indicates that the employer could exercise discretion as to whether Mr. Tate would be discharged and it had Mr. Tate acknowledge the policy requiring him to maintain an acceptable driving record. Whatever the employer's plan in April, the employer did not stick to that plan. Instead, the employer moved Mr. Tate to a new position and Mr. Tate continued to perform additional work in that new position for about three months. The three-month delay between the notice from the insurer and the discharge date, and the transition of Mr. Tate to a different position for the duration of that time, was an unreasonable delay and caused the loss of insurability to no longer constitute a current act for unemployment insurance purposes.

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

DECISION:

The Agency representative's August 6, 2012, reference 03, decision is modified as follows. 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/pjs