

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT A LINDSEY
Claimant

APPEAL NO. 12A-UI-10033-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PERFICUT LAWN CARE INC
Employer

OC: 11/20/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Robert Lindsey filed a timely appeal from the August 7, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 11, 2012. Mr. Lindsey participated. Jami McLeod represented the employer and presented additional testimony through Robert Ballard and Charles White.

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: Robert Lindsey was employed by Perficut Lawn Care, Inc., as a full-time night technician until July 13, 2012, when Robert Ballard, owner, discharged him from the employment. Mr. Lindsey's primary duties toward the end of the employment involved sharpening mower blades, filling vehicle and mower gas tanks, and checking oil levels on equipment.

On the morning of July 3, Mr. Ballard discovered that Mr. Lindsey had taken two five-gallon containers of gasoline without authorization. Mr. Ballard reviewed video surveillance that showed Mr. Lindsey carrying the containers of gasoline and placing them in the trunk of a coworker's vehicle. Mr. Lindsey did not have a car and was taking the gas to give to someone else. On July 3, Mr. Ballard telephoned Mr. Lindsey and told him to return the gasoline. That same day, Mr. Ballard told Mr. Lindsey that his employment would end two weeks from that day.

On June 19, the employer had placed a help wanted ad on Craigslist.com on June 19, 2012 due to dissatisfaction with Mr. Lindsey's work performance. After the gas theft came to light, the employer decided to move forward with discharging Mr. Lindsey from the employment.

In making the decision to discharge Mr. Lindsey from the employment, the employer also considered Mr. Lindsey's repeated failure to use the time clock to clock in or out despite repeated instructions to use the time clock to track his hours. The employer had recently

changed Mr. Lindsey from a salaried position to an hourly position after Mr. Lindsey complained of having worked seven consecutive days without extra pay beyond his regular salary. The employer wanted to better track Mr. Lindsey's work hours.

In making the decision to discharge Mr. Lindsey from the employment, the employer considered Mr. Lindsey's occasional failure to fully perform all assigned duties.

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 final incident, the gas theft, was by itself sufficient to establish misconduct in connection with the employment. Mr. Lindsey knowingly and intentionally stole about 10 gallons of gasoline from the employer on the evening of July 2 and converted it to his personal use. The weight of the evidence fails to support Mr. Lindsey's assertion that he had actual or implied permission to help himself to the gasoline. While the additional allegations raised by Mr. Lindsey and the employer may have played some role in the discharge, the administrative law judge need not look beyond the gas theft to find disqualifying misconduct. Mr. Lindsey 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.

DECISION:

The Agency representative's August 7, 2012, 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/pjs