

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LANCE R DYKEMA**  
Claimant

**APPEAL NO. 10A-UI-13408-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**A-LERT**  
Employer

**OC: 08/29/10**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the September 24, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 15, 2010. The claimant participated. Dawn Severs represented the employer and presented testimony through Kenneth Goff.

**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: Lance Dykema was employed by A-Lert Construction Company as a full-time millwright ironworker until August 31, 2010, when Kenneth Goff, Supervisor, and Dave Clemmons, Superintendent, discharged him from the employment. Mr. Goff was Mr. Dykema's immediate supervisor.

The final incident that triggered the discharge concerned an interaction between Mr. Dykema and Dave Hurla, ADM Head of Maintenance, on August 31, 2010. On that day, Mr. Hurla confronted Mr. Dykema about not having a job hazard assessment form properly signed before work began on a project. Mr. Goff had not signed the document. One or more other individuals who needed to sign the document had not signed a document. Mr. Dykema put the document on a table and walked away. When Mr. Hurla contacted Mr. Goff about the incident, Mr. Hurla alleged that Mr. Dykema had thrown the document on the table and further alleged that there had been words exchanged, but declined to go into the details.

Two or three years prior to discharge, the employer had counseled Mr. Dykema for failing to turn in a hot work permit.

## 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).

There is insufficient evidence in the record to establish misconduct in connection with the employment that would disqualify Mr. Dykema for unemployment insurance benefits. Mr. Goff candidly concedes that he does not know the details of the interaction between Mr. Dykema and Mr. Hurla. There is insufficient evidence in the record to establish Mr. Dykema did anything or said anything inappropriate in connection with his contact with Mr. Hurla on August 31, 2010. The employer had the ability to present testimony from Mr. Hurla, but elected not to present such testimony. Mr. Dykema was discharged for no disqualifying reason. Accordingly, Mr. Dykema is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Dykema.

**DECISION:**

The Agency representative's September 24, 2010, reference 01, decision is reversed. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw