

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATT M HEMANN

Claimant

APPEAL NO. 09A-UI-00784-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABSOLUTE ENERGY LLC

Employer

**OC: 11/23/08 R: 02
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Matt Hemann filed a timely appeal from the January 16, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 4, 2009. Mr. Hemann participated. Betty Johnson, Human Resources Manager, represented the employer and presented additional testimony through Tyler Schwarck, Environmental Health and Safety, Don Burns, Commodities Specialist, and Rick Schwarck, President and Chief Executive Officer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is an ethanol production plant. Matt Hemann was employed by Absolute Energy as a full-time Grains Receiving Attendant from December 17, 2007 until November 17, 2008, when Don Burns, Commodities Specialist, suspended him from the employment. Mr. Burns subsequently discharged Mr. Hemann from the employment on November 21, 2008.

The final incident that prompted the discharge occurred on November 14, 2008, when Tyler Schwarck, Environmental Health and Safety, observed Mr. Hemann smoking a cigarette in the vicinity of ethanol rail cars. Mr. Hemann was 400 yards from the designated smoking area, which was located on the other side of the production complex. Mr. Hemann knew he was not to be smoking in the area. Mr. Hemann turned and walked away as Mr. Schwarck approached in an attempt to conceal his cigarette. Mr. Schwarck radioed Mr. Hemann to extinguish his cigarette and Mr. Hemann complied.

Because the employer is an ethanol production facility and deals with a highly explosive substance, the employer had an enhanced concern about smoking in non-designated areas. Mr. Hemann was aware of the policy and had signed his acknowledgment of the written policy. The written policy indicated that violation of the policy could result in discharge from the

employment. The employer had reinforced the policy through discussions regarding safety in the production facility.

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. Hemann willfully and wantonly disregarded the interests of the employer by smoking in a non-designated area at an ethanol production plant. Mr. Hemann knew at the time he engaged in the area that the behavior created a risk of harm in the workplace. Mr. Hemann knew at the time he engaged in the conduct that it could result in discharge from the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Hemann was discharged for misconduct. Accordingly, Mr. Hemann 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 paid to Mr. Hemann.

DECISION:

The Agency representative's January 16, 2009, 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

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