

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EDWARD C CHURCHILL
Claimant

APPEAL NO. 12A-UI-14416-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOFFREDO FRESH PRODUCE CO INC
LOFFREDO GARDENS INC
Employer

OC: 10/21/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Edward Churchill filed a timely appeal from the November 27, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 10, 2013. Mr. Churchill participated. Mike Vilez, Human Resources Manager, represented the employer. Exhibits One through Three and A were received into evidence.

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: Edward Churchill was employed by Loffredo Fresh Produce Company as a full-time fueler from February 2011 until October 22, 2012, when Tim Boston, Operations Manager, discharged him due to unsafe driving practices. Mr. Boston was Mr. Churchill's immediate supervisor. On September 23, 2012 Mr. Churchill was backing up in one of the employer's trucks and hit another, stationary truck that was immediately behind him. The collision damaged the bumper of the stationary truck. On October 1, Mr. Churchill caused a second collision when he failed to engage the parking break in a truck he had been operating. The truck rolled across the employer's lot and struck a second, stationary truck. Mr. Churchill had turned in accident report to a supervisor immediately following each accident. At the time of the second incident, a supervisor told Mr. Churchill that he could get fired because it was the second incident. The supervisor told Mr. Churchill that it did not look good. Mr. Churchill continued to report for work until October 22, at which time Mr. Boston notified him that he was discharged from the employment.

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 administrative law judge notes that the employer did not provide testimony from any of the supervisors involved in the events leading to Mr. Churchill's separation from the employment.

The weight of the evidence establishes two incidents, one September 23 and another on October 1, wherein Mr. Churchill was careless and negligent in operating the employer's equipment. In the first instance, Mr. Churchill backed one vehicle into another because he failed to observe the stationary truck behind him. In the second instance, Mr. Churchill did indeed create a very dangerous situation by failing to engage the safety brake of a truck he had just finished operating. The employer was aware of both incidents as of October 1. A supervisor told Mr. Churchill he could get fired. Had the employer followed up in a timely manner after that statement to Mr. Churchill, there would be sufficient evidence to establish misconduct. However, the employer unreasonably delayed another three weeks before the employer followed up further and discharged Mr. Churchill from the employment. In the meantime, Mr. Churchill continued to report for work as usual. Under the circumstances, the administrative law judge concludes that Mr. Churchill's discharge was not based on a current act and cannot serve as a basis for disqualifying him for unemployment insurance benefits. Mr. Churchill is eligible for benefits provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's November 27, 2012, reference 01, decision is reversed. The discharge was not based on a current act. 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