

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

OLIVER A MORRIS
Claimant

APPEAL NO. 14R-UI-08758-JTT

**DES MOINES REGIONAL TRANSIT
AUTHORITY**
Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/16/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Oliver Morris filed a timely appeal from the June 26, 2014, reference 03, decision that disqualified him for benefits. After due notice was issued, a hearing was held on September 12, 2014. Mr. Morris participated. Randy McKern represented the employer and presented additional testimony through Steve Hansen. The hearing in this matter was consolidated with the hearing in Appeal No. 14R-UI-08759-JTT.

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: Oliver Morris was employed by Des Moines Regional Transit Authority (DART) as a full-time bus operator from 2003 until June 6, 2014 when the employer discharged him from the employment for having too many preventable accidents. Mr. Morris' immediate supervisor was Randy McKern, Transportation Manager.

The final accident that triggered the discharge occurred on May 30, 2014 when Mr. Morris collided with the exterior of the bus garage as he was coming around the building. Mr. Morris had a cup of coffee with him at the time. Mr. Morris had not secured the cup of coffee. As the bus was moving, Mr. Morris reached for the cup and then collided with the building. Mr. Morris was not paying attention to the position of the bus relative to the building. The employer had a policy that prohibited consuming beverages while the bus was in motion. Mr. Morris was aware of the policy. Mr. Morris was not drinking from the cup at the time of the collision. However, Mr. Morris elected to remain in motion while he reached for the cup, rather than stop the vehicle and secure the container before traveling further. Mr. Morris notified the employer's dispatcher of the collision. The employer reviewed surveillance video that clearly depicted Mr. Morris' conduct as the cause of the collision.

The employer considered prior preventable accidents when making the decision to discharge Mr. Morris from the employment. The next most recent incident occurred on June 11, 2013. At that time, Mr. Morris struck a parked vehicle while operating the bus. The collision damaged the review mirror on the side mirror on the stationary vehicle. Mr. Morris was unaware of the collision at the time it occurred. That incident prompted the employer to discharge Mr. Morris from the employment. Mr. Morris filed a grievance. In settlement of the agreement, the employer agreed on or about June 23, 2013 to return Mr. Morris to the employment, subject to a last chance agreement. Mr. Morris was then off for almost a year due to lung cancer. Mr. Morris returned to the employment at the beginning of May 2014. Mr. Morris' health issue was not a factor in the preventable accidents.

In making the decision to discharge Mr. Morris from the employment, the employer considered additional preventable accidents. In March 2013 Mr. Morris hit a large rock at Valley West Mall. In May 2012 Mr. Morris hit a garage door at the bus garage. In April 2012 Mr. Morris turned too sharp and hit a utility pole near a Younker's store.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

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 employer has presented evidence sufficient to establish a pattern of careless operation of the employer's bus. This is so even if the administrative law judge does not take into consideration any of the accidents prior to 2012. Mr. Morris was back to work less than a month when he had the final preventable accident that triggered his discharge. The final accident occurred in the context of a last chance agreement. In other words, Mr. Morris knew that his employment was in jeopardy. Immediately before going off work in June 2013 Mr. Morris had been involved in another preventable accident. Another preventable accident had just happened three months earlier. Two had occurred in 2012 within a month of each other.

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

DECISION:

The Claims Deputy's June 26, 2014, reference 03, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and 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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