

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID L KELLY

Claimant

APPEAL NO. 08A-UI-09367-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ROYAL CLEANING SERVICES INC

Employer

**OC: 09/14/08 R: 01
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the October 9, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 29, 2008. Claimant participated. Charlie Engstrom, Manager, represented the employer and presented additional testimony through Darla Engstrom, Owner. Exhibits One through Five were received into evidence.

ISSUES:

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

Whether the claimant's discharge was based on a "current act."

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: David Kelly was employed by Royal Cleaning Services as a highway rest area attendant from November 16, 2006 until September 18, 2008, when Manager Charlie Engstrom discharged him. Ms. Engstrom was Mr. Kelly's immediate supervisor.

The final incident that prompted the discharge concerned a conversation that Mr. Kelly initiated with coworker, Ralph Phelps, on August 26 or 27, 2008. Mr. Kelly asked Ralph whether there was a club in the storage room that could be used to subdue someone if they got out of control. Mr. Phelps told Mr. Kelly there was no such item. Mr. Kelly went and looked in the storage room for a club-type item. Mr. Kelly returned and told Mr. Phelps that he was going to bring a sledge hammer handle or axe handle from home. Mr. Phelps reported the conversation to Ms. Engstrom the next day and followed up with a written statement. Ms. Engstrom spoke to Mr. Kelly about the incident on or about August 27. Mr. Kelly denied the allegation. Ms. Engstrom indicated that she would look into the matter further and get back to Mr. Kelly. Ms. Engstrom did not at that time put Mr. Kelly on notice that the conduct placed his job in

jeopardy. Ms. Engstrom did not again speak to Mr. Kelly until September 18, 2008, at which time she discharged from the employment.

In making the decision to discharge Mr. Kelly from the employment, Ms. Engstrom considered prior incidents in which Mr. Kelly had made inappropriate remarks to coworkers and/or patrons.

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 evidence in the record fails to establish a "current act" of misconduct. The employer knew about the final incident on or about August 27, but did not notify Mr. Kelly that the incident could serve as the basis for discharging him from the employment until September 18, 2008. The employer's delay caused the conduct to no longer constitute a "current act" and cannot serve as a basis for disqualifying Mr. Kelly for unemployment insurance benefits. Because the evidence fails to establish a current act, the administrative law judge cannot consider the previous incidents. See 871 IAC 24.32(8).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Kelly was discharged for no disqualifying reason. Accordingly, Mr. Kelly is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Kelly.

DECISION:

The Agency representative's October 9, 2008, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css